Neutral Citation Number: [2021] EWHC 2433 (Ch)

Case No: E30BM500

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
Insolvency and Companies List (ChD)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 02/09/2021

Before :

HHJ DAVID COOKE

- -

Between :

Serene Construction Ltd	**Claimant**
- and -	
Salata and Associates Ltd (formerly Salata & Company Ltd) (1) **Anthony Gene Salata (2)** **Anthony Mervyn Jorden (3)**	**Defendants**

- -
- -

Ian Pennock (instructed by **Glaisyers Solicitors**) for the **Claimant**
Henry Bankes-Jones (instructed by **Berrymans Lace Mawer LLP**) for the **Defendant**

Hearing dates: 2-4 August 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ David Cooke:

Introduction

1. On 31 January 2012 the second and third defendants ("the Receivers") were appointed by Barclays Bank as fixed charge receivers over an unbuilt residential development site at Brierley Lane, Bilston owned by the claimant company. On 18 February 2013 they completed the sale of the site for £175,000. The claimant contends that this sale was made in breach of the fiduciary duty owed to it by the Receivers to take reasonable steps to achieve the best price available and that if they had complied with that duty they would have realised at least £575,000, which it says was the true market value. The claimant accordingly claims damages of £400,000 plus interest. The Receivers deny any breach of duty and contend that the price realised was the best realistically available in the circumstances.

2. The first defendant is a limited company through which the Receivers conducted their business. Though named as a defendant, no separate case is pleaded against it, and it is now accepted that the Receivers' appointment was a personal one and the duties relied on were owed by them personally and not by their company. Accordingly Mr Pennock accepted that no claim lies against the first defendant.

3. The Defence pleads limitation, asserting that any loss suffered by the claimant must have arisen no later than 22 October 2012 when the offer to buy for £175,000 was accepted. The claim was issued on 12 December 2018, more than 6 years after that date. However the defendants do not now pursue that defence because the acceptance on 22 October 2012 was "subject to contract" and the Receivers did not become obliged to sell the site, and so crystallise any loss to the claimant if they were in breach of duty, until a binding contract was entered into on 21 January 2013.

4. The allegations against the Receivers are in summary that they failed to obtain an independent market valuation of the site and so failed to understand its true value, and that they failed to advertise it generally or offer it for sale by auction, instead inviting offers only from about 20 developers selected by the agents they instructed and so failed to receive offers reflecting the true value. I should note that although the claimant's evidence and submissions contain hints at the possibility of connections between the Receivers' agents and the eventual buyer and references to allegations of fraud made against those agents in other cases, there is no pleaded case in this claim to any such effect, and no evidence shown to me that would support any such suggestion. Mr Pennock accepted that there was no proper basis for putting any such suggestion to any of the witnesses.

Factual background

5. The claimant company was incorporated in 2004 specifically to acquire the site at Brierley Lane, which it intended to develop by building 13 residential properties. Its directors initially were Mr Dess Raj, who was at the time the owner of the site, and his wife Mrs Santosh Kumari. Mr Raj resigned as a director in 2009 having been made bankrupt and disqualified from acting as a director, since when Mrs Kumari has been the sole named director. It is nevertheless clear from the documents and evidence that Mr Raj continued to play a substantial active role in the company's affairs.

6. On 7 March 2003 (Bundle p 287) Wolverhampton City Council granted planning permission for 10 semi detached houses, one detached house and two semi detached bungalows to be built on the site. That permission predates the incorporation of the claimant company and was granted to "Serene Homes", presumably a trading name used by Mr Raj. The site was transferred, with the benefit of that permission, to the claimant company at some point in 2006. It was a condition of the permission that the development must "be begun" within five years of the date of grant, ie by 7 March 2008, and it is common ground that the permission would have lapsed if that condition was not satisfied. There is an issue between the parties whether sufficient work had been done to satisfy the condition and so whether or not the 2003 permission remained extant at the time the Receivers were appointed.

7. In February 2007 the claimant entered into the first of a number of loans with Barclays Bank, borrowing £250,000 which was used to repay previous finance. The Bank obtained a valuation of the site for the purposes of its loan from Aitchison Rafferty which was dated 26 February 2007 (p 29). The site is referred to as "a cleared site albeit prepared for residential development including the provision of services" (p 31 para 6.2). The services are said to be "connected… as developer's supply" (para 5.1), ie presumably to the site itself but not the individual plots. The valuers' opinion on developable value is based on the plans and designs they were shown. They were provided with copies of the 2003 planning permission and a Buildings Regulations approval of the design drawings, on which they made no comment; they did not refer to the five year commencement date which by then was only 9 months away. They concluded that the site value in its present state with the then existing planning permission was £1,027,000 and that if fully completed its value would be £2,500,000 (p 34).

8. The first loan agreement was superseded by a second in February 2008 under which the bank made available up to £1,038,000 to repay the first loan and finance the construction. The bank obtained a further valuation from Aitchison Rafferty dated 17 March 2008 (p 55) which stated that "there have been no material changes to the site since we last inspected" and referred to it as "an undeveloped site". It stated that the planning position "has not changed" since the 2007 valuation. No reference was made to the five year date which had by then passed. The valuers evidently assumed the 2003 permission was still in force, but it appears they may have overlooked the five year point, since although they refer to some site preparation and infrastructure works as having been done they did not mention any information they had from which they were satisfied that this would be sufficient to satisfy the condition. Their opinion was that the value of the undeveloped site was £900,000, reflecting increased costs of building out the development, but they maintained their view that if completed it would have a value of £2,500,000 (p 58).

9. The second loan agreement was replaced by a third in July 2008, though the amount of the facility was not changed. The bank asked Aitchison Rafferty to confirm their valuation, no doubt because by then the impact of the now well known financial crisis was beginning to be felt. The valuers wrote a letter dated 7 October 2008 (p 71) noting "substantial fluctuations within the residential and financial markets which have resulted in what is referred to as 'the credit crunch'", that house prices had fallen by between 1.5% and 2% per month resulting in a reduction in their estimate of the value of the completed development being reduced to £2.2m which, with increased build costs resulted in a value of the undeveloped land of £516,000 in its existing state. There is no mention of the five year planning issue, though the assumption

evidently remains that the planning permission is still in effect. It would appear from the documents in the bundle that this estimate takes no account of any possible continuation of the rapid falls in house prices noted.

10. On the basis of that value the drawings already made caused a breach of a loan-to-value covenant in the loan documentation, and the bank informed Mr Raj that it would not allow further drawings under the facility and intended to call in the loan, which it did by making demand on 29 October 2008. At that time the debt outstanding to the bank was £327,413.

11. It is not clear from the evidence what happened between then and the middle of 2011, though the bank must have been exploring its recovery options and it seems it obtained at least one "strategy/options" report from Lambert Smith Hampton in February 2009 (witness statement of Mr Jorden, p 221, Defendant's disclosure bundle DB/103). The witness statement of Mrs Kumari (which Mr Raj has confirmed but not amplified) does not disclose what if any efforts the claimant made in that period to find a buyer or to refinance the Bank's debt. Presumably it would have been in its interest to do so if, as it now says, the value of the site was well in excess of what was owed to the bank.

12. The Receivers' involvement began in July 2011 when Mr Jorden was contacted by Barclays Bank. He and Mr Salata are both Chartered Surveyors and Fellows of the RICS, and have worked together since the 1990s in relation to realisation of property security, in particular by taking receivership appointments. Their practice was to take a joint appointment, but that on any given appointment one of them (in this case Mr Jorden) would take the lead, supervising the staff allocated to the case, with the other being available as backup or in case of absence. Mr Jorden's health is now poor and he has retired from practice. His evidence given by witness statement was that on appointments outside London it was usual for him to instruct Mr John Sparrow of Connells to provide advice on marketing and valuation, as he did in this case. Mr Sparrow is also now elderly and in poor health and although he made a witness statement he was not able to appear at the trial. Both witness statements were admitted pursuant to a hearsay notice.

13. Mr Salata gave evidence including evidence as to the general practice he and Mr Jorden followed, though he was not in a position to have any direct recollection of the specific circumstances of this case. I did hear from Mr Louis Furner, himself a qualified Chartered Surveyor, who was at the time employed by the first defendant company and acted as the principal assistant to Mr Jorden for this instruction.

14. The Bank's initial instructions were to review the site and prepare a report assessing options before any appointment of receivers was actually made. Mr Jorden contacted Mr Raj by telephone to discuss the site, but Mr Raj refused to speak to him and said he was intending to sue the bank.

15. Mr Jorden made contact with Mr Sparrow's office on 2 August 2011 copying the initial options report he had submitted to the bank (DB 169) and asking:

> "1. Do we need a planning report or can you check out if the consent is implemented?
>
> 2. Can you check out the contamination situation and what impact that will have on price?

> 3. we need to advise on likely value today and if it is sell now or hold for a number of years as values are likely to rise quite a lot when the market returns?"

16. Mr Jorden was thus plainly aware of a potential issue as to whether any sufficient work had been done on site to satisfy the commencement condition. It would appear he was having to consider this in the absence of any information or cooperation from Mr Raj, who had refused to speak to him. Although the claimant has filed evidence from Mrs Kumari stating that over £200,000 had been spent on works at the site she does not say in any detail what these were. Copies of invoices said to show spending of £247,000 on work by contractors at the site have been disclosed, but there is no evidence from the claimant that this information, or those documents, were given to the receivers at any stage before or during their appointment.

17. It appears that the question of the status of the planning permission was in fact followed up by Mr Furner, who emailed Mr Jorden on 9 August 2009 (DB 178) to say that he had seen confirmation from the planning authority that it had approved the designs submitted pursuant to the 2003 planning permission and stating that work could therefore commence, and continuing:

> "I have also spoken to Steve Scanlon in Building Control who has confirmed that they have a record of work having commenced 05/04/2007 (drains laid) therefore I can confirm that work has commenced prior to the permission expiry date of 07/03/2008"

18. However a day later Mr Furner sent another email to Mr Jorden saying:

> "…I have just received the following from Steve Scanlon… contradicting what he told me yesterday:
>
> *Louis*
>
> *This application was withdrawn by Pharoah Designs Ltd on 19 February 2007. It therefore was not treated as commenced.*
>
> If they have a record of work commencing 05/04/2007 there appears to be some confusion. I have asked for further information."

19. It does not appear what if any further information was ever provided by Mr Scanlon. It is not clear what "application" is being referred to as having been withdrawn or how that could have affected the planning permission that had by then already been granted. Mr Furner's evidence was that he could not recall whether they ever got to the bottom of the situation with the council.

20. Mr Jorden and Mr Sparrow arranged to meet at the site on 18 August. Prior to that Mr Sparrow sent a hand written note to Mr Jorden (DB 165) saying :

> "Herewith our GDV assessment. As you can see sales figures per square foot are pretty low. I have done a fairly quick residual which throws up a land value (clean) of £350,000 max. We can discuss on Thursday."

21. This assessment was prepared with the assistance of Sue Bates, an employee in Connells local office with, according to Mr Sparrow, extensive knowledge and experience of the local property market. The "residual" referred to is, as is apparent from the expert evidence in this case, a form of calculation done to evaluate development sites, starting from an estimate of the Gross Development Value ("GDV", ie the estimated sale value of the development once complete) deducting all the costs of building and financing the project and an allowance for the profit required by the developer, which is typically expressed as a percentage of GDV, and arriving at a "residual value" of the land itself, ie the price that could be paid for the land and still leave the required profit at the end of the development.

22. The calculation attached, though headed "Land Value Assessment" in fact appears to be a calculation of the developer's profit if a price of £350,000 is assumed to be paid for the land. The conclusion is "Profit after Finance £158,050 = 9.4% return on capital." Mr Sparrow could not of course be asked about this, but it is easy to see that if the calculation had been done so as to produce a developer's profit of 20%, such as the defendant's expert Mr Willet considered appropriate, the assumed value of the land would have to be of the order of £200,000.

23. Mr Pennock submits that this estimate must have been on the basis of an assumption that the development built would be in accordance with the 2003 planning permission. I accept this, as any discussion of alternatives seems to have commenced at the site meeting a few days later.

24. It appears that at or about the date of the site meeting, Mr Sparrow advised Mr Jorden that he (and Ms Bates who also attended) considered that the houses envisaged in the 2003 planning permission were too large and upmarket for the area, and would likely be difficult to sell. If so that would obviously affect the willingness of developers to pay for the site in order to build those houses. A more attractive scheme to a purchaser, he thought, would be for a similar number of smaller two or three bedroom houses. They discussed whether a further planning application should be made. On 19 August Ms Bates sent some information on likely sale prices of such houses and on 24 August she advised that a new scheme should provide for 75% of three-bed units and 25% two-bed. Mr Sparrow contacted Woburn Design Consultancy and asked them to prepare outline drawings for a revised scheme, the intention being to explore with the planning authority whether that would be likely to be acceptable and obtain an informal assurance so that "the site could then be marketed to prospective purchasers with the benefit of either the Serene Scheme or the Woburn Scheme therefore making it a more attractive purchase" (witness statement at para 17, p 254).

25. Mr Sparrow sent an email to Mr Jorden on 23 August 2011 (DB/184) saying:

> "…I think all three of us [ie, presumably, himself, Mr Jorden and Ms Bates] are pretty positive that we really do have to think seriously about not necessarily making a formal planning application but getting the nod from the planners that an amended scheme would be likely to be acceptable…
>
> Given that we could get the nod from the planners… I think that would probably suffice in terms of getting the site to the market.

> As it is frankly I do not think it is saleable save possibly, and rather doubtfully, to a housing association."

26. On 7 October Mr Jorden reported this to the bank as follows:

> "The permission granted in 2003 is in our agent's opinion inappropriate for the site in the current market. It may never have been appropriate. It is too upmarket for the area… The target should be more downmarket and should be aimed at Housing Associations with a mix of terraced houses and flats rather than private market housing.
>
> We would recommend that the most appropriate strategy would be to commission an architect/planning consultant to prepare an indicative layout for a scheme targeted at that market… the likely sales revenue is expected to be in the region of £350,000 to £400,000 prior to the deduction of sale and planning costs."

27. On 6 January 2012 Mr Sparrow advised (DB/212):

> "…Sue's estimate of GDV is of the order of £1,500,000 and given that there is no market place there at all, this one is likely to be worth somewhere of the order of £375,000- £400,000. The difference however between the two schemes is that I suspect this one is saleable and the other isn't. There is a general feeling that it might be worth having a go locally to try and get shot of it and inviting bids for it based on what Tom is able to agree with the planning authorities…and should we not be in a position to find a local developer… then I suspect the best way of dealing with it [would be] by way of a sale by public auction. That would certainly flush out any likely interested parties.
>
> The alternative of course is to offer it for sale by public auction unless previously sold- I think on balance that is probably the best route…
>
> …the earlier scheme… constituted units far too good for the site, hence our view that that scheme would be very difficult to sell in the open market."

28. On 31 January 2012 the receivership appointment was made Mr Sparrow notified Ms Bates (DB 216), asked her to instruct her colleague Tom Ayres to open discussions with the planning department about the revised scheme and said "…now that the appointment has been made it will be in order for you and Tom to speak to a few likely interested parties."

29. There was then a somewhat protracted period of discussion with the planning office about the likely acceptability of the revised scheme. On 30 March Mr Sparrow asked Ms Bates (DB/230):

> "I know that Tom Ayres is discussing with the planners the Woburn Design scheme which was based on your

> recommendations as to the most appropriate form of housing mix here.
>
> Do you still hold to that view, in other words has the market in any way improved which would lead you to believe that the original consented scheme… might be viable in today's market place, since I do not want to go down the wrong route and if therefore you feel that there would be some prospect of the Serene scheme rather than the Woburn Design one being marketable today please let me know…"

In response Ms Bates said:

> "… may I advise that the potential for sales in the area has not improved since our last discussions. In fact unfortunately I have a client who purchased a site literally round the corner who has been refused build cost funding because of lack of confidence by funders in the area. I repeat therefore that the Woburn scheme would be more appropriate."

30. In April Ms Herrera, a senior planning officer responded with observations on the Woburn scheme saying inter alia that the proposed density was too great. Woburn were asked to revise their drawings for resubmission. On the basis of the revised drawings Ms Bates advised a likely GDV of £1,420,000 and on 19 July 2012 Mr Sparrow advised (DB/268):

> "I have had another look at this and I am afraid the news is not very good. I am enclosing another residual that I have carried out to try to determine a land value element taking 20% of GDV which is £284,000… this …shows a minimal profit of £26,000… Of course no developer would work for that return and the killer… is the very low selling prices…
>
> I can only suggest therefore that if we can get a letter of comfort from the local authority we should go to the local market to investigate developer interest and see what sort of bids they come up with. If they are of a very low level it might be better for the bank to lock up the site for a number of years and wait for the market to recover…even with the wind behind it now having had the opportunity to look at these figures in some depth I think we are jolly lucky today to get £100-150,000 for it…"

31. Ms Bates received an approach from a developer (unidentified) asking about any available opportunities for site to build for housing associations, and enquired whether she could give him information about the site. Mr Furner authorised that on 26 July saying (DB/273) "It would be beneficial to have a market view (albeit only one view) of the site's value at this stage. If you feel this is an appropriate party to deal with please ask Sue to have that discussion.." It is not apparent from the documents what if any response this produced.

32. In August Ms Herrera responded to the revised Woburn scheme stating that it would be acceptable in principle subject to some caveats. On 24 August Mr Furner told Mr

Sparrow and Ms Bates (DB/282) "We can now take the site to market with the benefit of an indicative scheme which the LPA have confirmed they would not object to in principle (subject to the comments below). Please outline marketing proposals so we can notify the bank." On 28 August Mr Sparrow replied "… I think in all probability…there would be sufficient information [in Ms Herrera's reply] to enable us to go to market, although almost certainly it would have to be on a subject to planning permission basis… As we have discussed before this is very much a local market here and I certainly would not advocate going to the national press such as Estates Gazette. I think this is something that can very adequately be dealt with by our folk up in the Wolverhampton area and using the local media…" to which Mr Furner responded "Happy to take your advice on this one re local marketing."

33. Mr Furner said in his witness statement (para 44 p 248) that he had on 11 September emailed to Mr Ayres the revised Woburn scheme and correspondence with the planners and saying:

> "Re marketing strategy. I note your intention to first present the site to c. 20 local developers from Connells' database (whose current requirements match the site) with a view to collating and considering their feedback by the end of September. At this point we can identify any serious interest and either proceed with a preferred bidder or in the case of multiple interest consider a best bids scenario.
>
> Should this initial strategy fail to attract sufficient interest you will send details to the remaining local developers on Connells' database (total c 100). If there is still insufficient interest in the site a local marketing campaign will be undertaken including in house production of brochures, local press advertising (possibly also Estates Gazette) sign board etc.."

Mr Furner said in his witness statement that although he had relied on Connells' advice "I certainly agreed with the approach that they recommended as it was the usual approach and generally proved successful".

34. That email does not appear to be in the bundle, but Mr. Furner was not challenged about his evidence that it was sent, or that he approved the strategy Connells had proposed. Mr Jorden and Mr Furner both said in their witness statements that Mr Furner wrote to Barclays on 5 October to say that the site had been marketed to 15 local developers of whom three had expressed interest and two had made offers. One was from Amber Real Estate for £200,000 but was for a 12 month option agreement and conditional on planning permission and the other, which he recommended be accepted, was an unconditional offer of £175,000 from K&M Homes. He told the bank:

> "We are satisfied that the site has been sufficiently exposed to the market to achieve market value. The site has been presented to 15 developers however it has not been generally advertised as such a strategy will often be off putting to serious parties operating in the locality with a specific requirement. In this instance, with a potentially challenging site and location it has been suitable to first undertake a quality rather than a

> quantity based marketing strategy in order to obtain the best offers"

There was then a telephone discussion with the bank, which was no doubt concerned that the offer was well below the value initially indicated. Mr. Jorden sent a further email on 9 October 2012 saying:

> "I refer to our telephone discussion this afternoon concerning the offers received for the site which came in at figures substantially below the initial opinions of value expressed by our agents at the beginning of this case. As intimated in our emails of 10 August and 11 September, in view of the approach adopted by the local planning authority, we were becoming concerned at the level at which bids might be received but uncertain what that level might be. Unfortunately, our worst fears were realized by the reaction of the market and the bids received. We are satisfied that there are a reflection of the market value although there are two very disappointing level. I appreciate that such results are not welcome but sometimes they occur".

35. Neither of these emails is in the bundle but the claimant has evidently seen them as they are quoted in its Particulars of Claim. On 19 October Mr Furner emailed Mr Ayres confirming that the offer from K&M Homes was accepted. He was not challenged on any of this evidence.

36. On 17 December 2012 Mr. Ayres provided to Mr Furner a list of 20 names of "developers who received this site on 24 September" (p 270). There are no documents disclosed showing what information was sent to the 20 developers or what response was received from them, other than correspondence with the eventually successful bidder to accept his offer, subject to contract.

37. On 14 December 2012 Mr Raj emailed the receivers urging them not to proceed with the sale, referring to his dispute with the bank, to unspecified allegations of fraud against the bank and to the valuations it had received from Aitchison Rafferty in 2007 and 2008 "just before the crash of the banks", on the basis of which he said "clearly there is something wrong with the offer you have accepted" and that proceedings should be halted "until this matter is investigated by lawyers and the FSA". In reply Mr Jorden said that the receivers' investigations had shown that the units proposed in the existing planning permission were too big and expensive for the location and would have been very difficult or impossible to sell if priced at a level to make the development viable, that they had accordingly commissioned an amended scheme that could be marketed with a letter of comfort from the planning authority to increase the site's appeal and "given the current state of the regional development market it was decided that the only way to truly ascertain the value of the site was to put it to market with offers invited as opposed to placing a guide price which could have potentially undervalued the interest or indeed been too high and put potential purchasers off."

38. Contracts for the sale to K&M Homes at £175,000 were exchanged on 21 January 2013 and completed on 19 February 2013.

Relevant legal principles

39. The classical statement of the law on the duty of a mortgagee owed to a mortgagor on exercising a power of sale is in the judgment of the Court of Appeal in *Cuckmere Brick Co v Mutual Financ*e [1971] 2 All ER 633. The court held that although the mortgagee is not a trustee of the power obliged to exercise it in the best interests of the mortgagor rather than his own, and so is entitled for instance to sell at a time of his own choosing, he is under a duty to take reasonable steps to obtain "the true market value" or "a proper price" at the time he decides to sell. The court did not allow the mortgagee to argue that it had discharged this duty simply by leaving the matter in the hands of reputable agents, however negligent those agents were, since that point had not been taken at first instance, though it is clear from the judgments that the majority at least would have held the mortgagee liable for any negligence of their agents. It is also clear that from the facts of that case that in considering whether what was done was or was not negligent, account was taken of the fact that the steps taken were considered and decided on by very experienced professionals. In relation to any alleged breach of duty. Salmon LJ said (p 645):

> "No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."

40. In *Meah v GE Money Home Finance* [2013] EWHC 20 (Ch) to which Mr Pennock referred me Mr Alan Steinfeld QC, sitting as a Deputy High Court Judge, observed:

> "…the mere fact that a property is sold by a mortgagee at less than a valuer believes was its true market value is not in itself sufficient to give rise to a claim. What the mortgagor has to show is that in failing to achieve that value the mortgagee breached, and as Salmon LJ put it plainly breached, its duty to take reasonable precautions to obtain that value. In *Cuckmere Brick* Salmon LJ at p. 965 specifically observed "Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding is exceptionally low." Furthermore it was the view of two of their Lordships in that case (Cross and Cairns LJJ) that, even where the duty has been breached, the measure of compensation is not measured automatically by the difference between the price paid and what the expert assesses to have been the true market value of the property. Rather the compensation must be assessed on the difference between the price paid and the price at which the property would probably have sold had the duty been discharged, which is not necessarily the market value attributed to the property by an expert."

41. It is common ground that the same duty is owed by a receiver appointed by the mortgagee. The Court of Appeal confirmed that in *Silven Properties v Royal Bank of Scotland* [2003] EWCA Civ 1409, describing the duty (at para 22 of the judgment of the court) as being "to take care to obtain the best price reasonably obtainable". It is not suggested that there is any difference in effect between these various formulations of the standard.

42. Although noting that in some respects a receiver came under a positive duty to act to protect the value of the property, for example to exercise a power to review rents, the court rejected the submission that a receiver came under any higher duty by virtue of the fact that his appointment constituted him as agent of the mortgagor in exercising his powers, and in particular held that a receiver did not have any duty to delay sale in the interests of the mortgagor, or to expend money on improving the property or obtaining planning permission so as to enhance its value. Insofar as the receivers had begun steps to obtain a planning permission, they were entitled to halt those steps at any time and sell the property as it was, and so were not liable for a failure to continue the application until planning permission was obtained.

43. Mr Bankes-Jones also refers me to a passage from the judgment of Morgan J in *McDonagh v Bank of Scotland Plc* [2018] EWHC 3262 (Ch) at para 140:

> "When considering whether a mortgagee or a receiver has committed a breach of the equitable duty to take care to obtain the best price reasonably obtainable, the court must recognise that the mortgagee or receiver is involved in an exercise of informed judgment and if he goes about the exercise of his judgment in a reasonable way, he will not be held to be in breach of duty. An error of judgment, without more, is not negligence or a breach of the relevant duty in equity."

44. Mr Pennock submitted that the evidential burden was on the receivers to show what steps they had taken to obtain a proper price, and that these were reasonable, relying on *Mortgage Express v Mardner* [2004] EWCA Civ 1858. However that case, and the Privy Council authority *Tse Kwon Lam* [1983] 1 WLR 1349 on which it relied, referred to the onus on a mortgagee who sold the property to a company in which he himself had an interest. No doubt the same would apply if the sale was to a party in which the receivers or their agents had an interest, or perhaps if it were shown that there was some connection, short of an interest, sufficient to imply a real risk of willingness to prefer the buyer's interests over those of the mortgagee. But that is not the case here, since as noted above the claimant, although it hinted that it wanted to investigate whether there was any such connection between Connells and the purchaser, has not either pleaded that there was, or adduced any evidence that might have supported an allegation of, any such connection, let alone any interest, beyond the prima facie innocuous fact that the developers to whom the site was marketed were known by Connells through their local experience (including previous sales) to be potentially interested in similar development sites.

45. In the absence of any such interest in the buyer in my judgment in this as with any other case relying on alleged negligence or breach of duty it is for the claimant to plead and particularise the acts or omissions said to amount to such negligence or breach, and to prove those allegations by evidence, to the normal civil standard.

Expert evidence

46. By order of District Judge Rouine at a CCMC on 20 November 2020 each party was given leave to rely on the written reports of an expert valuer. There are some difficulties arising from the fact that the instructions given to the respective experts were not consistent with each other, and the opinions they expressed were, not surprisingly, not addressed in all respects to the same matters. The claimant's expert

is Mr Tim Boffey, and the claimant relies heavily on his written and oral evidence. A number of documents were submitted as Mr Boffey's written evidence.

47. Firstly a report dated 25 October 2017 (p 278). In cross examination he said that this had in fact been produced at a later date in 2020 and was an amended version of a report prepared in 2017 that had been attached to the Particulars of Claim, but he had omitted to amend the date. In his report, which has an expert's declaration attached, Mr Boffey records his instructions as being to prepare an opinion of "the valuation of the site as at September 2012 and February 2013" (p 279). He notes that his instructions came from Mrs Kumari but does not exhibit any letter of instruction. The valuation is based on the 13 units envisaged in the 2003 planning permission, which Mr Boffey estimates could have been sold at an average of £145,000 each. He estimates the build costs at £80 per square foot and at p 283 says:

> "The 13 units at a sale price of £145,000 each makes a total of £1,885,000 and less the build costs of £220,000 already spent, less professional fees, finance costs, sales and promotions costs, contingency profit etc I end up with a valuation of £569,000 for the land."

48. Mr Boffey did not give any detail of this calculation, such as the figures he had allowed for professional fees or finance costs. It became clear from his oral evidence that when he referred to "less the build costs of £220,000 already spent" he was giving credit for that amount, which he had been told by Mrs Kumari had already been spent, against his estimate of build costs at £80 psf. He had not made any evaluation of what had been achieved by that spending or the value it produced, in the sense of reducing the cost to a purchaser of completion of the works from their then actual state.

49. Somewhat confusingly Mr Boffey's report went on to say that in his opinion the market value of the site between September 2012 and February 2014 (I assume he meant 2013) "was somewhere in the region of £550,000 to £600,000 therefore a figure of £575,000 has been adopted as the valuation." If he was indicating a permissible range of opinion, he did not say why its mid point would be higher than his own estimate of £569,000. He also said at p 283 "the value of the land on a 'forced sale' basis is expected to be less than the Market Value, somewhere in the region of £450,000 to £500,000 in my opinion would be appropriate." He did not comment on whether he would have regarded a sale by the Receivers as a 'forced sale'.

50. There were also a number of letters written by Mr Boffey between May 2019 and May 2021 (pp313-325). These are in the form of response to queries made by Mrs Kumari and/or Mr Raj, but do not set out what exactly was asked, or attach the emails that contained the requests. In some cases Mr Boffey says he has been told that the claimant's solicitor has requested information but there is no letter from the solicitors showing what exactly he was asked. None of these letters has an expert's declaration attached and they have not been incorporated into the report that does have such a declaration. They appear to have been written with a view to assisting the claimant in preparing its case rather than reporting to the court. In part Mr Boffey gives his opinion on what steps should have been taken to market the site, and the extent of a receiver's duty, but I do not consider I can place any significant weight on this given (a) the fact these letters are not in the proper form for expert evidence (b) Mr Boffey does not seem to have been referred to the documents or evidence showing what the receivers and their agents actually did or their explanation of why that was justified

and (c) such opinions are on the face of it beyond the scope of the order later granted permitting expert evidence, as reflected in the fact that no similar questions were put to Mr Willet for the defendants.

51. Mr Boffey wrote a letter on 29 June 2021, which is expressed to be an addendum to his report and has an expert's declaration, recording that he has been asked for an opinion of the value of the site if the 2003 planning permission was not extant in 2012. His opinion was that there would have been some extra costs, mainly as a s106 contribution of £65,000 would have been required, but a renewed application would have been straightforward and accordingly his estimate of market value should be reduced by £100,000 to £475,000, or £350-400,000 on a forced sale basis.

52. Mr Adrian Willet was instructed for the defendants and has made two reports. The first is dated 24 March 2021 (p 330). It is in a much more conventional layout for a CPR compliant expert's report and in particular attaches his letter of instruction. That letter, as Mr Pennock pointed out, stated that the 2003 planning permission had expired and Mr Willet formed his opinion of value on that basis. I note that it also set out the allegations of breach of duty in the Particulars of Claim, but Mr Willet was not instructed to express any opinion on them. He was asked only for his opinion on the market value of the site as at 21 January 2013, when contracts were exchanged.

53. Mr Willet sets out in some detail the residual value calculation he made and the basis of the figures he adopted. He started with an estimate of the total selling price of the units proposed in the 2003 planning permission, noting criticisms of those designs and taking comparable prices from sales of new build properties in September 2012-January 2013, most of which seem to have been at a single development at Kynance Grove Bilston. From this he estimated a GDV of £2m. He gives in detail the costs he has deducted in arriving at a residual value for the land. In particular he notes the different figures up to £247,000 said to have been spent by the claimant on the site and gives detailed reasons based on his examination of the invoices produced and the site itself why he is not satisfied that those figures are reliable or that they reflect costs that a purchaser would not have to incur to take the site to completion. His own estimate of the allowance against total costs for the work already done was £125,000.

54. From this calculation Mr Willet arrived at a residual value of the land, on the assumption that the 2003 planning permission was subsisting, of (in round terms) £339,000. He accepted in cross examination that, on that assumption, he had been wrong to include an allowance for s 106 costs of £65,000 because no s 106 contribution would have been due if the 2003 permission was still effective. Adding that back, his valuation with the 2003 planning permission in force would be £404,000.

55. Mr Willet's report then says that if the 2003 planning permission was not subsisting, and it was his opinion that it was not:

> "Taking into account prevailing market conditions as at January 2013, the location, nature and condition of the Property at that date, the virtual absence of a functioning development finance market, the works completed to date (most likely without any form of assignable warranty) and the planning risk/delay/cost attached to securing a replacement planning permission, I am of the opinion that the applicable discount to market value to

> reflect the Property's lapsed planning status is 40% of its 'with planning' value."

56. Applying that to his estimated value of £339,000 he arrived at a figure of £203,388 which he rounded to £200,000. Although this calculation was not put to Mr Willet, a 40% discount on £404,000 would give £242,400, but the 40% figure plainly did not include the known additional s 106 cost and if that was then deducted the net value without planning permission would be £177,400. At best, from the claimant's point of view, if the s 106 cost was deducted before applying the 40% discount the result would get back to Mr Willet's figure of £200,000.

57. Mr Willet did not separately evaluate the Woburn scheme, but said that in his opinion it did not add anything to these values.

58. Somewhat unusually, I also have before me some real-world contemporary evidence of how the value of the site was considered by a party potentially interested in the acquisition, because Mr Sparrow approached Mr Harper, the principal of K&M Homes, in 2018 and was given by him a copy of a valuation prepared in December 2012 for Zorin Finance Ltd, who provided finance for K&M's successful offer. That valuation (p 272) is by Mr Alan Herbert FRICS, and indicates that the intention of the buyer is to develop in accordance with the 2003 scheme, although it refers to that consent as having lapsed. Mr Herbert refers to informal discussions he has had with Ms Herrera at the planning authority from which he believes consent for a similar scheme would be granted again, though noting that a s 106 payment of £67,500 would probably now be required. It must be inferred from what he says, in my judgment, that Ms Herrera's position on behalf of the authority was that the 2003 consent had indeed lapsed so that a new application would be necessary. Mr Herbert advised the lender that the GDV was £1,725,000 and having performed a residual value calculation the market value of the land if planning permission had been extant would have been £331,500. He went on to say however that he was valuing it as being without a current consent, on which basis the value was £175,000. He states that he has derived that figure by applying a percentage discount to the 'with planning' value to reflect the costs and risks of applying for consent. He does not state the discount figure, but it amounts to about 47% including the estimated s 106 cost, or 27% if that is taken separately.

The pleaded allegations

59. The allegations of breach of duty are set out in para 28 of the Particulars of Claim. It is important to focus on these, and the evidence produced that bears on them, because in my view the claimant's approach to this case has become excessively centred on its view of the market value of the site and the evidence obtained from Mr Boffey of that value, including his opinion that the 2003 planning permission was still in force in 2013 and that the true value of the site was therefore to be assessed with the benefit of that planning permission. However, as noted above the mere fact of a sale below the value assessed by an expert is not sufficient itself to give rise to a claim. The market value of the property is only relevant to loss if a breach of the duty to take reasonable steps to obtain a proper price is found, and even then the amount of loss depends on a finding of what the property would probably have sold for in the absence of that breach, which is not necessarily the same as an expert's assessment of its market value at the time. I should say that the above is not a criticism of Mr Pennock, who had no responsibility for the pleadings and seems to have been brought in to the case at a late stage.

60. Those allegations are:

i) "the receivers failed … properly or at all [to] engage independent expert valuers for the purpose of determining the true market value of the development. Had the receivers engaged independent expert valuers they would have understood the true value of the development and consequently obtained a better price for it."

ii) "The receivers marketed the development to a limited number of potential buyers. Had the receivers marketed the development to a greater range of potential buyers they would have obtained a better price for the development."

iii) "The receivers marketed the development as a portfolio and not individually". This was not pursued at trial; understandably as it would plainly have been inappropriate to seek to market a development site which at best consisted of levelled ground with the beginnings of an access road as individual plots.

iv) "The receivers failed to market the development with a guide price… this would have encouraged potential buyers to buy the development for an amount closer to its true market value."

v) "The receivers rejected an offer …of £200,000." This too was not pursued at trial; it would have been a hopeless task to suggest that the receivers could not properly have assessed an unconditional offer of £175,000 as more advantageous than an offer for an option, conditional on planning permission, which might have realised £200,000 in 12 months time. In any event, it is pleaded in the defence, and not contradicted by any evidence, that this offer was withdrawn because the prospective purchaser could not obtain finance in the market at the time.

vi) "at the time the true market value of the development… was £575,000… the sale… by the receivers at £175,000 was [an] undervalue sale." Mr Pennock did not pursue this separately, no doubt because as noted above failure to obtain the assessed market value is not by itself sufficient to establish any breach of duty.

The 2003 planning permission

61. A great deal of the focus at trial was on whether Mr Boffey was right in his view that the 2003 planning permission was extant, because the works that the claimant said it had spent £247,000 on must have been sufficient to amount to establish that the development had "begun" for the purposes of s 56 Town and Country Planning Act 1990. Mr Pennock submitted that I could make a finding to that effect myself, and that the receivers had been in breach of duty in failing to market the site as having the benefit of that permission, or by failing to follow up the inconsistent information provided by Mr Scanlon as to whether work had commenced. Had they done so, he submitted, it would have been established that the council were wrong to say that the permission had lapsed and it could have been marketed with the benefit of that permission. This was not a matter, he said, of incurring expense or time in obtaining planning permission but of evaluating the nature of the asset they were appointed over.

62. Starting with the last point, on the evidence before me it can only be concluded that if the receivers had pressed the council further than Mr Furner actually did, they would have continued to be told that the council's position was that sufficient work had not been done to amount to commencement of the development. That is because:

    i) That is the clear implication from the latest statement by Mr Scanlon to Mr Furner. The fact that he telephoned to change what he had first said suggests he had been overruled by higher authority and so his first statement did not represent the position of the authority.

    ii) It is also the clear implication of what Ms Herrera told Mr Herbert when he made his own enquiries for the purposes of his valuation in December 2012.

    iii) When the defendant's solicitors enquired in February 2021 at the request of Mr Willet they were told by the planning department (DB 333):

    > "I have discussed this with the section leader building control and we have agreed the following response. The only works carried out were a basic drainage connection and site access roadworks, this is unlikely to have been a material commencement for planning purposes… a judgment was taken in 2014 that no material commencement had taken place and as such application ref 14/00050/FUL was submitted and is now the relevant planning consent for the site."

    iv) The 'judgment' referred to in 2014 must have been made when the purchaser sought to proceed on the basis of the 2003 consent. The council maintained its position that that consent had lapsed and the purchaser was obliged to accept that and make its own fresh application which, as the claimants say and indeed rely on, was for a very similar scheme.

63. The council's position was therefore clear. The claimant says it was wrong and urges me to make a finding to that effect. There is however no sufficient evidence for me to do so, and in any event such a finding would not be relevant- the material question is whether the receivers were under any duty to press the council further in 2012 and what would have happened if they had done so. It must be assumed, for the reasons given above, that if the receivers had gone back to the council seeking to dispute what Mr Scanlon told them, that they would have received the answer that K&M did in 2014- that the council did not consider the work that the claimant had done in 2007 sufficient. Whether the work was sufficient is not a matter of how much the claimant says it spent on the works, but what those works had actually achieved. That could have been ascertained on the ground, and the receivers would have been in no better position in 2012 to argue that what could be seen on site was sufficient than K&M were in 2014. It must be assumed that K&M would at that stage have put forward the best case they could, as they positively wanted to implement the 2003 scheme and if they could rely on the previous permission it would have saved them the costs of a fresh application including the s 106 contribution. But that evidently did not persuade the council and K&M must have accepted that they had no alternative to making a fresh application and incurring the cost of doing so.

64. The receivers could only have sought to overcome the council's position by some form of proceedings to challenge it. However if as is accepted they were under no duty to make a fresh application they cannot have been under any duty to incur the

risk and cost of proceedings to establish the effect or status of the previous consent. The result is that even if it is assumed in favour of the claimant that the receivers should have made further enquiries to clarify what they had been told, that would not have resulted in them being able to market the site as having the benefit of an extant planning permission. At best they could have drawn attention to the 2003 planning permission and told bidders that the council's position was that it had lapsed.

65. Mr Boffey held to the view that the council's position was wrong, and accordingly the true market value of the site should be assessed on the basis that the 2003 position was in force. But he seemed to accept in cross examination that a buyer looking at the site and being told that the council considered the permission to have lapsed would approach the site on that basis, since at best he would be buying an argument with the planning authority seeking to overturn its view. That in my view must be right; no realistic purchaser would simply assume that the council would change its position on request. It would follow that any purchaser would be likely to evaluate the site on the basis that it did not have a current planning permission and a fresh application would have to be made even if it was in effect the same as the 2003 scheme. That of course is exactly the approach Mr Herbert took when valuing the site for K&M's lender and there is no reason to think any other purchaser, or its lender, would have done any differently.

66. It was suggested that the receivers had failed to mention the 2003 planning permission at all when the site was marketed, or have failed to show that they had done so because they have not produced the material that was in fact sent to prospective bidders. It is indeed surprising that this material has not been disclosed; its absence may or may not be explained by a policy of Connells that Mr Sparrow refers to of destroying files after five years. However, its absence must have been obvious to the claimant and there has not been any application for specific disclosure to obtain it. The claimant would be obliged to plead and prove any such omission, but it is not an allegation made in the Particulars of Claim and, without the documentation itself the claimant is not in a position to establish any such allegation either on the basis of the pleadings or evidence.

67. In any event, insofar as I can draw any inference at all on the evidence before me, it would be that prospective buyers probably were made aware of the 2003 permission, since (a) the correspondence shows that Mr Sparrow and Connells commissioned the Woburn scheme in order to offer the site as having two possible routes for development and (b) Mr Herbert when instructed in K&M's transaction clearly was aware of it. Of course, he may have become so aware as a result of his own enquiries rather than what Connells told prospective buyers, but that possibility only throws up the point that it would be for the claimant to show by evidence that any failure by the receivers to mention the 2003 planning permission in their marketing material would have led to prospective buyers being unaware of it and so making no bids or lower bids than they otherwise might have. There is no evidence before me to that effect.

68. In that respect, the position may now be rather different than it was on the facts of *Cuckmere Brick*, which occurred in 1967. In that case a property was advertised as having planning permission to build houses, but no mention was made of a further permission to build flats. There was evidence before the court that it would have attracted a higher price if the permission for flats had been included in the advertisement. It could not I think necessarily be assumed that the same evidence would be given today, since it is now well known that any prospective purchaser,

indeed any member of the public, can readily see the whole planning history of a site on the local planning authority's public website. Still less would it be appropriate for the court to assume, in the absence of evidence, that a failure to mention a possibly extant planning permission to prospective developer purchasers would lead to those purchasers being unaware of it.

69. The result is that in this case there is no pleaded allegation of breach of duty by failing to refer to the 2003 permission in marketing the site, no evidence that would have supported an allegation of such an omission, no evidence that if there was such an omission it would have led to prospective buyers being unaware of that permission and no evidence that, if the 2003 permission had been referred to, anything that could properly have been said about it would have made any difference to the interest that would have been shown in the site or the amount that buyers might have been prepared to pay for it. There can be no claim against the receivers in that respect.

The pleaded allegations of breach of duty

70. Turning to the allegations that <u>are</u> made, the first is that the receivers (a) failed to instruct independent expert valuers and (b) would have had a better understanding of the value of the site if they had done so.

71. It was submitted that obtaining advice from Mr Sparrow was not sufficient because he is not a MRICS and because he was associated with Connells, who were expected to be instructed as the selling agents. Insofar as Mr Sparrow obtained advice from Connells' staff such as Ms Bates, they were not qualified to the level of a FRICS and were not independent of Connells. Mr Sparrow describes himself as a residential land agent who was at the time a Consultant to Connells, having previously been a main board director. He was also a consultant to Jorden Salata. Connells is said to be the largest seller of new and second hand homes in the UK having 640 offices throughout the country.

72. Mr Pennock did not refer me to any case holding that a receiver complying with his duty to take reasonable steps to achieve a proper price must take valuation advice either from a valuer with a particular qualification, or one who is independent from the agents he proposes to instruct on the sale. Mr Boffey in his letter of 20 January 2020 advised Mrs Kumari that in his opinion the receivers should have obtained a valuation from someone other than Connells, but this appears to have been mainly because he regarded it as essential to have the advice of a Registered Chartered Valuation Surveyor rather than that a receiver should not rely on any valuer associated with his selling agent. In any event, for the reasons given above that letter is not in my judgment evidence on which I can place any weight.

73. I accept of course that the duty to take reasonable steps may include a duty to take suitable advice on matters in which the receiver does not himself have the relevant expertise. It is easy to see that this is likely to be the case in relation to marketing and sale of a property where the receiver does not himself have the requisite knowledge of the property and or the appropriate market. It is often the case that fixed charge receivers are themselves estate agents or valuers, and so may consider that they have the necessary expertise in house. If so they may nevertheless consider it wise to obtain outside advice 'to cover themselves' as Mr Boffey put it. But any omission to 'cover themselves' does not of itself necessarily amount to a breach of duty.

74. Having decided to take advice, in my judgment, in deciding who should provide that advice the duty to take reasonable steps requires only that the receiver acts reasonably in identifying a suitable person or persons capable of providing that advice, and that duty is not prescriptive about whom that should be or, for instance, that they should have no other role in the sales process. Having done that, on the basis of the law as it now stands, the receiver is responsible for the advice actually given, so if that advice is negligent, the receiver is himself liable notwithstanding he relied on it and whether or not the advisor was appropriately selected.

75. I do not consider that the receivers can be said to have been in breach of duty in taking advice on valuation, or on marketing, from Mr Sparrow or Connells. Mr Sparrow was a highly experienced property professional with whom the receivers had worked for many years in similar situations. There is no evidence before me of any circumstances that might have indicated that they should not continue to do so, either generally or in this particular case. If he were to be criticised as being a consultant to the receivers' own firm, that fact in itself is not in my judgment a reason why he could not be used. The duty to take reasonable steps no doubt requires appropriate consideration to be given to the value of an asset to be sold, and that in turn may require that advice be taken if the receivers do not themselves have the necessary expertise available to them. But if they do have that expertise, either personally or perhaps from an employee, it may be reasonable to rely on that advice, depending on the circumstances. If it could be reasonable in principle to use the expertise of an employee, it could be no less reasonable to use a consultant.

76. Further, Mr Sparrow had available to him the expertise of Connells, and there can be little doubt, on the evidence, that Connells and the particular individuals involved had the appropriate skills to value both residential properties and residential development sites, and the market knowledge and experience to do so in this case. There can be no inflexible rule that they could not be asked to do so if they were themselves to be instructed as selling agents, and in the absence of any such rule, it is a matter for the "informed judgment" of the receiver, as Morgan J put it, whether it is appropriate to do so in a particular case.

77. Since there is no matter shown in the evidence to suggest a reason not to use the expertise of Mr Sparrow or Connells either generally in this case, I cannot say that the receivers acted unreasonably, still less that they were plainly 'on the wrong side of the line' in doing so.

78. Nor am I persuaded that instructing any different valuers would have either led to the receivers forming any materially different understanding or view of the value of the site, as the claimant pleads, or "consequently [obtaining] a better price for it".

79. There are no particulars given in the pleading of the reasons for which another valuer would have given any different advice; the claim is seemingly premised on Mr Boffey having a higher opinion of its value, which Mr Pennock submits I should accept as the best evidence of market value at the date of sale, together with an assumption that if a higher value had been advised, a purchaser would have paid that amount.

80. Although the defendants' witnesses were questioned about the advice that Mr Sparrow and Connells gave (which the receivers plainly accepted and in any event are responsible for) that they considered the units envisaged in the 2003 scheme to be too upmarket and potentially difficult to sell:

i) There is no pleaded allegation that that aspect of the advice was wrong, let alone negligent, or that if it was it caused any diminution in the price achieved.

ii) There is no admissible expert or other evidence before me to indicate that that advice was wrong, let alone negligent. Neither Mr Boffey nor Mr Willet were asked to express an opinion on that issue, nor have they sought to do so. The fact that they have both valued the development on the basis of sale for implementation of the 2003 scheme, and for that purpose have found some evidence of market sales of individual houses that they considered acceptable comparables for the units on the proposed development, does not imply that the advice was wrong. An expert's opinion that a property has a value of £x on the assumption (required for valuation purposes) that it is sold does not necessarily imply an opinion that there was a market, still less a competitive market, for sale at that price at the relevant time.

iii) In any event, the steps taken to explore the Woburn scheme did not take away the possibility of implementing the 2003 scheme if a purchaser preferred to do so, and nor is it shown, for the reasons given above, that purchasers were not aware of that possibility so that they could include any value they attributed to it in their offers.

iv) Further, Mr Sparrow's advice was not that there was any material difference in the theoretical value of the land as between the 2003 scheme and the Woburn scheme- he gave initial estimates of £350-400,000 on either basis. The advantage of the Woburn scheme, he considered, was that it was marketable and the 2003 scheme was not.

v) Mr Pennock made the point that the eventual purchaser in fact wanted to and ultimately did proceed on the basis of the 2003 scheme. No doubt that is some support for criticism of Mr Sparrow's opinion, as it indicates the view of one market participant, but it does not show that Mr Sparrow's opinion of the market's likely view generally was wrong, still less negligent. Indeed there are facts apparent from the evidence of what happened after the sale which might well suggest that it would have been reasonable, at the time of the receivership, to consider that development of the 2003 scheme would be problematic: K&M Homes did not proceed immediately with their development but took about a year to obtain the replacement planning permission they needed; it appears the development was then not completed until about 2016, suggesting that it may have been difficult to fund. Then only two of the completed houses were actually sold, the developer being obliged to rent the others out and await a hoped for upturn in the market before trying to sell the others, implying that the market for sale of those houses had not substantially improved in the three years since the purchase of the site.

81. As to the market value that a different expert might have advised the receivers at the time, there is a considerable range of opinion expressed, both as between the experts called in this case and such as can be gathered from the contemporary documents. In evaluating this issue, I start from the premise that, for the reasons given above, any such valuation would have been on the basis of an assumption that the 2003 planning permission was no longer in force, because that is the view that any likely interested purchaser would have taken.

82. On that basis, Mr Boffey's opinion was that the value was £475,000, or £350-400,000 on a forced sale basis, and Mr Willet's opinion was, at best from the claimant's perspective, £200,000. As between the two experts, I consider that Mr Willet's evidence was more persuasive, largely because it showed, in my view, a more detailed and considered approach to the issues (and in particular the difficulties of the markets for residential properties and development finance at the time) and was consistently framed in compliance with the obligations of an expert to the court, whereas Mr Boffey seemed in his correspondence and approach generally to be seeking to do the best to assist his client in preparing and presenting its case.

83. There are reasons to question the detail of the figures Mr Boffey arrived at. He starts from an estimated GDV of £1.885m, slightly less than Mr Willet (£2m). Mr Boffey's general assumed figure for construction costs (£80 psf) is also rather higher than that used by Mr Willet (£76.26, see p 396). If all else were equal, one would expect from this that Mr Boffey would have arrived at a lower residual value than Mr Willet. Unfortunately, as Mr Boffey gives no detail of his calculations, it is not possible to see how it is that the result he in fact arrived at is the other way round:

    i) It may be that Mr Boffey has used a significantly different estimate of the area of the proposed houses, to which he has applied the build cost per square foot. That cannot be seen from his report.

    ii) Mr Boffey has given no figures for the "professional fees, finance costs, sales and promotions costs, contingency profit etc" that he states he has taken into account. If the total he estimated for those costs is different from Mr Willet's figures, it is not possible to see how the difference arises.

    iii) Mr Boffey seems to have assumed without question that the £220,000 that the claimant said it had spent to date would result in an equivalent reduction in the cost to complete the development. That strikes one immediately as a questionable assumption. Mr Willet made his own inspection and evaluation of the work done, and in my view his resulting estimate of £125,000 of benefit from those works is more likely to be reliable, and in particular more likely to correspond with what a valuation based on the approach of a likely purchaser would have concluded. On that basis alone, Mr Boffey's figures should be reduced by £95,000 for comparison purposes.

    iv) Mr Boffey made no allowance for costs of a s 106 contribution (estimated at £65,000 by Mr Willet) which I am satisfied a purchaser would assume would be payable. He presumably made no allowance for other professional costs of applying for planning permission, but as Mr Willet has not broken those out I cannot easily adjust for them. The total allowance Mr Boffey made of £100,000 between the values with and without planning permission (being 17% of his starting figure of £575,000), seems likely to be inadequate as a discount even if had not included the specific extra s 106 cost, given Mr Willet view that a figure of 40% would be more appropriate, and that it can be seen from the contemporary valuation by Mr Herbert, in connection with an actual transaction, that he applied a discount of 27% over and above the s 106 cost.

    v) Mr Willet was criticised for making an additional allowance for costs of deeper foundations (£39,000 at £3,000 per unit), and Mr Pennock suggested I should find there was no sufficient evidential basis for that allowance and add it back to Mr Willet's figures. However Mr Willet gave a persuasive

> explanation, which was that it could be seen from a remediation report that some excavation work had been done to remove contamination from the site, and that although the extent of it could not be determined from that report it would be reasonable to assume that this might result in a requirement to build up foundations from a lower than normal level to get back to a ground floor level consistent with the general ground surface. Far from being something that should be disallowed on the basis of insufficient evidential support, that in my view is a proper way to reflect the way in which a purchaser would treat the uncertainty caused by that lack of evidence, and so a proper allowance to make in evaluating what a purchaser in the market might pay.

84. Deducting only the specifically quantifiable amounts above (£95,000 + £65,000 + £39,000 = £199,000) from Mr Boffey's figures would reduce his estimated value without planning permission from £475,000 to £276,000, or £151-£201,000 on a forced sale basis. No doubt it would be necessary to take other matters into account if one were to seek to make a detailed comparison between the two opinions, and it is not possible to do that given the lack of detail that Mr Boffey has provided. However his figures even with the clearly apparent adjustments above range above and below Mr Willet's figure of £200,000.

85. In my view, Mr Willet has given much the more comprehensive and credible consideration in his report to the exceptionally difficult market conditions at the material time, and this is no doubt reflected in the significantly greater discount he has allowed from the 'with planning' figure he had estimated. Mr Boffey in cross examination acknowledged those conditions, and said himself that this was a "very difficult" site to value as a result, a factor which I do not think was sufficiently reflected in his written report.

86. Taking all those matters into account, I prefer the evidence of Mr Willet and find that if the receivers had instructed valuers other than Mr Sparrow to provide a valuation on the basis of the relevant RICS valuation assumptions, they would likely have been advised that the market value of the site, at the date of sale and on that basis of was of the order of £200,000. I am fortified in that finding (a) by the fact that it is very close, certainly within the margin of inevitable range of opinion, to the valuation given at the time by Mr Herbert and (b) because it must be inherently unlikely that the land value (with planning permission) could have increased from the £516,000 estimated by Aitchison Raffety in 2008, when as Mr Boffey acknowledged the sale prices of houses had fallen considerably in that four year period.

87. By the time the site was sold, of course, Mr Sparrow had revised his opinion of the likely realisable price for the site from his original £350-400,000 down to what he said in his email of 19 July 2012 (p 150): "I think we are jolly lucky perhaps today to get £100-£150,000 for it." That of course was on the basis of his revised assessment of the GDV and costs of implementing the Woburn scheme, rather than the 2003 scheme which is the assumed basis of the £200,000 valuation. He did not re-evaluate the site on the basis of implementation of the 2003 scheme, no doubt because he was still of the view that it was unlikely that there would be a purchaser willing to buy on that basis. For the reasons given above, it has not been shown that it was negligent for him to have formed that view (or for the receivers to have adopted it). It is relevant to bear in mind also that, as I have said above, Mr Sparrow was advising not just on the theoretical market value on the assumption of a sale to a willing purchaser (as both expert witnesses have done) but on the potential realisable value in the actual market

at the time, ie taking account of whether there were in fact willing purchasers available in the market at the time and what their intentions might be. That is of course the most relevant question for a receiver, for whom an assumed buyer is of no use unless he actually materialises.

88. The crux of the case is, in my view, the allegation that the receivers marketed the site only to a limited number of buyers, and did so without a guide price. The defence accepts that there was no guide price, and pleads that details were sent to 21 potential interested parties. These were both matters of deliberate decision by the receivers, acting on the advice of Mr Sparrow, for which the explanation at the time was that the difficulties of attracting any interest in the market were such that a guide price that was out of line with what buyers were prepared to consider might put off people who would otherwise make a bid at a lower level, and that the site was only likely to be of interest to small scale local developers, to whom it could be directly marketed because they were known to Connells, that the likely extent and level of such interest could be gauged by a targeted approach to those regarded as most likely to be interested, and that a wider advertising and marketing campaign might be counterproductive.

89. As I have said above, I have no reliable expert evidence on these matters. They were not within the scope of the expert evidence sought and ordered, and although Mr Boffey has offered some opinions on the mode of marketing, he has not done so in a form that would comply with the requirements for expert evidence, or that Mr Willet would have had the opportunity to respond to. There are no rules laid down by case law as to the form of marketing of properties, nor could there be because the potential range of circumstances is so great. As with all aspects of performance of a receiver's duty, the question is whether there were reasonable steps taken to achieve the best price, and the court will be slow to criticise a receiver who has approached his functions in a considered and responsible manner, even if others might have done differently.

90. There is little assistance to be gained from cases relating to the sale of individual residential properties. By the nature of those sales, the range of potential purchasers is wide and unpredictable, so it is likely to be reasonable to expose them widely to the market by way of signage and advertisement. In contrast, it is not by any means implausible that there is a relatively limited range of likely purchasers of a partially commenced residential development site and, particularly in the extremely difficult market for financing such developments and selling the resulting houses that prevailed in 2012-13, that a reasonable view of the best way of gauging the potential level of interest in a site from parties likely to be in a position to proceed would be to make a direct approach to a sufficient number of those known to the agent to be most likely offerors.

91. That was the approach adopted in this case by very experienced receivers, with the advice of their very experienced agent. There is nothing whatsoever to suggest that they did so by way of shortcut, or without paying attention to the objective of obtaining the best price available; the documents show that they explored the options with the agent and, on his advice recommended to the Bank and then implemented a scheme for a different development that they considered could add to the marketability of the site. They were not obliged to do so, and the fact that they did supports the view that they were conscientiously seeking to comply with their duty for the benefit of the mortgagee and potentially the mortgagor, not neglecting it. The documentation shows that they also considered whether to recommend to the Bank, if

there was insufficient interest in the site, that sale should be deferred in the hope of market improvement. They were not, therefore, proceeding on the basis of rushing into a sale and accepting any offer received without due consideration, but of evaluating whether any offer received was better than could be achieved by waiting.

92. Further, it must be remembered that the limited targeted marketing was only the first step in the strategy recommended by Mr Sparrow and adopted by the receivers- if there was insufficient interest there would be a wider targeted marketing and potentially a local advertising campaign. If they are to be criticised for undertaking that step, it would have to be either on the basis that either (a) they should not have done so at all, but proceeded directly to some other presumably wider mode of marketing, or (b) that having done so and received the offer from K&M (and negotiated it up from the initial £160,000 to £175,000) they should have rejected that offer and gone on to a wider marketing campaign.

93. As to (a) it is impossible in my view to say that the receivers should never have undertaken any such initial marketing exercise, certainly in the absence of any admissible expert evidence that doing so would cause some harm to the eventual realisation proceeds. Doing so did not commit them in any way, and if it had not produced a satisfactory offer they had clearly identified other stages that they could move on to, with the ultimate fallback of deferring any sale until the market improved.

94. So the question comes down to whether having done so and received an offer of £175,000, their duty required them to reject it and continue marketing. In the light of their own view of the likely realisable price, ie on the basis that they accepted Mr Sparrow's advice that they would do well to receive £100-150,000, there could be no doubt that they would be acting properly by accepting that offer.

95. At best, from the claimant's perspective, if it is assumed in its favour that the receivers had obtained another valuation and been advised that the market value was £200,000, they would have had to weigh up whether to accept the bird in hand or hold out in the hope that a buyer could be found who would be prepared to pay more. If they did, they could not reasonably have assumed that any such buyer would be likely to pay more than £200,000. They would run the risk that no further offers were received and the property would be back on the market with potential buyers knowing that it had failed to sell. It would have been a very real risk in the market at the time. I repeat that a valuer's opinion as to value assumes the existence of a willing purchaser; it is not advice that willing purchasers at the assessed value exist.

96. In that hypothetical situation, in my judgment, it could not be said that the duty to take reasonable steps to obtain the best price required the receivers to take that risk, and accordingly they would not have been in breach of duty if they had proceeded to accept the £175,000 offer.

97. In summary therefore, on the pleaded allegations of breach of duty:

    i) It was not a breach of duty for the receivers not to have obtained an opinion as to the market value of the development from someone other than Mr Sparrow or Connells.

    ii) If the receivers had in fact obtained such an opinion, on the evidence it would have been that the market value was of the order of £200,000.

iii) It was not a breach of duty to adopt the marketing strategy that the receivers did, including the first step of marketing to a targeted list of known local developers.

iv) It has not been pleaded or shown that there was any breach of duty by failing to give adequate information to those potential buyers, in particular in relation to the status of the 2003 planning permission.

v) Having received an offer of £175,000, it was not a breach of duty to accept that in the circumstances as known to the receivers at the time, including their own view (as advised by Mr Sparrow) of the likely realisable value, and it would not have been a breach of duty to accept that offer even if they had received an opinion that the market value was £200,000.

98. In the result, the claim must be dismissed.

99. I will list a date for this judgment to be handed down, remotely and without attendance, and invite the parties to agree a draft of the order resulting which should be submitted by email to my clerk. Any matters not agreed should be noted in the draft and explained by short written submissions so that if possible they may be resolved without a hearing.