Neutral Citation Number: [2022] EWHC 1495 (Ch)

Case No: CR-2013-008817 & CR-2013-008818

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES COURT (ChD)

IN THE MATTER OF SWISS COTTAGE (38) PROPERTIES LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF SWISS COTTAGE (40) PROPERTIES LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 20/06/2022

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

(1) FITZROY STREET CAPITAL INC **(2) BMB AVENUE ROAD LIMITED**	**Applicants**
- and –	
(1) LEE ANTONY MANNING **(2) MATTHEW DAVID SMITH**	**Respondents**
-and-	
BARCLAYS BANK PLC	**Additional Respondent**

- -
- -

Justin Fenwick QC and Ben Smiley (instructed by **Aughton Ainsworth**) for the **Applicants**
Derrick Dale QC and Ben Griffiths (instructed by **DAC Beachcroft LLP**) for the **Respondents**

Hearing dates: 8, 9, 10, 13, 14, 15, 16, 21 December 2021

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Corrected Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10am on Monday 20 June 2022.

This Corrected Approved Judgment corrects typographical errors at paragraphs 239(i) and 239(iii) pursuant to CPR 40.12

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Mr Justice Adam Johnson:

Introduction

1. This case concerns allegations of breach of duty by company administrators ("*the Administrators*"), appointed on 14 October 2013 in relation to two companies ("*the Companies*") whose business involved the development and sale of two properties ("*the Properties*") at Nos. 38 and 40 Avenue Road, London. I will refer to No. 38 Avenue Road as "*38 AR"*, and to No. 40 Avenue Road as "*40 AR"*.

2. In circumstances which I will describe below, a single buyer was initially identified in late 2013. This was a Singaporean investment vehicle, Primestate Investment PTE Ltd ("*PIPTEL*"). The initially agreed sale price was £61.25m. Some complications arose on the sale to PIPTEL, however, and the upshot was the Properties were eventually sold in 2015 – 38 AR to PIPTEL, and 40 AR to purchasers known as the Vaswani family. The total value achieved was approximately £62m (£21.25m for 38 AR and £40.3m for 40 AR).

3. This resulted in the primary secured funder to the Companies, Barclays Bank PLC ("Barclays") recovering the whole of the principal amount it had advanced (some £51.5m), plus fees and some interest, but still with a substantial shortfall in the region of £10m.

4. The present Applicants, however, who apply both as unsecured and junior secured creditors of the Companies, received nothing from the Administrations.

5. They argue that insufficient value was realised from the Properties, and make a number of the allegations of wrongdoing against the Administrators accordingly:

    i) Their primary claim is that, by entering into certain contractual arrangements with PIPTEL in December 2013 and January 2014 (which I describe further below: see [132] and [138]-[139]), the Administrators exceeded their powers. That is said to be because those contractual arrangements involved a disposition of the Properties, which were subject to fixed charge securities in favour of the junior secured creditors, as if they were not subject to those securities, but without obtaining the permission of the Court pursuant to Insolvency Act 1986, Sch. B1, Para 71.

    ii) The Applicants then make other claims of breach of duty by the Administrators. These revolve, broadly, around two themes. One is that the Administrators either ignored or paid insufficient regard to the interests of the junior secured creditors, and the other is that the efforts undertaken to market the Properties were inadequate with the result that they were sold for below market value. In their Written Closing Submissions, the Applicants alleged the following specific breaches of duty, namely that the Administrators:

        a) failed to understand the market value of the Properties;

        b) failed to understand the identity and interests of the creditors with fixed charge securities over the Properties and the value of the interests secured;

c) failed to perform their functions in the interests of the creditors as a whole and to act impartially in balancing the competing interests of individual creditors;

d) failed to provide creditors with sufficient information to allow them to participate in the collective administration regime in a meaningful way;

e) failed to take reasonable care to obtain the best price for the Properties which the circumstances of the case permitted.

The Trial and the Witnesses

6. On behalf of the Applicants, I heard factual evidence from Mr Sanjay Hira, Mr Jasjeev Singh Kandhari and Mr Richard Brent Thomas. Mr Hira's family and Mr Kandhari's family, together with the Sakhrani family, were shareholders in the Companies via an Isle of Man vehicle, BMB Avenue Road Limited ("*BMBAR*"). Mr Thomas was one of the directors of BMBAR. His evidence was that the directors would typically act on the instructions of the shareholders, which came from Mr Hira.

7. Mr Hira is an experienced investor with significant commercial experience and struck me as an astute businessman. Mr Kandhari is a qualified accountant and has a degree in economics. He also struck me as astute and commercially savvy, but was not directly involved at the time of the events the present action is concerned with, because the investments in the Companies were managed by his brother, Harjeev Kandhari. Consequently, Mr Jasjeev Kandhari was unable to provide much by way of evidence on the contemporaneous events, but was able to provide more general evidence about what his family's attitude and views would have been at the time.

8. On behalf of the Administrators I heard factual evidence from Mr Lee Manning, who was the lead Administrator. He gave evidence about the conduct of the Administrations and the efforts undertaken to sell the Properties. Mr Manning also struck me as a commercially astute and driven individual. Where necessary he accepted there were shortcomings in the conduct of the Administrations, as I will explain. He maintained the position, however, that such shortcomings caused no loss to the Applicants, given the commercial realities he (and they) were faced with. That was the main focus of attention during the trial.

9. Given that the relevant events occurred now some while ago, in late 2013, the recollections of all the factual witnesses were somewhat hazy and must be treated with caution. In approaching their evidence, I bear in mind the sentiments expressed by Leggatt J in Gestmin v. Credit Suisse [2020] 1 CLC 428, esp. at [22]. Leggatt J there emphasised that the real utility of cross-examination in a commercial case is likely to be the opportunity it affords to gauge the personalities and motivations of those giving evidence. The story is much more likely to emerge from the documents, and on the basis of inferences drawn from those documents. I respectfully agree.

10. I should say I am satisfied that all the factual witnesses sought to give their evidence honestly, but I do not feel able to accept everything they said. In the case of Mr Hira and Mr Kandhari, I am sceptical that as experienced investors they would have sought to provide further funding or support for the Companies in late 2013, as they appeared to suggest they would. As I mention below at [321]-[322], that seems to me inherently

improbable when looked at in light of the situation the Companies were in at the time. As to Mr Manning, I feel unable to accept his evidence on two particular points (below at [70] and [178]-[183]), where it seems to me he must have been mistaken in his recollection, in a way which is understandable given the historic nature of the relevant events.

11. The approach in Gestmin places a premium on the availability of documentary evidence, and that presented an issue here in one respect, namely that no notes were available of meetings attended by the Administrators. No clear explanation emerged, although one likely explanation is that notebooks kept by one of Mr Manning's junior colleagues have been lost. The Applicants emphasised the lack of notes during the trial, including in the written Closing Submissions. I agree it is unfortunate, but I do not consider that overall it hampers a proper determination of the issues. Much is contained in the email traffic in particular, as my narrative of the relevant chronology (see below) will show. In my view, a sufficiently clear picture emerges, even though some of the detail may have been lost. In fact, there is a danger in a case of this kind – which was apparent through the course of the trial, including in the lengthy submissions and evidence filed on both sides – that a fixation on the detail may obscure the bigger picture. In his submissions, Mr Dale QC for the Administrators warned against what he called the narcissism of small differences. That attractive and evocative phrase is a reminder that the tendency to pick away at points of detail, natural enough in a case where professional conduct is in issue, can sometimes result in one losing sight of the wood for the trees. Thus, I have sought here to focus on the main point in contention (see below at [169]), and to evaluate the evidence with that key point in mind.

12. Turning to the expert evidence, the Applicants relied on valuation evidence from Mr David Rusholme (of Chestertons) and evidence on insolvency practice from Mr Finbarr O'Connell (a partner in Smith & Williamson LLP). The Administrators relied on valuation evidence from Mr Ian Asbury (a director of Strutt & Parker) and on evidence on insolvency practice from Mr Michael Rollings (a partner in Rollings Butt LLP). I am satisfied that all experts gave their evidence honestly and did their best to assist the Court.

Chronology

The Companies and the Properties

13. Each of the Companies was the owner of a single property. Swiss Cottage (38) Properties Limited ("*SCP (38) Ltd*") was the owner of 38 AR. Swiss Cottage (40) Properties Limited ("*SCP (40) Ltd*") was the owner of the adjoining property at 40 AR.

14. The Companies had the same shareholders. These were (1) a Mr Shravan Gupta (whose shares later came to be held under a trust structure which included the Lailak Settlement, of which Mr Gupta was a beneficiary), and (2) BMBAR, the corporate vehicle used by the Hira family, the Sakhrani family and the Kandhari family.

15. The Properties was originally acquired in 2007, and were the subject of substantial redevelopment with a view to their being sold. The redevelopment was managed by a company called BMB Property Investments Limited (now dissolved) ("*BMBPI*"). The shareholders and directors of BMBPI were Mr Julian Mercer and Mr Paul Pheysey. The idea was to develop the Properties to a high standard and to market them to ultra-

high net worth individuals as the ultimate buyers. Mr Hira was the main point of contact on behalf of BMBAR, and he gave evidence that he would be in contact with Mr Pheysey and Mr Mercer every 4-6 weeks.

16. The bulk of the funding for redevelopment of the Properties was provided by Barclays pursuant to a facility dated 30 June 2008 ("*the Barclays Facility*").

17. Other funding came initially from Mr Gupta and from BMBAR. The Lailak Settlement, associated with Mr Gupta, provided substantial unsecured shareholder loans to the Companies. BMBAR also provided shareholder loans of approximately £1.8m.

18. Early signs were promising. During the course of construction, the Properties were valued by Montagu Evans at a combined total of £100m in June 2008 and August 2009, and at £109m in July 2010 and February 2011.

19. The Properties were large on any view, and had the novel feature that a major proportion of the available space was below ground (62.29% in case of 38 AR and 61.84% in the case of 40 AR). They were referred to during the course of trial as "*iceberg houses*". Overall, 38 AR was 21,860 sq ft and 40 AR was 21,565 sq ft. The lower ground and basement accommodation of 38 AR comprised 7,223 sq ft plus 6,349 sq ft respectively (totalling 13,542 sq ft); and in the case of 40 AR was 7,022 sq ft plus 6,314 sq ft respectively (totalling 13,156 sq ft).

20. It was this structure which represented the value proposition the Applicants had invested in. Mr Khandari said so in his evidence. He said the basement component was to be significant "*because that is why we were getting the extra planning permission and where the value would be uplifted from our investment*". He went on to say that Properties structured with significant underground space were common in the most expensive developments in the Middle East, and he had seen the same trend then develop in places like Kensington in London.

Additional Funding is Required

21. Deemed practical completion of 40AR took place on 11 May 2011. All the same, additional funding was still required to complete the redevelopment overall.

22. Thus, on the same day, 11 May 2011, the Barclays Facility was amended and restated and arrangements were put in place for other sources of funding. These arrangements included an Intercreditor Deed dated 11 May 2011, governing the relationship between the Barclays debt and that owed (or to be owed) to two other creditors – i.e., the two junior secured creditors who are Applicants in this action.

23. The junior secured creditors are:

    i) First, BMB Swiss Cottage Investment LLP ("*BMBSCI*"). BMBSCI was a limited liability partnership set up by Mr Mercer for the purpose of raising additional finance for the Companies. Both he and Mr Pheysey were members and made funds available to it. So too, in various forms (the detail is not material) did the Hira and Kandhari families, at various points in 2011 and 2012. A large amount of funding was made available by the Kandhari family, and in order to protect their interests a BVI company controlled by them, Fitzroy Street

Capital Inc. ("*Fitzroy*"), also became a member of BMBSCI. The lending to BMBSCI was at high levels of interest – between 20% and 30%. BMBSCI in turn provided funding to the Companies during 2011 and 2012. BMBSCI was the first-ranked junior creditor under the Intercreditor Deed.

ii) Second, BMBAR – i.e., the shareholder in the Companies which was the investment vehicle used by the Hira, Sakhrani and Kandhari families. As part of the new arrangements in May 2011, BMBAR was granted a charge to secure its earlier lending, and was named as second ranked junior creditor under the Intercreditor Deed.

24. I should mention at this point for clarity that much later, in 2019, the interests of Mr Gupta/the Lailak Settlement (as unsecured creditor), and of BMBSCI (as first ranked junior secured creditor) were assigned to Fitzroy, the BVI company associated with the Kandhari family. Fitzroy is one of the two present Applicants, together with BMBAR. Thus, in substance the present action is brought to assert the interests of Mr Gupta/the Lailak Settlement as unsecured creditor, and those of the two junior secured creditors, BMBSCI and BMBAR. The focus, however, was on BMBSCI and BMBAR.

Marketing 2011-2012: the Properties are not sold; the Barclays Facility expires

25. Returning to the chronology, after a long period of development 40 AR was substantially "*dressed*" by September 2011. By November 2011, 38 AR was not "*dressed*" and needed more work. There is an issue about what work was in fact needed and the likely costs of completing it, which I will come back to below.

26. The Properties were marketed by Knight Frank and Savills, pursuant to a joint agents' agreement dated 7 September 2011, and signed on 20 September 2011. The primary agents were James Simpson of Knight Frank and Stephen Lindsay of Savills.

27. The Properties were marketed at an aggressive guide price of £75m each. Regular updates were provided at sales meetings, attended by Knight Frank and Savills.

28. In January 2012, Montagu Evans valued the Properties again, this time at £65m each plus £2m for presentational items. By a letter from Knight Frank to the directors of the Companies dated 26 January 2012, it was recommended that the guide price be maintained at £75m. Savills agreed in their letter of 10 February 2012.

29. The marketing efforts undertaken were unsuccessful, however. It is clear that price was a factor, coupled with the unusual design. This is demonstrated by a document later prepared by Savills, summarising feedback from viewing appointments they had arranged, headed "*Summary of applicant interest*". Feedback in this initial period, prior to the appointment of the Administrators, included the following:

i) 23 March 2011 – Mr Warren: "*He saw the house before it was finished and couldn't quite get his head around the prices*".

ii) 26 March 2012 – Mr & Mrs Bradley & Denise Gerrard: "*Like the property but can't get their head around the price and the basement space is so big*".

iii) 28 March 2012 – Mr Haneet Vaswani: "*Pre-viewing on behalf of one of his friends. Thinks the price is totally unrealistic, as he knows the biggest ever sale in the area is £37.3m*".

iv) 29 March 2012 – Mr Victor Kharitonin: "*He really loved the house. Had a bit of trouble with the ticket price and thought the space in the basement was a bit over the top … "*.

30. At the sales meeting on 9 July 2012, there was a "*long discussion"* about reducing the guide price. Minutes of a later meeting on 24 July 2012, record "*It was agreed that the guide price to remain but agents are to encourage offers and make it clear that these houses are to be sold."*

31. While this was happening, the Barclays Facility was amended and restated again, in April 2012. BMBAR at this point made a further £1m of additional funding available. The Barclays Facility finally expired on 31 October 2012, but was not immediately called in and marketing efforts continued.

Barclays considers its options; Mr Pheysey admits his mistake

32. The Properties had still not sold by the Summer of 2013. On 4 July 2013, Barclays consulted both DLA Piper and Deloitte with a view to assessing their options and DLA Piper produced a review document on 11 July 2013.

33. Mr Manning had a meeting with Mr Pheysey on 21 August 2013 at 40 AR. He recorded the meeting in a draft note, sent by email on the same day to Mr Neilson-Clarke of DLA Piper, who had also been in attendance and who provided some brief corrections. Mr Manning's note records the following (amongst other matters):

> *"Paul was quite candid with us and feels that he made a mistake developing houses of this style and scale in St John's Wood, as it isn't sufficiently upmarket a location to attract the typical client who would purchase houses of this style who tend to live in Kensington and Mayfair …*
>
> …
>
> *Whilst at the outset it would have been possible to achieve a price to recoup all the costs (c £90m) he [Mr Pheysey] believes that it will be a struggle to repay the bank debt in full and puts this down partly to the person who backed losing his wealth and, in an effort to repay some of the debt, was sending out desperate messages to the market that the houses could be bought relatively cheaply. He did not come across as fatalistic and said he was willing to help the Bank get back as much as possible but felt strongly that any insolvency appointment would further erode value and that the Bank should consider a refinancing or deal on its debt (he referred to the Candy brothers as credible purchasers of the debt but at a discount).*"

34. Deloitte were formally engaged to provide contingency planning advice on 27 August 2013.

35. Against that background, on 23 September 2013, Barclays wrote to the Companies demanding repayment of the Barclays Facility, and stating that the sums outstanding totalled £66,704,024.

36. In the meantime, although viewings of the Properties (in particular 40 AR) had continued, there was still no interest at or around the guide prices. The following, later entries in the "*Summary of applicant interest*" document are notable:

    i) 18 September 2013 – Ms Tereza Kandelaki: "*Savills Russian desk correspondent with her buyers from Azerbaijan … They loved the house. They intimated that they would be prepared to pay £40[m] for the house, although need to get their father to come and have a look first …*".

    ii) 25 September 2013 – Bryan D'Arcy Clarke: "*Working for Cordea Savills/hedge investment fund. Offered £25m for house 40*".

    iii) 3 October 2013 – Deepak Mawandia: "*Acting on behalf of a Singapore investment fund … Thought that the balance of the accommodation was bad and also the prices are sky high*".

37. I note in passing that the Savills "*Summary of applicant interest*" shows they conducted approximately 66 viewings in the period March 2011 to October 2013. A later email of 29 October (below at [63]) refers to 80 viewings by that stage, and the same again by Knight Frank, giving a total of 160.

The Administrators are appointed

38. Discussions about a possible refinancing were undertaken involving Barclays, BMBAR, BMBSCI and the majority shareholder (Mr Gupta/the Lailak Settlement). Those discussions eventually broke down, however, and Barclays made their application to appoint administrators on 27 September 2013. The Administration Order was made on 14 October 2013.

39. By that date, the overall funding position was as follows:

    i) Barclays, the senior secured creditor, had total secured debt of approximately £66.89m.

    ii) BMBSCI, the first ranked junior creditor, had secured debt of approximately £7.1m.

    iii) BMBAR, the second ranked junior creditor, had secured debt of approximately £2.728m, and was also a shareholder in the Companies.

    iv) Mr Gupta/the Lailak Settlement had unsecured debt of approximately £19.6m, and was also a shareholder.

Initial jostling by the estate agents

40. It is fair to say that in the immediate aftermath of the Administrators' appointment, there was a certain amount of jostling for position between the estate agents with a possible interest. These included Knight Frank and Savills, who had previously been instructed, but other agents who sought to be involved were Bargets (a firm in Regents Park), who emailed Mr Manning on 15 October 2013, and Aston Chase. At the same time, Mr Pheysey had an inquiry from a potential buyer in the UAE, for whom he arranged a viewing on 16 October 2013. Mr Lindsay of Savills was uneasy about the Properties being exposed in this way and in an email to Mr Manning on 16 October 2013 recommended that viewings should cease immediately pending an agreement on price.

Knight Frank and Savills make the marketing recommendations

41. Mr Manning and others from Deloitte had a meeting with Savills and Knight Frank on 16 October 2013.

42. On the same day, Mr Simpson of Knight Frank wrote to Mr Manning with a report setting out Knight Frank's marketing recommendations. In respect of price, Knight Frank recommended:

> *" … initially quoting a guide price of £30,000,000 for house 40 which we believe is a sensible guide price aimed at generating substantial competition amongst buyers with a view to maximising the price…*
>
> ***Please remember that this figure does not represent a valuation****…".*

43. That part of the Report headed "*Marketing recommendations*" included sections on "*Marketing material*" (which recommended preparation of a "*first-class brochure*"); "*Advertising*"; "*Press relations*"; "*Web presence*"; "*Knightfrank.co.uk*" (the Knight Frank website); "*Portals*" (a reference to other websites such as Countrylife.co.uk); "*iPhone and iPad app*" (a reference to a Knight Frank app available via the App Store); and "*Database*" ("*Knight Frank's single, integrated database*" which "*covers all residential offices*" and is "*our most powerful tool*".)

44. On 17 October 2013, Savills wrote with their marketing strategy. Mr Lindsay explained his long relationship with the Properties. He said:

> *" … I have personally been involved with these properties prior to them being built, as I sold the land to the developer and advised throughout the build".*

45. On price, he said:

> ***"1 .Price***
>
> *…it is obvious that the previous borrower has grossly overpriced the assets. This is the fundamental reason why a sale has not been achieved.*

> *Realistic pricing will address confusion and the negative recent history around the properties…*
>
> *Savills are of the opinion that the basement space of 13,000 sq ft should be priced at £1,000 per sq foot and £2,250 per square foot for the 8,000 sq ft above ground. This equates to £31,000,000 for house 40.*
>
> *As discussed in the meeting, we feel that number 39 should always be priced at £10,000,000 less than number 40, as it will cost c.£5,000,000 (pus fees) to finish off the house and bring it up to the standard similar to number 40. We also need to bear in mind the time it will take to finish the property (a 12 month period).*
>
> *In conclusion, house 40 should be guided at £30,000,000 and house 38 guided at £20,000,000…*
>
> *By pricing the houses competitively we anticipate that this will generate competitive bidding and allow the market to find its own level…*
>
> *…this report is provided as marketing advice prior to a possible sale. It does not constitute a formal valuation…."*

46. As to the strategy for marketing, he said:

> "***2. Strategy for marketing***
>
> *The houses should be offered to the market immediately on a discreet but widespread basis concentrating on Russia, the Middle East and India Pacific Purchasers via our internal departments around the globe.*
>
> *As discussed, the properties will be re offered to all serious purchasers who have already viewed the houses. We do however recommend that we implement a vetting process for buyers, and limit access to serious principals only, who can provide proof of funds*
>
> *…*

47. In recommending a joint agency appointment with Knight Frank, he said:

> "**4. Agency**
>
> *… both agencies in St John's Wood have a strong local presence, as well as a huge international reach …*
>
> *There are some clear advantages to retain Savills and Knight Frank to work as a team and deal with the buyers who have already seen the houses first and foremost, as it is a strong*

> *possibility that with the correct level of pricing, someone who has already seen the houses makes an offer*".

48. On timing, he said:

> "***8. Timing***
>
> *The top end of the market is extremely strong currently. However, there are very few purchasers at this level. When speaking to such purchasers over the last 6 months, and increasingly so now, there has been discussions concerning looming mansion taxes and how it will impact the top end of the market. Bearing this in mind, we feel that … the houses need to be offered out at the agreed guide prices as soon as possible*".

49. He also said the following about advertising:

> ***"11. Advertising***
>
> *A carefully targeted advertising campaign will be an essential part of creating market awareness for your sale. Savills advertise in key local and national newspapers, magazines and publications which will include the Hampstead and Highgate Express, Fabric Magazine, London Property and national newspapers like the Sunday Times and Weekend FT. These conventional media lines attract just the kind of buyers you are looking for".*

50. In his conclusion he said:

> **"*12. Conclusion***
>
> *"This advice is given with the benefit of hind sight and 2 years of monitoring buyers reactions in showing the property first hand. My advice to the previous owners of these properties for the last 18 months has been to reduce the price to more reasonable levels, as whilst the feedback on the product and the finished was positive, the fact that the houses have so much basement space and are priced in such an aggressive way was extremely negative and off putting*".

51. Neither document referred expressly to any specific recommended marketing period, although Mr Lindsay's letter did convey a sense of some urgency in suggesting that the Properties should be offered out at the guide prices as soon as possible.

52. Mr Manning was concerned about the £10m price differential between 38 AR and 40 AR suggested by Savills, and sought advice from a Deloitte property specialist, Mr Binstock. In his email of 18 October, Mr Binstock thought the £10m differential would be difficult to absorb, bearing in mind "*the level of bank debt and the c. £5m cost to getting into a finished product*" vis-à-vis 38 AR. But he agreed that *"[c]reating competitive tension is the key to getting these properties sold*".

Valuing the Properties

53. There was obviously a pressing question about the likely returns to be generated on sale of the Properties. Mr Manning's initial assessment was not optimistic. He spoke to his colleague Mr James Howie at Deloitte, who then reported in an internal email dated 21 October 2013:

> *"We think it is very unlikely that we will make sufficient realisations from the sale of the properties that we would be in a position to return any funds whatsoever to shareholders."*

54. This obviously reflected a more modest expectation of likely returns than might have been suggested by the earlier £75m guide prices, or by the earlier Montagu Evans valuations.

55. Consistent with that more modest assessment, the Administrators received an offer on 23 October 2013 for purchase of the two Companies for some £65m. This was from Reed Smith LLP on behalf of a client.

56. On 28 October 2013, in giving a report to Barclays, Nicola Burns suggested there was ongoing uncertainty on the question of value. He said "*We haven't been given a reliable indication of what likely eventual price we will achieve*", and described the range of indications of value from the agents as "*extremely wide and not much to work with*".

57. At roughly the same time, however, as part of the Administrators' efforts to gather information, on 18 October 2013, Ms Thomas of BMBPI (the development company owned by Mr Mercer and Mr Pheysey) emailed Ms Burns and James Howie of Deloitte, with further information about the Companies. The email attachments included a recent letter from Savills dated 9 October 2013. This was from Mr Michael Sharpe-Neal of Savills' Margaret Street office and was addressed to Martin Lent of South Central Management Limited, and stated:

> *"…. in our opinion the current valuations of the above properties are …*
>
> *Market Value of the Freehold interest for 38 Avenue Road is in the order of £42,500,000.*
>
> *Market Value of the Freehold interest for 40 Avenue Road is in the order of £52,500,000.*
>
> *I confirm that we have inspected the properties and made all relevant enquiries for the purpose of undertaking our valuation. Our valuation, therefore, is provided with commitment, subject to and on the basis of the assumptions, conditions, information and definitions set out in our formal report. This is in the course of preparation, and will be forwarded to you in due course. This letter is provided as an aid towards decision making pending receipt of our formal report.*"

58. Mr Manning was not aware of this letter at the time, but became aware of it soon after, as I will explain below (see [90]). The Mr Sharpe-Neal letter achieved some prominence during the course of trial, and I will need to come back to it below. For now, I note that although it refers to a formal valuation report being in the course of production, no such report has been produced in the present action and none was available during the trial.

Tension between the agents; meeting on 29 October 2013

59. In the meantime, there was still ongoing uncertainty as to the roles of the interested agents and this resulted in developing tension. Both Mr Lindsay of Savills and Mr Simpson of Knight Frank expressed concerns about the fact that Aston Chase had arranged viewings, which they considered was happening in a disorderly way which might affect a proper disposal.

60. On the morning of 29 October 2013, Mr Lindsay of Savills emailed Mr Manning and said:

> *"I am writing to express my concern on a certain major point, which has come to light over the last few days in regards to the sale of the above properties.*
>
> *Aston Chase have started to show the properties to other local agents, such as the Estate office, and Greenstone Estates. These agencies are known for selling lower end properties cheaply to dealers, developers and generally people who are looking to 'steal' properties and turn a quick profit …*
>
> …
>
> *I strongly stand by my initial advice that two agents, who work well together in a consistent way have the instructions to sell this property and approach the real buyers out there, most of whom we have already shown around rather than approach such a serious matter in the way which has unravelled over the last week or so."*

61. Mr Lindsay though then proposed a possible solution. This was as follows:

> "*To sum up, I have requested that KF & Savills are given a period of c.28 days to go back to all of the buyers who we have shown in the first instance. We should quote a guide price for each house individually, which you will provide us with.*
>
> *We can send out an invitation requesting best bids 28 days from when we have instructions. In my opinion this is the safest way of discreetly placing the houses off market initially, and we will then get a good sense of where are on price. This is effectively the 'dry run'.*

> *If this fails, then I agree that we will need to review the strategy and potentially bring another agent in before we openly market the properties"*

62. When Mr Manning replied he broadly agreed. In cross-examination he accepted that a group viewing apparently arranged by Aston Chase had been inappropriate, but said he was not aware at the time that it was happening and sought to ensure that it would not happen again. I accept that evidence which is consistent with the contemporaneous documents, which show steps being put in place to regulate access to the Properties (see [71] below). In his email in reply to Mr Lindsay, Mr Manning said:

> *"I have taken on board your comments about direct approaches being made by you and Knight Frank to those potential buyers who you consider were keen on the property but put off by the asking price and agree that it makes sense to give you some time to do this before we finally sign up a third agent and any direct approaches that we receive which have not been dealt with by yourselves before will be referred to Paul Pheysey to arrange a viewing – the details of which will be copied in to you.*
>
> *However, my duty is to achieve the best price reasonably achievable in the prevailing circumstances and therefore I have to consider all approaches from interested parties but will try to exclude those who we can establish are of insufficient means or are fronting a deal for a non-existent buyer".*

63. Mr Simpson of Knight Frank expressed similar sentiments in his email to Mr Manning, from which it is also clear that he was concerned about sharing information with Aston Chase. He also advocated contacting those who had previously seen the Properties, but proposed a slightly longer period of 4-6 weeks:

> "*… I am sure you have gathered by now that I am not at all comfortable discussing my views in front of Aston Chase. Any discussions should be private and confidential. At least two of my applicants have now been contacted directly by third party individuals saying they the houses can be acquired at 'rock bottom' prices.*
>
> *After three years and over 80 viewings (including Savills, 160 viewings) it is highly likely that the buyer has already been shown over the house. If we are not given any time to re-contact all those past buyers, many of whom are international, and they are randomly being contacted by smaller agents, it is not only unprofessional but it gives the impression of desperation*
>
> *I have therefore declined the meeting today in Aston Chase's offices and respectfully ask for at least 4 to 6 weeks in order to contact all my applicants as I am certain I can extract offers from previously interested parties once I have this short time to re-establish their interest.*

> *If we have not received an acceptable offer within that time frame I would welcome Aston Chases' involvement…".*

64. In any event the meeting did go ahead (although not at Aston Chase's offices). The meeting was a matter of some focus at the trial, and Mr Fenwick QC criticised Mr Manning for the fact that there is no note available of it. It is true that there is no note as such; but there is an email sent on 31 October 2013, to Judith Kinnersley at Barclays, providing her with a report. The key elements were as follows:

> "*…We propose that Savills and Knight Frank will be given a window of 28 days in which they will have the opportunity to contact all parties previously identified by each agent, to arrange viewings and receive offers. If, at the end of the 28 day period, no offer has been recommended to you and accepted for either both or one of the properties, Aston Chase will be instructed as joint sole third agent to market the properties (or property), with Savills and Knight Frank continuing in that role.*
>
> *At present it is our intention to market number 40 Avenue Road only, and to only show number 38 upon specific request, although we appreciate there is already interest in purchasing both properties as a package. The recommended guide price (agreed by the two retained agents and Aston Chase) for the two properties, which we expect to achieve in excess of, is set at a price which is designed to attract offers and likely to be bid upwards as follows:*
>
> *40 Avenue Road - £35 million*
>
> *38 Avenue Road - £30 million…*".

65. It seems clear that the £35m guide price for 40 AR was a compromise, both Knight Frank and Savills having recommended a guide price of £30m (see [42] and [45] above), but Aston Chase a more aggressive guide price of £40m (referenced by Mr Lindsay in his later email of 21 November 2013: see [92] below).

Other viewings continue

66. It seems that the impression Knight Frank and Savills had after the meeting on 29 October was that they would be given control over managing viewings during the 28 day window agreed.

67. Mr Manning, however, felt it his duty as Administrator to permit viewings by any interested party, or at least any interested party who presented a real opportunity for a sale. It also seems to me clear that, initially at any rate, Mr Manning was sceptical that Knight Frank and Savills would find a buyer within the time allotted to them.

68. In my view, this latter point is apparent from an email Mr Manning sent to Mr Bernstone of Aston Chase, after the meeting with Knight Frank and Savills on the evening of 29 October 2013. He said as follows, referring it seems to a viewing Mr Berntsone wished to carry out the following day:

> "*Happy to go ahead with the second viewing. I think we got to as good a place as we could tonight and I would be amazed if there is nothing to sell within 28 days*".

69. Mr Manning was asked about this email during his cross-examination, and said what he meant was that "*I would be amazed if there weren't some decent offers coming forward that might be capable of acceptance*".

70. In my judgment, however, Mr Manning must be mistaken in his recollection of what he meant. It seems to me quite clear that his personal view following the meeting on 29 October was that it was very unlikely that Knight Frank and Savills would in fact find a buyer within 28 days, and in sending his email he was seeking to give assurance to Mr Bernstone of that fact, and to convey to him the expectation that there would still be something for Aston Chase to sell at the end of the 28 day period.

71. In any event, in order to provide coordination, the Administrators proposed a system under which Mr Pheysey would manage viewings, but interested parties would need to be vetted by Mr Howie of Deloitte first, who would keep Knight Frank and Savills informed. Mr Simpson of Knight Frank however was still unhappy, and in an email of 1 November 2013 expressed his concern:

> *" ... the management of access in regards to controlling viewings and applicant checks is far too complicated. In order for myself and Stephen Lindsay to achieve the best price we need to carefully coordinate ALL the viewings so that we, at least, know who is coming and going to the houses and make sure that they are NOT parties who have already been introduced to the properties ... In fact it is highly likely that we have shown over at least some of these 'new' buyers".*

72. This proposal prompted an somewhat intemperate response from Mr Manning, in an internal email sent within Deloitte to Ms Burns, Mr Binstock and others. He said:

> "*I am not going to have these guys tell me what to do about viewings . They have their 28 days and should use them wisely. We will let Paul Pheysey be the judge of the suitability of potential viewers introduced by Aston Chase. James Simpson can make much better use of his time trying to drum up interest from his client base rather than incessantly moaning*".

Initial interest in the Properties

73. While this was happening, however, a number of parties began to express interest in the Properties. This was before either Knight Frank or Savills had sent out any formal notice inviting new bids (see below at [81]), and so it is clear that word was circulating in the market:

    i) On 1 November 2013, Beauchamp Estates made an offer on behalf of an unknown offeror, for the acquisition of the shareholdings in the two SPVs, in the amount of £65m.

ii) On 1 November, Mr Pollack of Aston Chase sent an email referring to an offer from a Mr Gebay in the sum of £64,500,000 for both properties. Mr Manning responded to say that sounded encouraging, but *"[p]robably needs to get up by at least a million and a half to be in the running*".

iii) Also on 1 November, Mr Lindsay of Savills emailed Manning, forwarding an enquiry from Nick Candy as to whether Savills were formally instructed by the Administrators. Mr Lindsay's tone was positive. He said, "*the word is out now, the sale should play out very well from now on".* On 4 November, Mr Lindsay sent a further email to Mr Manning in which he said that Mr Candy had asked for confirmation whether a good offer would be considered before the 28 days were up – and Mr Manning replied to say "*He would have to be at around £70m for us to sit up and change track*".

74. I should briefly expand on the concept mentioned at (i) above, namely a disposal not of the Properties themselves but instead of the shareholdings in the two Companies. As Mr Manning explained in his evidence, a possible structure which might have been attractive to some purchasers was a sale of the Companies via a CVA. The attraction would have been a possible saving on stamp duty land tax for the purchaser. The structure would not have been straightforward, however, for a number of reasons. One is that the purchaser would have wished to acquire the Companies free of any existing security and debt, and that would have involved the secured creditors being willing to release their existing charges, and the unsecured creditors being willing to release their unsecured debt. They are unlikely to have been willing to do so without an agreement that they also receive a benefit in the form of an increased distribution, reflecting a share of the stamp duty land tax saving made by the purchaser.

Communications with the creditors

75. The evidence shows that there was regular and detailed communication between the Administrators and Barclays in periods after the Administrators' appointment, and I did not understand that to be disputed. Such communications included a request for an additional short term facility totalling £110,000, split between the two Companies and to be reviewed again in January 2014, depending on progress by that date (which Barclays agreed to).

76. As to the other creditors, there was communication only with Mr Pheysey, with whom Mr Manning was in contact. As already noted, he was one of the shareholders in the development company, BMBPI, and together with Mr Mercer and Fitzroy was also a member of BMBSCI, the LLP set up to provide additional funding for the Companies.

77. Mr Hira's evidence was that he was in contact with Mr Mercer in about early November 2013, who advised him that the Properties were being marketed for sale by the Administrators, with guide prices of offers in excess of £30m and £35m for 38 AR and 40 AR respectively. He was also advised that the Administrators intended to fix a short marketing period.

Barclays give instructions to seek best bids

78. Meanwhile, Savills and Knight Frank had been waiting for sign-off from Barclays on the strategy proposed at the meeting on 29 October 2013. They wished to send out a

formal communication inviting bids. There was a short delay while matters were considered by Barclays, but Mr Manning spoke to them and obtained instructions on 4 November 2013, which he recorded in an email to Knight Frank and Savills. He told them that Barclays were prepared to accept their recommendations of guide prices at £35m and £30m, but "*wish these to be expressed as 'offers in excess of', not least given the level of offers received to date …"* .

79. It seems that Knight Frank and Savills were in agreement with that, because shortly afterwards Mr Lindsay of Savills sent a draft "*best bids letter*" to be sent by Knight Frank and Savills, in which they were to say:

> *"We have been instructed to quote* offers *in excess of £35,000,000 for House 40 & £30,000,000 for House 38, offers for both houses will also be considered, subject to contract.*
>
> *All parties are requested to express their interest within 28 days from Monday 4th November 2013…".*

80. Mr Manning however wanted to push more aggressively. In his email in response he said:

> *"I want to have considered all offer (sic.) by 28 days, so the offer deadline should be November 21st".*

81. That was then reflected in the final email sent out by Mr Lindsay to unspecified recipients at 16.09 on 4 November 2013:

> *"Knight Frank and Savills have been instructed by Deloitte LLP acting as administrators in the sale of 38-40 Avenue Road, NW8.*
>
> *We have been instructed to quote offers in excess of £35,000,000 for House 40 & offers in excess of £30,000,000 for House 38, offers for both houses will also be considered, subject to contract.*
>
> *All parties are requested to express their interest by 21st November. All offers should be from a reputable firm of solicitors who have instructions to proceed on the purchase and be accompanied by a bone fide bank reference with proof of funds and a realistic time scale for exchange and completion."*

82. I had no evidence of the list of persons to whom this email was actually sent, either by Mr Lindsay or Mr Simpson. The idea though, reflected in the outcome of the meeting of 29 October 2013, was that it would be sent at least to those who had previously viewed the Properties. It seems very likely that it had a wider distribution than that, however. I say that because another email chain, showed to Mr Manning in cross-examination, contained a follow-up email sent on 18 November 2013, reminding recipients of the 4 November email of the impending deadline on 21 November. The particular email Mr Manning was shown was sent by Savills to a Mr Jeremy Gee. Mr Manning identified him as another estate agent in the Golders Green area of London. That being so, it is clear that the efforts undertaken by Knight Frank and Savills to

identify potential purchasers must have involved them casting a wider net than simply re-contacting potentially interested parties who had viewed the Properties previously.

The Sales Process

83. The best evidence of viewing activity in the period up to 21 November is contained in a Schedule to an email sent on 22 November 2013 by Jemma Livesey of BMBPI to Mr Agius and Mr Howie of Deloitte. This shows a total of approximately 41 viewings completed by Savills and Knight Frank in the period since 5 October 2013, and approximately 30 since the meeting on 29 October. All but one were prior to the deadline on 21 November.

84. As to expressions of interest during this period, I have mentioned some of the early approaches above. Others made by about 20 November were as follows:

    i) 5 November 2013: an offer to purchase the Barclays senior debt for £45m, which was rejected by Barclays.

    ii) 5 November 2013: an offer via Savills from a "*VK*" for the purchase of both Properties for £45m

    iii) 11 November 2013: an offer via Withers LLP, solicitors, for purchase of 40 AR for some £31m.

    iv) 18 November: an offer from a Mr Al Shihri to purchase 40 AR for some £20m.

    v) 20 November: an offer by clients of Edwin Coe which valued 40 AR at £25m and 38 AR at £20m.

Update to Barclays

85. It was in this context that, on 19 November 2013, Mr Manning emailed Mr Dale Sellers of Barclays giving him an update on the sale process. Referring to the offers mentioned above, he said that he had already had 2 or 3 offers promising to pay circa. £65m, but went on "*talk is cheap and some of them want to buy the companies rather than the properties, so that might involve some horse trading with BMB*". He went on:

> *"However, one of them says they want to buy the properties at that price, so with a bit of competitive tension we could get close to a full recovery but let's wait until we get to COB on Thursday".*

86. Mr Manning accepted in cross-examination that *"full recovery…"* meant full recovery for Barclays.

Aughton Ainsworth's letter

87. On 19 November 2013 a firm of solicitors, Aughton Ainsworth, wrote to the Administrators. They were instructed by BMBSCI and BMBAR (the two junior secured creditors), and by BMBPI (the property development company owned by Mr Mercer and Mr Pheysey).

88. Aughton Ainsworth's letter referred to the outstanding indebtedness owed to the junior secured creditors (which they put at £4.1m owed to BMBSCI and £2.782m owed to BMBAR). Aughton Ainsworth then said it had come to their clients' attention that the Administrators were marketing the Properties at offers over £35m each, which *"[o]ur clients do not consider … is a fair or true market value or proper price for the Properties*". The letter went on to refer to a recent valuation from Savills, in which the Properties were valued at £52.5m and £42.5m respectively. This was plainly a reference to the letter signed by Mr Sharpe-Neal, set out above at [57]. The nub of the complaint was then set out as follows:

> *"We consider that the way in which both you and the Bank are acting unfairly prejudices our clients by selling hastily at a knock-down price sufficient to pay off the debt to the Bank but not to our clients".*

89. Aughton Ainsworth's letter concluded by saying that their client would hold the Bank (i.e. Barclays) to account if a proper price was not in fact achieved.

The reaction to Aughton Ainsworth's letter

90. The letter came to Mr Manning's attention on 20 November 2013 – the day before the deadline for bids in response to Savills' and Knight Frank's marketing efforts, and just as the process of finalising the Statement of Proposals was nearing completion (as I will mention below, this was finalised on 22 November 2013).

91. Mr Manning sought comments on the Aughton Ainsworth letter from Savills and Knight Frank. He received rather mixed messages in a lengthy exchange of emails on 21 November.

92. To begin with, Mr Lindsay of Savills responded positively, and said:

> "*Aston Chase, Knight Frank and Savills were all invited to give their advice on the above mentioned properties. All of the agents advised between £30m and £40m to be set as guide prices for the new marketing strategy, given the history and the situation.*
>
> *Knight Frank and Savills have shown approximately 160 applicants over the last 2.5 year period (this does not include Beauchamp Estates buyer) and a sale has not been concluded on either house, nor has there been a serious offer for some time. Of the 160 people whom we have shown the houses to, at least 40 of them are amongst the wealthiest individuals in the world.*
>
> *Knight Frank and Savills both advised Deloitte to reduce the prices of the houses significantly to create a competitive bidding situation. We still stand by the fact that this is the best advice for this situation.*
>
> *Savills are advising the client who owns the house next door (number 42), however the property is not being launched until at*

> *least February next year, and we have not yet set a fixed guide price.*
>
> *There is no formal valuation from Savills at £52.5m for house 40 or £42.5m for house 38. This was merely a desk top valuation arranged for re financing purposes prior to the properties being put into administration.*"

93. Mr Manning responded:

> "*Do you believe that the properties have been fully exposed to the market and that there is any advantage served by continuing to market for a number of weeks or even months ? Equally, what is the downside risk*"

94. Mr Lindsay replied as follows, this time adopting a more defensive tone:

> "*Thank you for your email. You recall when we met at your offices with James Simpson from Knight Frank and myself, that the advice from Knight Frank and Savills, was to pursue a targeted advertising campaign, together with a longer marketing period.*
>
> *You will recall that you instructed us not advertise the properties, and bring the matter to a head in 21* days, *despite Savills and Knight Frank's recommendation to the contrary.*
>
> *Furthermore, you indicated that you wished to have multiple agents acting after our 28 day sole agency period expired.*
>
> *For the record, we have already advised you that a multiple agency approach is completely inappropriate for a property of this value, indeed because of the number of agents you are in contact with and in discussions with, the marketing of these properties has been adversely affected by your firms' intervention and has generated into a free for all which is exactly contrary to our advice. We reiterate our previous advice that the appropriate way to market these properties to achieve the best possible value is for Knight Frank and Savills to jointly undertake a widespread global targeted marketing campaign.*
>
> *I trust that this sets out our considered view, we await your further instructions.*"

95. Mr Manning was plainly concerned about this response, in particular in light of Mr Lindsay's earlier message, and said:

> "*Excuse me but you appear to be contradicting yourself! I did not say that I wanted the matter brought to a head in 21 days and that we should not advertise . You and Knight Frank agreed that an advertising campaign would cheapen the properties and the*

> *right thing was to go back to all interested parties and re kindle their interest at a price that would stimulate offers and drive the price upwards.*
>
> *Your email suggests that I ignored your advice – yet your earlier email said we have effectively exhausted the market over the last month or so and the prospects of doing better were remote I quote – 'Knight Frank and Savills have shown (the properties) to approximately 160 applicants over the last 2 years …… of the 160 people we have shown the houses to at least 40 of them are amongst the wealthiest in the world ….'.*
>
> *So are you now saying that we should have re advertised and had a lengthy campaign and the strategy we have been pursuing is wrong ?*
>
> *It was Knight Frank who resisted having a third agent and who recommended, with your agreement, that we have an intense campaign to get in offers , from known interested parties over a 28 day period and resist having a third agent – we took that advice .*
>
> *Can you please let me have your comments.*"

96. Mr Lindsay pushed back, and explained further:

> "*When we were initially called in you had already been in contact with and encouraged several different agents to commence showing the property. Our advice was damage limitation because you had already decided to open up the agency. Under the circumstances we had no alternative than to recommend a short sharp marketing period at a guide price aimed at getting maximum interest in the shortest period of time.*
>
> *We further understand that you have continued engaging with other agents encouraging them to act independently and not as a team working with us in order to achieve the best possible price. Our advice as to advertising, length of marketing and agency agreements has consistently been ignored…*"

97. Mr Manning replied to that email, copying in Mr Simpson of Knight Frank, and suggested that Mr Lindsay and Mr Simpson speak to and deliver "*a collective response"*. He also said:

> "*…We agreed that if other agents were approached about the properties, that I had a duty to the creditors let their clients view but none of these agents were instructed to market the properties, nor have they done so .*
>
> *These properties have reached a wider market by word of mouth and from a myriad of sources, including shareholders,*

> *developers, middle men and secured creditors – none of whom we have 'marketed' to. This reflects the special nature of the properties and the manner in which these 'international' transactions tend to play out – which is precisely what you indicated was likely to happen.*
>
> *It has nothing to do with whether we had a 4 week or a 4 month marketing campaign*".

98. Mr Simpson then emailed as follows:

> "*Following our conversation, I confirm that in my opinion we have adequately exposed the above properties to the market.*
>
> *Knight Frank and Savills are the leading estate agents for super prime property in the UK. No other agents have the breadth of experience in selling this type of property, and have* been *so actively involved with the houses. We therefore recommend that all three parties (Savills, Knight Frank and Deloitte) work together to consider each bid on its own merit in order to be in the best position to give you the correct advice. I strongly feel that this is the best and most professional way forward to ensure that you can make a fully informed decision with our unambiguous approval, whether it be to accept a bid or continue with the marketing.*
>
> *I trust this is clear and satisfactory, should there be anything further you require please do not hesitate to let me know*".

99. Mr Manning agreed. He said:

> "*Fine. We can consider all offers on our call at 12.30 tomorrow and decide the next steps based on what we are faced with".*

100. This exchange on 21 November 2013 of course coincided with the deadline for submission of bids in response to Knight Frank's and Savills' efforts, which was 6pm on 21 November 2013.

<u>Bids received by the deadline</u>

101. Activity leading up to the 6pm deadline on 21 November was disappointing. This is illustrated in a series of emails in the period immediately before and after the deadline:

i) At 16.34 Mr Manning emailed Ms Kinnersley and said jokingly: "*No flood of offers yet – maybe everybody is treating it like an E Bay sale!*"

ii) At 17.53, Mr Simpson emailed Mr Manning and said: "*V disappointing so far……hoping for better later."*

iii) At 18.07, Mr Manning emailed to say "*There will always be bargain hunters – better to whittle down to realistic bidders early on anyway."*

102. There was then, perhaps predictably, a late flurry of activity on or about the deadline, 21 November. The position is summarised in the following table:

Date	**38AR**	**40AR**	**38/40AR**	**Agent/Offeror**
21.11			£45m	Savills/Guglielmo
21.11			£71m	Aston Chase/Emile at Covalift
21.11			£62.5m	Direct to Deloitte: company purchase
21.11			£55m	Savills/Reed Smith client (revised offer).
21.11			£50m	Savills/A&O client
21.11	£17m	£28m	£45m	Savills/"*VK*"
21.11		£31m		Savills/Mr and Mrs WB
21.11			£45m	Savills/CPC Group
21.11		£36m		KF/Farrer & Co
21.11			£62m (inc SDLT)	KF/Sator Properties
22.11			£65m	Direct to Deloitte/Nordic Partnership

103. There was a meeting on Friday, 22 November 2013 involving Mr Manning, Mr Simpson and Mr Lindsay. No detail is available. Late that same afternoon, Mr Agius of Deloitte emailed Ms Kinnersley with a summary of the offers received up to that point, but advised that further offers might come in over the weekend or early the following week:

> *"We have been informed that some other offers may be made on Sunday/Monday so we will assess where we are on Monday before we go back to the bidders. I am also expecting a schedule to be provided from Knight Frank and Savills which I will review once received and let you know if there is anything I may have missed".*

104. In fact, more bids did arrive during the following week. I will describe them further below. While that was unfolding, however, the Administrators' Statement of Proposals was being finalised on the same day, 22 November 2013.

The Administrators' Fees

105. One topic that came to be a focus of attention as the Statement of Proposals was being finalised was the process for approval of the Administrators' fees. A draft of the Statement had suggested that, at least as regards SCP (38) Ltd, a resolution seeking approval for the fees would need to be put to the general body of creditors by correspondence. On the morning of 22 November 2013, however, Mr Manning sent an internal email within Deloitte disagreeing with this idea. It said:

> *"Subject: 38 Avenue Road – approval of fees by creditors where there are no floating charge assets*

…

> *… nowhere in the rules does it tell us that we need to have a meeting of creditors to approve our fees when we can actually dispense with the meeting because there are no floating charge assets.*
>
> *The unsecured creditors have no economic interest in the outcome and never will in this company and that is why the rules are silent on it as no party can challenge our fees other than the secured creditors …".*

106. As I note below, the final version of the Proposals reflected this reasoning.

The Administrators' Statement of Proposals

107. The Executive Summary included the following statement at para. 1.2:

> *"At present it is not possible for the Joint Administrators to accurately comment on the likely outcome for creditors, as this is dependent on the sales price achieved for the properties. The Properties are unusual assets and it is challenging to accurately estimate the level of bids which will be received.*
>
> *That said, House 40 has sufficient floating charge assets to allow for a material distribution under the PP".*

108. The reference to "*PP*" was to the "*Prescribed Part*", i.e. that part of the Companies' net property the Administrators were required to make available for the satisfaction of unsecured debts under Insolvency Act 1986, s. 176A(2)(a).

109. In a section dealing with the "*Purpose of the Administration*" at para. 3.3, the Statement referred to the objectives at Insolvency Act 1986 Sch. B1, para. 3(1)(a) (rescue as a going concern), and (b) achieving a better result for the creditors as a whole than would be likely on a winding-up (which was not preceded by an administration) (I will refer to these as "*Objective A*" and "*Objective B*"). The Statement then referred to the fact that some purchasers might wish to proceed by acquiring shares in the Companies rather than by means of a sale of the Properties, and said:

> " *… it may be possible to exit the Administrations through a CVA, and hence satisfy the first purpose of an administration, to rescue the Companies as a going concern.*
>
> *In the event that a sale of the Companies is not achieved, the purpose of the Administrations will be to achieve a better result for creditors as a whole than would be obtained through an immediate liquidation of the Companies. The purpose of the Administrations will therefore be achieved through a sale of the assets of the Companies being the Properties*".

110. Para. 4.3, headed "*Post appointment strategy and marketing of the Properties*", referred to the decision to seek offers "*in excess of*" the £30m and £35m guide prices, and explained:

> "*It was felt that at these prices a number of serious bids would be submitted which would drive the selling price upwards and above the minimum quoted*".

111. Para. 4.3 then referred to Savills and Knight Frank having been given:

> *" … 28 days from 3 November 2013 as joint sole agents in which to market and generate acceptable offer (sic.) for the Properties to those parties who had previously shown an interest in the Properties, and any new interested parties they could find.*
>
> *…*
>
> *… interested parties have been asked to submit their bids by 6pm on 21 November 2013, following which the Joint Administrators will review them and revert to the bidders who are considered to have the leading bids, such that a second bidding round (for a select few) is likely".*

112. Of course, the reference to 28 days was inaccurate and confusing, because the period allowed expired on 21 November, and began on 4 November (not 3 November).

113. Para. 4.3 then went on:

> *"Upon acceptance of an offer by the Joint Administrators, the purchaser will be required to pay a non-refundable deposit of 10% of the offer price on exchange and have a period of 7 days to carry out due diligence … Proof of funding will be critical before any bid is accepted. Following exchange of contracts, the purchaser will have 28 days to complete the transaction".*

114. At para. 5.2, the Proposals then stated that the secured debt as at 14 October 2013 was as follows:

Creditor	**SCP38**	**SCP40**	**Total**
Barclays (Senior Secured Lender)	33,446,021	33,446,021	66,892,042
BMB (Junior Secured Lender)	2,783,048	2,783,048	5,566,096
Total	36,229,069	36,229,069	72,458,138

115. This summary was also of course inaccurate, as the Administrators accepted. "*BMB*" was a defined term in the Proposals, and in fact was a reference to *BMBPI* – the

company controlled by Mr Pheysey and Mr Mercer, which had managed the development of the Properties. BMBPI was not a junior secured lender at all. Even if one reads BMB as referring to BMBSCI, the first ranking junior secured creditor, its overall debt was in fact much larger than that shown – in the region of £7.1m. The Proposals did not on any view mention the position of the second-ranking junior creditor, BMBAR.

116. Unsecured claims were also understated. The figures given were £201,837 for SCP 38 and £265,200 for SCP 40. No mention was made of the substantial unsecured debt owed to Mr Gupta/the Lailak Settlement.

117. Although the initial draft of the Proposals had assumed there would be a creditors' meeting, a different position was adopted in the final version. In Section 5.6 , the Proposals said as follows:

> *"On the basis that there are insufficient funds for a distribution to the unsecured creditors of the Companies other than through the PP provisions the Administrators will not be convening a creditors' meeting, unless required to do so, in accordance with Paragraph 52(1)(a) and (b) of Schedule B1 of the Act".*

118. The Proposals went on to state that a creditors' meeting could be requested by the creditors themselves using the form attached at Appendix 5, which was to be returned by 4 December 2013. However, as was accepted by the Administrators, the relevant form (2.21B) was not in fact included at Appendix 5.

119. It appears that the Statement of Proposals was sent to some recipients on 22 November 2013 and to others on 23 November 2013. However, again as was accepted by the Administrators during trial, it was not sent to BMBAR, BMBSCI or Gupta/the Lailak Settlement.

Further Bids for the Properties

120. As matters turned out, Mr Agius of Deloitte was correct in his prediction on Friday, 22 November that further offers might come in early in the following week. The news was not all positive (for example, Mr Lindsay emailed Mr Manning to say "*Candy and Candy are out . They will not pay more than 55 m",* and the Withers' clients also withdrew their offer), but some further bids were received as follows:

Date	**38AR**	**40AR**	**38/40AR**	**Agent/Offeror**
25.11			£60m	Savills/Marcus Cooper Group
26.11	£20m	£30m	£50m	Savills/"*VK*"
26.11			£70m	Beauchamp/Unknown (never formally confirmed)

121. Then on Wednesday 27 November 2013 an offer of £61m was made by the eventual purchaser, PIPTEL.

122. On the same day, 27 November 2013, there was a telephone call between Mr Manning, Mr Lindsay and Mr Simpson. According to Mr Manning's evidence, the position by that stage was that there appeared to be three serious bids in play for figures at or over £60m. These were:

    i) The Sator Properties offer received on 21 November, of £62m for both Properties (but including SDLT).

    ii) The Cooper offer received on 25 November of £60m for both Properties.

    iii) The PIPTEL offer received on 27 November of £61m for both Properties.

123. Knight Frank and Savills were concerned about losing momentum, and an email from Mr Lindsay of Knight Frank said, "*if the Administrators wish to dispose of the assets before Christmas we recommend that a preferred bidder be selected and the sale put in hand*".

124. Mr Manning gave instructions to go back to the three best bidders and invite best and final offers by the following day.

Knight Frank and Savills recommend accepting PIPTEL's offer

125. PIPTEL duly increased their offer to £61.25m on 28 November 2013, and provided proof of funding and confirmation of their ability to perform. Although Marcus Cooper Group also produced proof of funding, their offer was not increased. The Sator Properties offer was not increased, and it seems was not accompanied by formal proof of funding or of ability to perform.

126. In those circumstances, on the following day (Friday 29 November 2013) Savills and Knight Frank recommended that the Administrators accept the PIPTEL offer:

> "*Further to our several recent telephone conversations, as requested Knight Frank and Savills recommend that we should proceed with the offer from the highest credible bidder. After a comprehensive best and final bids process, it appears that the Singaporean consortium, fronted by Mr Failla, have provided the highest offer with proof of funding and confirmation that they are able to perform.*
>
> *We await your confirmation that we that we can proceed to agree the sale to them. It is, however, imperative that we maintain the pressure so that the sale goes through successfully, as another abortive sale at this stage will devalue the houses further.*"

127. Mr Manning emailed Simpson and Lindsay:

> *"So, are you confirming that in your opinion we have done all we can to market these properties and that taking them off the market or waiting for better offers would be a risky exercise as the offers received reflect the 'market value' of the properties and on that basis we should proceed with the offer of £61,250,000?"*

128. In an important email, Mr Simpson replied:

> *"Yes ……. bearing in mind these properties have been on the market for over two years, with the benefit of over 200 viewings, they have recently been extensively covered by the national media and we are still continuing to carry out numerous viewings it would be difficult to argue that these properties have not been fully marketed.*
>
> *The price reflects the lack of serious bidders at this level in St Johns Wood and the limitations of the houses. The houses are starting to look tired and I have noticed that things are starting to deteriorate (on my last two viewings the car air bed and the Jacuzzi were not working) so bearing in mind we are coming up to Christmas waiting for other offers could certainly be risky.*
>
> *Therefore Knight Frank and Savills recommend that we should proceed with the offer of £61,250,000"*

129. Dealing in cross-examination with the circumstances in which this final decision came to be made, Mr Manning said the following:

> *" … there was no suggestion, never any request for more time, because they had spoken to any number of former clients who viewed and said, we would love to see you again, we are very interested, but we cannot come for so many weeks or days. That did not take place".*

130. I accept that evidence, which is entirely consistent with the contemporaneous documents.

131. PIPTEL was notified on 2 December 2013 that its offer was accepted. Mr Manning requested a "*non-refundable exclusivity fee of £500,000*" and a period of 7 days for exchange. This was refused. The Notification of Sale produced on 2 December 2013 referred instead to a figure of £250,000 and 14 days for exchange of contracts.

Exclusivity Agreement with PIPTEL

132. The Administrators executed an exclusivity agreement with PIPTEL on the afternoon of 11 December 2013 (the "*Exclusivity Agreement*"). This contained an option binding the Administrators and the Companies to sell the Properties to PIPTEL. More precisely, clause 3.3 provided *"If the Option is exercised, the Companies and the Administrators will sell and the Purchaser will purchase the Property for the Purchase Price on the Sale Terms".* The reference to "*Sale Terms"* was to a draft sale agreement which was appended to the Exclusivity Agreement.

Report to Barclays

133. Barclays meanwhile had been updated as to the position by emails on 3 and 4 December 2013. Mr Manning stated:

> *"Our retained agents and other agents /'introducers' have fully exposed the two properties to the UK and international 'ultra-high net worth' investor community for over 2 years and our post administration marketing campaign has elicited over a dozen written offers for the properties both individually and collectively".*

134. He went on to summarise the offers received, and asserted that:

> *" ... the very extensive marketing of these properties over the past two and a half years, coupled with the intense selling efforts post administration, has, in our opinion and more importantly, in the opinion of our selling agents, demonstrated the market value of these two properties combined to be in the low £60 m range".*

The creditors other than Barclays

135. On the same day, 2 December 2013, DLA wrote to Aughton Ainsworth, responding to the letter of 19 November 2013. They conveyed a similar message to that conveyed to Barclays, and asserted that the Administrators had discharged their duties. They referred to the offers that had been received and indicated that the Savills' valuation of 9 October 2013 relied on by Aughton Ainsworth had been a "*desk top"* valuation only, which is what Savills had said.

136. At roughly the same time, the Administrators/Deloitte appear to have realised for the first time that there were substantial shareholder loans by Mr Gupta/the Lailak Settlement to each of the Companies, not noted in the Administrators' Statement of Proposals. This came about when investigating the possibility of the sale of shares in the Companies to PIPTEL, as opposed to the sale of the Properties. Mr Agius emailed Mr Neilson-Clark and Mr Manning on 12 December 2013, indicating that he had not previously noticed those loans and noting that they would increase the unsecured claims and would impact on any share sale. There were also internal Deloitte emails on 12 and 13 December 2013 regarding the need to send all creditor correspondence to the shareholders (Gupta/the Lailak Settlement and BMBAR), and the existence and extent of the shareholder loans.

137. Aughton Ainsworth wrote again to the Administrators on 12 December and on 23 December 2013. In their letter of 23 December, they asked whether the Administrators intended to enter into a contract for the sale of the Properties and sought an undertaking that they do not do so until 7 January 2013. Of course by then, the Administrators had already entered into the Exclusivity Agreement with PIPTEL on 11 December 2013. DLA replied on 24 December, informing Aughton Ainsworth of the Exclusivity Agreement. They asserted that the Administrators had discharged their duties.

Second Exclusivity Agreement with PIPTEL; exchange of contracts

138. On 17 January 2014, PIPTEL entered into a second Exclusivity Agreement, which included a mechanism for apportioning the £61.25m combined sale price between the two Properties. At the proposal of PIPTEL, AR 38 was to be sold for £21.25m and AR 40 was to be sold for £40m. In his cross-examination, Mr Manning described the

apportionment as "*arbitrary"* from his point of view, but said he did not care much about it in the final analysis given the overall price achieved.

139. On 31 January 2014, contracts were exchanged with PIPTEL for the sale of the Properties. The purchase prices assigned were £21.25m for 38 AR, and £40m for 40 AR.

Release of the Junior Secured Creditors' Charges

140. That still left the question of the charges in favour of the junior secured creditors, BMBSCI and BMBAR. Sale of the Properties free of those charges required the charges to be released, be consent or by Order of the Court. Thus, on 13 March 2014, DLA wrote to Aughton Ainsworth, and asserted that the Administrators could apply to the Court under paras 63 and 71 of Sch. B1 for an order releasing the charges. DLA asked instead that the charges be released by agreement, and provided release documents.

141. When Aughton Ainsworth replied on 19 March 2014, they maintained that the sales of the Properties were *not* at market value, but noted that the Administrators had already contracted to sell them with completion fixed on 31 March, and offered therefore to deliver executed release documents *"under protest and in escrow"*, on the condition that all rights against the Administrators were reserved. On the same day, DLA accepted the reservation of rights.

Dispute with PIPTEL; sales of the Properties

142. There was subsequently a dispute between the Administrators and PIPTEL concerning the sale. There has been limited disclosure in respect of subsequent events, but it appears that PIPTEL sought to purchase 38 AR alone, and that (at some point) the Administrators determined to sell 40 AR to a new purchaser.

143. Ultimately, on 19 November 2014, the Vaswani family offered to purchase 40 AR for £40.3m. Mr Haneet Vaswani had previously conducted a viewing in March 2012 (above at [29]), albeit on behalf of a friend. Mr Manning was cross-examined about the process which led to the sale of 40 AR to the Vaswanis. He indicated that when it became clear that PIPTEL would not complete on 40 AR, the Administrators had put 40 AR back on the market by informing "*the agents*". He was unclear in his recollection of precisely who had been informed, but was confident that it had included Knight Frank and Savills. The offer from the Vaswani family came from Beauchamp Estates, so they were plainly aware also. The documents refer to one other offer of £37.5m from a Saudi Arabian bidder.

144. In any event, much later, in April 2015, the dispute with PIPTEL was compromised. Some £2.5m was paid by PIPTEL by way of settlement.

145. The sale of 38 AR to PIPTEL for £21.25m completed in April 2015. The sale of 40 AR to the Vaswani family for £40.3m completed shortly afterwards in May 2015.

Distribution to Barclays and end of the Administrations

146. According to Mr Manning's evidence, a sum of £61,491,025 was distributed to Barclays. Barclays had loaned a principal amount of £51.5m. The remainder of its debt consisted of fees of £8.9m, and interest (which had increased from approximately £3m at the beginning of the administration to approximately £6.8m by the time the Properties were sold).

147. On 14 April 2017, the administration ended. On 31 May 2018, the Court ordered *inter alia* that the notices filed on 14 April 2017 were deemed sufficient for the purposes of the Insolvency Rules 2016 and that the Administrators were discharged from liability in respect of their actions as Administrators from 4pm on 28 June 2018.

148. On 9 August 2018, Gordon Wilson was appointed as liquidator of the Companies. The liquidation remains ongoing.

The Primary Claim: acting in excess of power

149. This relies on Insolvency Act 1986, Sch B1, para. 71:

> ***Charged property: non-floating charge***
>
> *71— (1) The court may by order enable the administrator of a company to dispose of property which is subject to a security (other than a floating charge) as if it were not subject to the security.*
>
> *(2) An order under sub-paragraph (1) may be made only–*
>
> *(a) on the application of the administrator, and*
>
> *(b) where the court thinks that disposal of the property would be likely to promote the purpose of administration in respect of the company.*
>
> *(3) An order under this paragraph is subject to the condition that there be applied towards discharging the sums secured by the security–*
>
> *(a) the net proceeds of disposal of the property, and*
>
> *(b) any additional money required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the property at market value.*
>
> *(4) If an order under this paragraph relates to more than one security, application of money under sub-paragraph (3) shall be in the order of the priorities of the securities…".*

150. The Applicants' primary claim is that the Administrators acted unlawfully and/or in breach of their custodial or stewardship duty by disposing of the Properties which were

subject to fixed charge securities in favour of BMBSCI and BMBAR, as if they were not subject to those securities and without obtaining the permission of the Court pursuant to Sch B1, Para 71.

151. In particular, the Applicants say the Administrators disposed of the Properties either: (a) on 11 December 2013 by the grant of the option to PIPTEL; or (b) on 31 January 2014 by the exchange of contracts for the sale of the Properties to PIPTEL.

152. I reject this first contention. In short that is because I do not consider that entry into either of the option in the 11 December 2013 Exclusivity Agreement, or of the later Sale Agreement, in fact involved any disposal of property by the Administrators as if not subject to the Applicants' security. (There was no difference as regards the option between the Exclusivity Agreement of December 2013 and the later one of January 2014. In their submissions the Applicants relied only on the first such Agreement).

153. The starting point is an obvious but important one, which is that in the ordinary course Administrators have no power to dispose of property in a manner which overrides a creditor's security interest, at least not without the creditor's consent. That is because Administrators are agents for the company over which they are appointed, and have no greater power to make a disposal free of such an interest than the company itself would have. Any attempt to do so would be bound to fail: the purchaser would be bound by the security interest, and if the company (or the Administrators) had contracted on the basis that the security interest was overridden, then it (or they) would be in breach of contract.

154. More likely, the Administrators would not be able to find a buyer at all, and historically this presented a serious practical problem. The Report of the Cork Committee described it as follows:

> "*By remaining passive, and refusing to allow the mortgaged assets to be disposed of without his consent unless his security is redeemed by payment in full, a secured creditor can effectively inhibit a rescue scheme or an advantageous sale."*

155. It was this concern which prompted the change in the law now reflected in para. 71 of Sch. B1. It provides a mechanism which allows the Court to confer on Administrators a power to sell the property in question "*as if it were not subject to the security*". But that is subject to a number of conditions, including at para. 71(3) conditions designed to ensure that the holder of security is not left out of pocket – hence the requirement that the net proceeds of sale be applied towards discharging the security, together with an additional amount if that is necessary to reflect what the net proceeds would have been on a sale at market value.

156. For present purposes, the point is that para. 71 enables the Court to confer on Administrators a power they would not otherwise have, absent agreement from the secured creditor in question. And an application to the Court is needed in order for that power to be conferred. That is the context in which the Exclusivity Agreement, and the Sale Agreement, were executed. The parties must be taken to have understood, as part of the factual matrix in which those Agreements were executed, that the Administrators' powers were so limited. It would be very surprising, in such circumstances, if the parties intended to contract on a basis which ignored such an obvious limitation on their

power. I find that they did not do so, and the terms of the Exclusivity Agreement and of the Sale Agreement are consistent with that, as Mr Griffiths for the Administrators explained in his written and oral submissions.

157. The Exclusivity Agreement provided for the Companies and the Administrators to grant PIPTEL an option during the "*Exclusivity Period*" (defined initially as a period of 21 days) to purchase the Properties at the price of £61.25 million: clause 3.1. If the option were to be exercised, the Companies and the Administrators would sell and PIPTEL would purchase the Properties for £61.25 million on the "*Sale Terms*", being the terms set out in the sale and purchase agreement annexed to the Exclusivity Agreement ("*the Draft Sale Agreement*"): clause 3.3.

158. The Draft Sale Agreement provided, amongst other matters, for:

i) The Companies (acting by the Administrators) to sell the Properties: clause 2.1.

ii) On completion, the Administrators' solicitors to provide to the purchaser's solicitors (1) the original transfer duly executed by the Companies, (2) two Land Registry DS1 forms releasing Barclays' legal charges over the Properties duly executed by Barclays, and (3) Land Registry DS1 forms releasing the legal charges of BMBSCI and BMBAR over the Properties duly executed: clause 4.2.3.

iii) If either (1) the Administrators so required or (2) the Administrators were unable to comply with the provisions of clause 4.2.3, then PIPTEL would on completion accept a transfer and/or transfers of the Properties duly executed by Barclays in exercise of its power of sale as legal mortgagee in Land Registry standard form TR2, with no title guarantee and covenants for title to be implied: clause 11.2. (A similar provision was included in clause 11.2 of the later Sale Agreement, though this also provided that "*in such event [i.e. if the Administrators so required or where unable to comply with the relevant provisions of clause 4] completion shall be conditional on the Bank providing the transfer in Land Registry standard form TR2*").

159. Although it is true that in many cases, the effect of a contract for the sale of land is to create an immediate equitable interest in the property contracted to be sold (which amounts to a disposal), that is not an invariable rule, and each contract must be looked at on its own terms. No equitable interest will arise in favour of a purchaser where on a proper construction of the contract it is not intended to arise: Englewood Properties Ltd v. Patel [2005] EWHC 188 (Ch), [2005] 1 WLR 1961, at [41(b)].

160. Here, I agree with the Administrators' submissions, made with admirable clarity by Mr Griffiths. Thus, I find it impossible to construe either the Exclusivity Agreement, or the Draft or later final Sale Agreements, on the basis that they were intended to create an equitable interest of a type which the Administrators had no power to convey – i.e., transfer of the beneficial interest in the Properties free from the charges in favour of BMBAR and BMBSCI.

161. Properly construed, it seems to me that the Administrators contracted on the basis that they would cause one of three things to happen at completion: (i) they would procure consent of secured creditors who would deliver the Land Registry DS1 forms; (ii) they

would make an application to the Court under Sch. B1, para. 71; or (iii) they would procure that Barclays sold as mortgagee in possession. None of these alternatives, however, contemplated that the Companies would transfer a beneficial interest in the Properties free from the second-ranking charge prior to completion. On the contrary, each contemplated that an act from a third party independent of the Administrators would be needed in order for completion to take place. That structure, as it seems to me, is quite inconsistent with the idea that there was any immediate disposal of an interest in the Properties *not* subject to the existing security interests.

The Alternative Claim: other breaches of duty

The Parties' Cases in Outline

162. I have mentioned above at [5] that the Applicants also allege five other breaches of duty. Expressing these grounds of complaint in more concrete terms, the Applicants broadly say the following:

i) The whole course of the administration of the Companies was badly mismanaged because the Administrators (principally, Mr Manning) were in an unreasonable and unnecessary rush, driven only by concern for the position of Barclays (who had appointed him), and that led them into a number of serious errors.

ii) Thus, it is said that Mr Manning failed properly to inform himself of the true value of the Properties, in particular by failing to take account of the earlier Montagu Evans valuations, and/or by failing to procure an up-to-date, formal (Red Book) valuation. Insofar as there was a disparity between those earlier valuations and the guide prices, suggesting a difficulty in valuing these particular Properties, that was even more of a reason to commission a Red Book valuation. The issue was particularly acute given the valuation undertaken by Mr Sharpe-Neal of Savills in October 2013, which Mr Manning paid no attention to. The guide prices were just that - an intended starting point for a bidding process, not an end point, and they could not be relied on as indications of real value.

iii) This ongoing uncertainty over valuation had the consequence that it was wrong for Mr Manning to have signed off on the Statement of Proposals in the way he did. He failed to apply due care and attention in doing so. The Statement indicated that there would be no distribution other than to the unsecured creditors by way of the Prescribed Part. But that was not a view Mr Manning was entitled to come to in the absence of proper and reliable information about the real level of value of the Properties, which he did not have. The error in turn led Mr Manning to conclude that it was not necessary to convene a meeting of creditors, but that too was a mistake. For one thing the Proposals stated that the Administrators were pursuing Objective A, which was inconsistent with the idea that there would be no distribution to creditors. In any event, the uncertainty over the value of the Properties meant Mr Manning could not be confident whether the unsecured creditors would get anything or not. In all those circumstances, the proper course would have been to convene a meeting.

iv) Instead, the major creditors (with the exception of Barclays) were left in the dark. They were not consulted. The Statement of Proposals was not even sent to BMBSCI and BMBAR or Mr Gupta/the Lailak Settlement. The Statement was in any event inaccurate in a number of material respects, including in particular in its account of the junior creditors' position. This was careless and disrespectful, and all of a piece with the idea that Mr Manning was motivated only by the desire to get Barclays their money back, and did not care about the other creditors.

v) As to sale of the Properties, a flawed marketing strategy was pursued. Mr Manning did not act on the marketing advice originally given by Knight Frank and Savills, and then when Knight Frank and Savills agreed to a 28 day period as a "*dry-run*" before Aston Chase were instructed, unilaterally reduced that period to 17 days (in fact only 13 working days), which was entirely inadequate. The marketing approach was flawed in other ways, including in the shambolic manner in which viewings were permitted to take place, against the advice of Knight Frank and Savills, which resulted in a free for all. Consistent with all that, Mr Manning also insisted on the imposition of unnecessary and restrictive conditions (such as exchange within 7 days), and such conditions would have deterred potential purchasers. All in all, the marketing efforts undertaken were ineffective, and so one cannot be sure that the prices achieved for the Properties in fact corresponded to *market value*. In fact, there are contrary indications, including not only the earlier valuations (see above), but also the fact that in November 2014, the Vaswani family agreed to purchase 40 AR for £40.3m. That was in excess of the guide price for that property of £35m, and that is what one might have expected since the guide price was only ever intended to act as a starting point for bids and not an end point. That also makes it very surprising and concerning that 38 AR was sold to PIPTEL for only £21.25m, a figure well below the guide price for that Property, which was £30m. That all goes to show that a combined value of roughly £62m for both Properties was well below market value, a conclusion that is supported by the expert valuation evidence of Mr Rusholme, who values 40 AR at £49,695,000, and 38 AR at £46,695,000.

163. The Administrators' position, broadly, is as follows:

i) They accept there were certain shortcomings in the conduct of the Administration, including in the information contained in the Statement of Proposals, but they say these errors were of no practical significance. They also accept there was only limited engagement with the junior secured creditors. But again they say that such matters are of no real significance, and that to criticise the Administrators for them would be overly formalistic and would ignore the reality.

ii) The reality included the following: (1) by October 2013, there was no real prospect of any restructuring or refinancing of the Companies – there had been discussions between the original investors and Barclays during the pre-administration period and they had come to nothing; (2) the Administrators *were* aware of the *approximate* scale of indebtedness of the Companies secured by the second-ranking security, and the precise value of the indebtedness *would* have become relevant if there had been realisations in the Administrations at a sufficient level to give rise to a surplus for distribution to the junior secured

creditors – but that did not happen and was never likely to happen; (3) the judgment not to call a creditors' meeting was within the range of permissible discretion available to Mr Manning, and was taken in good faith; and (4) the Administrators *were* in regular contact with Mr Pheysey throughout the administration, and were entitled to assume that he would have passed on any key information to the junior secured creditors – who in any event had legal advice (being represented by Aughton Ainsworth), and could easily have adopted a more pro-active position themselves had they thought there was material, additional value in the Properties, and in particular could have sought to call a creditors' meeting had they thought that a worthwhile endeavour.

iii) In any event, more importantly, the process by which the Properties were sold was not flawed. In adopting the course they did, the Administrators *did* follow the advice of Knight Frank and Savills. Although it is true that the initial 28 day period was truncated, because bids received after the 21 November 2013 deadline were still considered, including PIPTEL's bid, which was eventually successful. The marketing exercise in November 2013 must be looked at in the light of the extensive marketing of the Properties over the previous two years, both by Knight Frank and Savills. Taking all of the evidence into account, it is clear that the Properties were very extensively marketed and that the prices eventually achieved represented market value in late 2013. Whatever shortcomings there may have been in the process, they all came out in the wash. That overall conclusion is reinforced by the evidence of Mr Asbury, who valued 40 AR at £35m, and 38 AR at £21m.

Discussion

Identifying the main point in issue

164. It seems to me plain that although Mr Manning was aware that the Companies had creditors other than Barclays, they were not at the front of his mind and did not engage his attention in any detail.

165. As a general proposition, I do not understand this to be seriously contested. In any event, it is entirely plain on the evidence. It explains a number of matters, most particularly:

i) The confusion which arose between, on the one hand, BMBPI (Mr Mercer and Mr Pheysey's property development company), and on the other, BMBSCI and BMBAR, the junior secured lenders. That confusion was reflected (for example) in the Deloitte email of 29 October 2013 which stated that "*the property developers are called BMB Property Limited. They are the same people who also have the mezzanine debt…*" (that was inaccurate: BMBSCI was the holder of the mezzanine debt, not BMBPI). More importantly, it was also reflected in the Administrators' Statement of Proposals (see [114] above).

ii) The related confusion, not so much about the identity of the junior secured creditors, but also about the extent of the indebtedness owed to them – which was understated in the Statement of Proposals (also above at [114]).

iii) The apparent lack of recognition of the position of Mr Gupta/the Lailak Settlement, as unsecured creditor, at least until December 2013, when Mr Agius flagged the point (above at [136]).

iv) Consistent with (i) to (iii) above, the failure to send the Statement of Proposals to any of BMBSCI, BMBAR or Gupta/the Lailak Settlement.

166. I agree with the submission made by Mr Fenwick QC that these deficiencies are surprising, because the Administrators had in their possession at all times the information necessary in order to be able to determine who the Companies' creditors were. This was included in the evidence filed by Barclays at the time of making its application for an Administration Order. Moreover, by the time of the Statement of Proposals on 22 November 2013, the Administrators had received the letter from Aughton Ainsworth dated 19 November 2013 (mentioned above at [88]), which identified the junior secured creditors and gave different figures for their indebtedness than the figures in the Statement of Proposals.

167. These deficiencies are consistent with a lack of attention and care. Again, that much is obvious and again I did not have the impression the point was seriously contested. What was contested, however, was whether any of these points were serious, in the sense of them having serious consequences, rather than being mere technical oversights.

168. For his part, Mr Manning justified his position on the basis that it was only ever Barclays which had any real "*economic interest*" in the outcome of the Administrations. That is because the value expected to be achieved from the Administrations was not likely to be enough to secure any realisations for the other creditors, other than a payment to the unsecured creditors by way of the Prescribed Part. Mr Manning's position overall was thus that he *did* direct his attention to the position of the creditor which actually had an interest in the Administrations. The other creditors had no such interest, on the basis of the information he had available at the time, and so even if there were technical deficiencies in the way they were dealt with, nothing really turns on that – in the final analysis, given the true values of the Properties, they were no worse off than they would otherwise have been.

169. Without wishing to belittle the importance of the deficiencies so far identified – they should not have occurred - I rather agree that an appropriate point of focus is whether the creditors other than Barclays had any real economic interest in the Administrations. That leads one directly to what seems to me to be the real point of contention between the parties, which is their dispute about whether the Properties were sold for their proper value.

170. As to this, the basic legal standard to be applied was common ground. The relevant standard of care was described as follows by Millett J (as he then was) in Re Charnley Davies (No. 2) [1990] BCLC 760 (at 775e-776a):

> "*It is to be observed that it is not an absolute duty to obtain the best price that circumstances permit, but only to take reasonable care to do so; and in my judgment that means the best price that circumstances as he reasonably perceives them to be permit. He is not to be made liable because his perception is wrong, unless it is unreasonable."*

171. Snowden J in Davey v Money [2018] Bus LR 1903 summarised the overall position as follows at [387]

> *"An administrator must be a professional insolvency practitioner. A complaint that he has failed to take reasonable care in the sale of the company's assets is, therefore, a complaint of professional negligence and in my judgment the established principles applicable to cases of professional negligence are equally applicable in such a case. It follows that the administrator is to be judged, not by the standards of the most meticulous and conscientious member of his profession, but by those of an ordinary, skilled practitioner. In order to succeed the claimant must establish that the administrator has made an error which a reasonably skilled and careful insolvency practitioner would not have made."*

172. In their written submissions, the Applicants relied on the Administrators having a duty to understand the market values of the assets they were dealing with, but accepted that this is really no more than an aspect of the general duty to act with reasonable care and skill. As Chief ICC Judge Briggs put it in Brewer v Iqbal [2019] EWHC 182 (at [52]-[56]) at [83]:

> *"Failure to understand the nature of the intangible asset, and the true value of the EPGs, led to a failure to properly market the EPGs. These constituted a failure to act with reasonable care and skill."*

173. Two other points seem to me relevant. The first is that the decision to sell an asset involves an exercise of commercial judgment. The authorities establish clearly that the court will not lightly interfere with an exercise of commercial judgment. As Neuberger J expressed it in Re CE King Ltd (in administration) [2000] 2 BCLC 297 at 302-303, the court will in general not question the administrator's commercial judgment unless it is based on a wrong application of the law or is conspicuously unfair to a particular creditor. The rationale is explained in Lightman & Moss (para. 12-008) as reflecting:

> "*…a broad judicial understanding of the nature of the administrator's task and the challenges that he faces on appointment; an appreciation, in particular, that the administrator will invariably be operating at pace in difficult and urgent circumstances which dictate the need for quick decision-making, often based on less than perfect information, if value is to be preserved. It also reflects an institutional judgment that licensed professionals are better placed than the court to formulate and implement commercial strategy according to the circumstances in which they find themselves.*"

174. The second point is the principle that an administrator is entitled to rely on appropriate professional advice in carrying out his duties, and will not be liable in negligence if the advice relied on appears to be competent: Davey v. Money at [451] per Snowden J. It is up to the administrators to establish that such reliance was reasonable in the circumstances: One Blackfriars at [223] per John Kimbell QC.

175. Against this background, I propose to deal with the key points by addressing the following questions, which are ordered so as roughly to follow the chronology of the Administrations:

i) Was the initial marketing advice from Knight Frank and Savills ignored by the Administrators?

ii) Did the Administrators sufficiently investigate the value of the Properties and should they have commissioned a Red Book valuation?

iii) Were the guide prices set at reasonable levels?

iv) Should more have been done to engage with the junior secured creditors?

v) Should the Administrators in any event have called a meeting of creditors?

vi) Were the Properties adequately exposed to the market, and were the Administrators entitled to rely on the advice from Knight Frank and Savills to that effect?

vii) Is any part of the above analysis affected by the expert evidence on valuation of the Properties?

viii) Insofar as there were breaches of duty by the Administrators, did they cause loss to any or all of the Applicants?

Was the initial advice from Knight Frank and Savills ignored by Mr Manning?

176. An initial point of contention was whether the position reached as a result of the meeting on 29 October 2013 (see [64] above – what Mr Lindsay of Savills called the "*dry run*" approach) involved a movement away from the approach originally suggested by Knight Frank and Savills at the meeting with Mr Manning and others on 16 October 2013 (above at [41]).

177. The argument that it did rests principally on Mr Lindsay's email of 21 November (above at [94]), in which he said, "*You recall when we met at your offices … that the advice from Knight Frank and Savills, was to pursue a targeted advertising campaign, together with a longer marketing period*". This was used as the basis for a submission that Mr Manning had chosen to ignore the advice from Knight Frank and Savills about what should be a proper marketing period.

178. There is no note of the 16 October 2013 meeting, and when cross-examined Mr Manning gave possibly contradictory evidence about it. On Day 2 of the trial, he agreed with the proposition that the agents' "*preliminary advice was different to their eventual advice*", implying that they had originally suggested something longer than 28 days; but on Day 3, having considered the matter overnight, he said he did not think there had been any change in the advice about the recommended marketing period, because that topic had not in fact been canvassed until the later meeting on 29 October 2013. Consistent with that, Mr Manning pointed to the fact that the written recommendations made by Knight Frank and Savills on 16 and 17 October 2013 make no reference to a specific marketing period.

179. It seems to me that the truth of it is somewhere between the two extremes. It is entirely correct that the written recommendations from Knight Frank and Savills make no express reference to a proposed marketing period. That being so, I also accept that they likely did not refer to any specific period in their discussions with Mr Manning on 16 October: had they done so, one would have expected to see some reference to it in the written recommendations sent shortly after the meeting.

180. That said, it also seems to me very likely that the agents – as at 16 October at any rate – had in mind something longer than 28 days, and also that Mr Manning understood that to be the case, without having to be told anything expressly. That seems to me clear from the later email exchanges on 29 October 2013, which preceded the meeting on the evening of the same day, in which Mr Lindsay of Savills set out his proposal for a 28 day "*dry run*", and Mr Simpson of Knight Frank asked for a period of 4-6 weeks (see above at [61]-[63]). The idea of a "*dry run*" suggests something shorter than the period originally contemplated.

181. These proposals were a reaction to the events which had occurred in the period immediately before 29 October 2013, including in particular the emergence of Aston Chase as another agency with an interest in the Properties (above at [59]). It seems to me quite clear that in making his proposal, Mr Lindsay was suggesting a change to what was previously contemplated. There was to be a shorter, more focused period of activity, to see what results could be achieved; but with the option to review and take alternative action if that period of activity was not successful. That, indeed, is what Mr Lindsay said in terms:

> "*We can send out an invitation requesting best bids 28 days from when we have instructions. …*
>
> *If this fails, then I agree we will need to review the strategy and potentially bring another agent in before we openly market the properties".*

182. I am confident that Mr Manning understood there was a change of approach, including as regards imposing a more truncated period of marketing than that originally contemplated. That is what he correctly accepted when in his evidence on Day 2 of the trial he referred to the agents' preliminary advice being different to their later advice.

183. It also seems to me clear that what was proposed to happen as part of the "*dry run*" was not to be the full range of marketing activities described at length in the Knight Frank Report and the Savills letter of 16 and 17 October. What precisely did happen is a little opaque, but it is common ground that it did not (for example) include advertising in the Hampstead and Highgate Express and Fabric Magazine (two of the matters proposed by Savills in their letter of 17 October 2013, see [49] above). Mr Manning accepted as much in cross-examination, and in fact said that advertising by such means was likely to be ineffective.

184. None of this, however, is the same as saying that Mr Manning ignored the advice he was given by Knight Frank and Savills (up to this point at any rate). On the contrary, the proposal for a 28 day "*dry run*" originated from Savills and was their advice. It was later endorsed by Knight Frank (although it is true that Mr Simpson had originally wanted a longer period of 4-6 weeks). Thus, it seems to me that in agreeing to the

structure discussed at the meeting on 29 October, Mr Manning was not ignoring, but instead was following, the advice given by Knight Frank and Savills.

185. The most that can be said is that that advice was itself a reaction to circumstances which Mr Manning had brought about, or had allowed to come about, and that in so doing he had acted unreasonably.

186. However, I do not consider it was unreasonable for him to have engaged with Aston Chase. In circumstances where Knight Frank and Savills had been the appointed agents for a long period, but had not achieved a sale, it seems to me it was entirely reasonable for Mr Manning as the incoming Administrator to consider engaging another agent. That was a natural and commercially sensible step to take, both in order to have the problem examined by a fresh pair of eyes, and also in order to apply some pressure on the existing agents by invigorating them with a sense of competition.

187. The other criticism made is that by allowing access to the Properties in a disorganised way, the Administrators cheapened them. Although I agree there was an initial period of confusion, steps were then taken to regulate access in a more satisfactory way, by means of the protocol under which Mr Pheysey would manage viewings subject to vetting by Mr Howie of Deloitte, who would keep Knight Frank and Savills informed. Perhaps inevitably when a substantial property is subject to a form of insolvency process, that will generate opportunistic approaches which an administrator will not really be in a position to stop, and which indeed he will be duty bound to consider given the obligation to achieve the best price reasonably achievable. Such dynamics will obviously create problems in structuring the form of marketing process Knight Frank and Savills ideally would have liked to have; but they did not arise because of any unreasonableness by Mr Manning. They were simply part of what he, and the agents, had to deal with. Of course Mr Simpson of Knight Frank remained unhappy with the protocol for viewings, which he thought "*too complicated*" (above at [71]), but it seems to me that was an unfair point given the Administrators' duty to give due consideration to any serious expressions of interest they received.

Should the Administrators have commissioned a Red Book valuation of the Properties?

188. The Applicants say they should. They argue that there was real uncertainty about the valuation of the Properties, and that it was wrong of Mr Manning to have acted without obtaining a formal, Red Book valuation. Had he done so, it would have revealed a figure the same as, or similar to, those arrived at by Mr Rusholme; and had that happened, Mr Manning could not and would not have come to the view that the secured creditors other than Barclays had no economic interest in the outcome of administrations.

189. I have come to the view that Mr Manning did not act unreasonably in this respect.

190. To begin with, the argument that he should have commissioned a Red Book valuation rests on the proposition that there was uncertainty about the true market values of the Properties, and a Red Book valuation would have resolved that uncertainty.

191. I do not find this point persuasive. It rests on the premise that it would have been possible to identify a true or correct value at the time through a process of analysis, but quite independently of any efforts actually to market the Properties or to gauge in an

active way the real level of market interest. I am rather sceptical that that would have been possible, and the evidence points in the opposite direction.

192. I say that because the Montagu Evans valuations had proven to be quite unrealistic. As will be remembered, these were in August 2009 (£100m for the two Properties together), July 2010 (£109m for the two Properties together), February 2011 (again, £109m), and January 2012 (£64m for each of the houses, plus an additional £2m for "*presentational items*" in respect of one them). In their letter of instruction dated 16 July 2009, Barclays had expressly asked for Montagu Evans to provide a valuation on a Red Book basis. That is what Montagu Evans did, and it seems clear that the subsequent updates were intended to be provided on the same basis.

193. The problem, however, is that even by November 2013, the Properties had not sold, and were nowhere near being sold, at anything like those levels. True it is that they had been marketed aggressively at even higher figures (£75m each) but it is also true (see above at [30]) that from July 2012, they had been shown on the basis that the sellers were open to offers, and still no sales or serious expressions of interest had been achieved.

194. To my mind, this history supports the submission made forcefully by Mr Dale QC for the Administrators, namely that the Properties, given their unusual if not unique design, were very difficult to value. When he was cross-examined about this Mr O'Connell (the Applicants' expert on insolvency practice) agreed, but he said that was more not less of a reason for obtaining a further Red Book valuation. I disagree. It seems to me that, faced with a series of historic Red Book valuations, none of which, when tested against actual market interest, had proven to be an accurate barometer of market value, the Administrators were entitled to assume that there would be little utility in commissioning yet another report prepared on the same basis.

195. I think it important to remember that the purpose of a Red Book valuation is to do no more and no less than to identify market value, defined by RICS as:

> *" ... the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion".*

196. But equally, as is obvious and indeed as the RICS decision makes clear, another way of establishing market value, and arguably a more reliable way since it does not involve a process of estimation, is actually to expose the relevant asset or assets to the market and try and sell them.

197. That is what happened here. In the circumstances, I do not consider that the Administrators can fairly be criticised for proceeding in that way. In his submissions, Mr Fenwick QC argued that they could, because unless in possession of a Red Book valuation they would have no accurate idea of what the market value for the Properties was, and so could not make reliable decisions about whether to sell or not.

198. To my mind, however, that submission places too much weight on what is essentially a process of estimation, and assumes that that process has a degree of superiority in

identifying market value over an alternative process of actual marketing. I do not agree. No doubt in some (or perhaps even in many) contexts, an estimate of value can be a useful tool; but on the present facts, given that the tool had proved to be unreliable, I think the Administrators were justified in seeking to test the Properties' value in a more practical way, and to say that the proof of the pudding would be in the eating.

199. That was also, it seems to me, the view of the agents. There is nothing to suggest that either Knight Frank or Savills recommended the commissioning of a Red Book valuation as a precursor to any renewed marketing of the Properties. The point may be made that the individuals the Administrators were dealing with were sales agents and not valuers, which is true; but they were also representatives of well-known property consultancy companies, and could be expected to have recommended obtaining a fresh valuation or valuations had they thought that necessary or appropriate.

200. Instead, their suggested approach was different. It involved exposing the Properties to the market with a view to generating competition. That was the initial advice offered both by Knight Frank and Savills in their written recommendations of 16 and 17 October 2013 (above at [42] and [45]). Knight Frank said, at section 3 of their Report, that their aim was to "*obtain the highest possible price for you*", and to ensure this their recommendation was to offer a "*sensible guide price aimed at generating substantial competition*". Savills were more explicit that the purpose of this strategy was to overcome the effects of the historic overpricing of the Properties, which had resulted in "*confusion*". The approach of seeking to generate competitive bidding would "*allow the market to find its own level*", and thus allow offers to be considered "*on their own merits for both assets or indeed individually*".

201. That basic advice never changed. Indeed, it was later endorsed by the Deloitte property expert Mr Binstock, who said that "*creating competitive tension is the key to getting these properties sold*" (above at [52]), and also by Aston Chase, who participated in the meeting on the evening of 29 October 2013 at which it was discussed, and who offered their own view on guide prices.

202. Looked at broadly, I can find nothing to criticise in the approach of marketing the Properties in a manner designed to generate competitive tension, in order to flush out the true market value, even given the absence of a Red Book valuation. On the contrary, given the history of the Properties including the obvious difficulty in valuing them accurately, it seems to me it is an approach which had much to commend it. In any event, for present purposes, I need only be satisfied that Mr Manning acted reasonably. Given that the idea of allowing the market to find its own level by fostering competitive tension was based on the advice and recommendation of three estate agents and the Deloitte property expert Mr Binstock, it seems to me that he did.

Were the guide prices set at reasonable levels?

203. It follows from what I have already said above that I do not accept the point that it was unreasonable to set guide prices for the Properties in the absence of a Red Book valuation. The Applicants' insolvency expert, Mr O'Connell, was critical of the decision to do so, but I do not agree with that criticism.

204. Mr O'Connell's logic was that until one knows the market value of a property, one cannot set a reliable guide price for it. The Applicants' valuation expert, Mr Rusholme,

said something similar. He said there is a danger, if a guide price is set too low, that you set an expectation that that is "*where the market is going to drive*". Mr Kandhari reinforced this. He said that as a prospective buyer, he would never start competitive bidding at a level in excess of the guide price because he would understand that as an indication of a price the seller was willing to accept, so as he put it:

> "*Why should I start bidding at a higher value when you have already told me this is your base price?"*

205. To my mind, however, there is something of a chicken-and-egg quality to these criticisms, in that they assume one must know the market value in order to set a guide price. That, however, ignores the logic of using a sales process based on guide prices as a means of *identifying* the market value. That was the point of the strategy Knight Frank, Savills, Aston Chase and Mr Binstock all supported.

206. I note the point made by Mr Khandari. He describes an entirely understandable reaction from a prospective buyer, but it does not justify the conclusion that a strategy based on setting guide prices is inherently flawed, or even unreasonable, as a method of seeking to derive an indication of market value. His point is that he would not as a buyer open up the bidding at anything higher than the guide price. No doubt that is correct, but it rather ignores the fact – relied on by the Applicants themselves in other contexts – that a guide price is intended only to set the starting point for the process, and not (necessarily) to represent the end point. Whether it does or not will depend on the degree of competitive tension generated. If a number of interested bidders appear, enticed by the initial guide price, then they will bid each other up. That is then likely to result in a price which can fairly be termed the market value, so long as there has been satisfactory marketing. If they do not appear, or if they do but the competition between them nonetheless results in bids at or around the guide price, then the prospective seller will need to decide whether to sell anyway. If satisfied that the asset has been adequately exposed to the market, the bids received will nonetheless be an indication of the market value, even if that is lower than the prospective seller wanted to achieve. If the seller thinks the asset has been inadequately exposed to the market, and there is still untapped potential to be accessed, he is likely to determine that market value has not been achieved, and to decide therefore to extend the marketing period or otherwise change his marketing approach.

207. This seems to me to be an entirely conventional way of looking at things, and effectively is what was recommended here to Mr Manning by a number of parties, including Knight Frank and Savills.

208. All that said, I agree that some degree of care was required in fixing the guide prices. I accept the point that a guide price, once made public, will act as a point of focus for potential bidders. So selecting the appropriate guide price is a matter to be approached with caution. But that does not mean that the only reliable way to do it is to reverse engineer it from an estimated market price based on a Red Book valuation. It is also possible, and in some instances (I think this is one of them) desirable, to approach things the other way around, and to start by asking what guide prices are likely to engage market interest, with a view to trying to create competitive bidding. That was the approach here. It seems to me it was a reasonable approach.

209. As to the precise level of the guide prices, Savills and Knight Frank were in a very good position to offer advice, given their historic involvement (over a lengthy period) with the two Properties, and the feedback they had received from the many viewings they had conducted. They had obvious expertise in the target markets, being recognised specialists in the sale of high-end properties to ultra-high net worth individuals. They were in a very strong position to be able to determine what level of guide price had the best chance of engaging interest. The process which led to identifying the guide prices eventually used (£35m for 40 AR and £30m for 38 AR) shows that there was discussion before they were finally settled on – in particular around Mr Manning's concern, which he shared with Mr Binstock, that the £10m differential in Savills' original recommendations between 40 AR and 38 AR would be difficult to absorb (see [52] above); and then arising from what appears to have been Aston Chase's more aggressive view about the guide price for 40 AR (see [92] above).

210. The Applicants said that these differences revealed a weakness in the Administrators' position, and reinforced the need for a Red Book valuation. I do not agree. It seems to me they show a healthy debate, during which Mr Manning was appropriately inquiring and sceptical, and for the purposes of which he took advice from a number of suitably qualified parties. Their differences demonstrate only that the fixing of guide prices is perhaps more of an art than a science; but then the same can be said about trying to identify an asset's market price by a process of inference and analysis, as the expert evidence in this case reveals (see the section starting at [293] below).

211. This is also a good point to address the significance of the letter from Mr Sharpe-Neal of Savills dated 9 October 2013, referred to at [57] above. This was relied on heavily by the Applicants, who said it showed more or less contemporary valuations for the two Properties at well in excess of the guide prices (£42.5m for 38 AR and £52.5m for 40 AR), and should have led to much higher guide prices being adopted.

212. This was a matter of concern and interest for me during the trial, but I have come to the view that it does not alter the analysis I have set out above.

213. The Mr Sharpe-Neal letter was referred to in the letter sent to the Administrators by Aughton Ainsworth on 19 November 2013, shortly before the deadline set for the receipt of bids expired, and shortly before the Statement of Proposals was finalised. Mr Manning made inquiries of Savills, and Mr Lindsay gave an answer in his email of 21 November (above at [92]):

> *"There is no formal valuation from Savills at £52.5m for house 40 or £42.5m for house 38. This was merely a desk top valuation arranged for refinancing purposes prior to the properties being put into administration."*

214. In cross-examination, Mr Manning said he had raised the issue with Savills and had been told that:

> " *... it was something the owners/borrowers had sought to commission because they were desperate to refinance the properties and it was what was described to me as a desktop valuation and it did not accord with Savills St John's Wood, or*

> *indeed Knight Frank's views as to the market values of the properties*".

215. Further:

> *" ... they said it should be disregarded, it was required by the borrowers because the borrowers were seeking to get a refinancing away".*

216. Mr Manning did as suggested, and discounted the Mr Sharpe-Neal letter as having any relevance. The Applicants were critical of this, and so was Mr O'Connell. He said there were unanswered questions about it which needed to be resolved. The Administrators' expert on insolvency practice, Mr Rollings, agreed in cross-examination that it would have been reasonable to inquire further and that if one had been able to find out more, it would have been helpful.

217. The following, further points are also relevant. Neither party called any witness from Savills to give evidence. I therefore have no explanation for the Mr Sharpe-Neal letter, beyond that given by Mr Lindsay in his email. As to the Mr Sharpe-Neal letter itself, as I have noted above, although it referred to a formal valuation report being in the course of preparation, none has been produced. It seems safe to infer that none was ever in fact finalised.

218. In such circumstances, and doing the best I can with the available evidence I have, I conclude that while it would no doubt have been reasonable for Mr Manning to have asked for more information, I do not think it was *unreasonable* for him to take Mr Lindsay at his word and to attach no weight to the Mr Sharpe-Neal letter in his own decision-making. That is for two reasons. First, the Mr Sharpe-Neal letter on its face seems to me to have little if any real value. Its purpose is unclear (the reference at the end to it being provided as an "*aid toward decision making*" is entirely opaque), and I have been given no context by either party to help me make sense of it. It is true that it states it is provided "*with commitment*", but that was only "*subject to and on the basis of the assumptions, conditions, information and definitions set out in our formal report*". But no such formal report is available to me, and none was available to Mr Manning either.

219. The second reason, which supplements the first, is that when asked, Mr Lindsay of Savills disavowed the idea that the Mr Sharpe-Neal letter expressed any formal view of valuation, which I take to mean, it did not reveal a view of market value which Savills were in fact willing to endorse. Thus, whatever purpose it may have served for the recipient – which I am unable to discern - Mr Manning was being told it was not something he could or should rely on. Given the oddities apparent on the face of the letter, and the lack of clarity about its background and purpose, it would have been a serious mistake for him to have done so. In the circumstances, it seems to me it was reasonable for him to discount it in his thinking, and not to regard it as calling into question the advice he had already received.

220. Even if that is wrong, and Mr Manning should have made further inquiries, it seems to me they would have led to the same end-point. Perhaps only evidence from Savills themselves would have shed light on the actual background, and no such evidence was available to me. In such circumstances, the Supreme Court has recently recommended

a common-sense approach to the drawing of inferences (Royal Mail Group v. Efobi [2021] 1 WLR 3863 at [41]). I infer here that, even had Mr Manning pressed and made further inquiries, they would not have been very illuminating and would have led to the same place, which is that whatever Mr Sharpe-Neal was doing, Savills as an institution did not endorse his letter as a valuation and Mr Manning should disregard it.

Should more have been done to engage with at least the junior secured creditors?

221. As I will explain below, a major point of contention between the parties was whether the Administrators should have called a creditors' meeting. As I will also explain, their justification for not doing so was that by the time their Statement of Proposals came to be circulated in late November 2013, it was a fair assessment that there would not be any assets available for distribution among the unsecured creditors, other than pursuant to the Prescribed Part. That being so, they were excused from the obligation to call any meeting: see Sch. B1, para. 52(b).

222. The statutory test under para. 52(b) is focused on the position of unsecured creditors, but in the present case we are concerned principally with the position of the junior *secured* creditors. The position there deserves separate consideration.

223. The Applicants argued that there should have been closer engagement with the junior secured creditors at an early stage, and said that the failure to do so exemplified Mr Manning's focus on Barclays, and lack of concern for the other potentially interested parties. Mr O'Connell, in giving his evidence, explained why he thought there was a need to engage:

> *"So if the properties had sold – if the bank was owed 67 and the properties were sold for 70, then it would have been the secondary secured creditors who would have been the marginal creditor there … every pound of realisations over 67 meant Barclays had no longer got a financial interest in the outcome".*

224. The point being made by Mr O'Connell is that, as far as the junior secured creditors were concerned, the "*value break*" (as he put it) – meaning the level at which they began to have an economic interest - was at a much lower level than would determine whether the unsecured creditors would receive a distribution. That seems to me a correct way of looking at it.

225. The Administrators submitted (and I did not understand this to be disputed) that there is no absolute obligation on administrators to consult creditors: whether or not to do so is a matter for the administrators' judgment in the circumstances of the case. And even where an administrator does consult creditors, he is not bound to follow their wishes. They argued that on the facts, sufficient had been done here because Mr Manning was in regular contact with Mr Pheysey and (to a lesser extent) Mr Mercer, and Mr Pheysey had given the impression that he was a conduit for the flow of information to others.

226. In cross-examination, Mr Manning gave the following evidence on this latter point:

> "*A. … I was answering about my communication with Mr Pheysey throughout the process when we started managing and trying to sell the properties. At that stage I believed Mr Pheysey*

> *was the representative and he was the representative of the junior secured creditors.*
>
> *Q. You say he was – did he tell you he was appointed to represent them?*
>
> *A. He was a director of the company that was managing the properties and was a member of one of the secured creditors and so one of those secured creditors, he and Mr Mercer had invested funds in. So yes –*
>
> *Q. Will you answer my question: did he tell you that he was authorised to act for and received information on behalf of the second chargeholders, or not?*
>
> *A. He did not make that specific statement. But he inferred it by telling me that he represented them.*"

227. It seems to me that, on the facts, sufficient was done to engage with the junior secured creditors:

i) To begin with, I agree that in principle the Administrators were required to engage with the junior secured creditors, or at any rate BMBSCI as the first-ranking junior secured creditor. I accept the proposition that there is no absolute duty and that each case must be assessed on its own facts, but here the guide prices – which were set at £65m but were intended to generate competitive tension, and hopefully drive the bidding upwards – left open the possibility that the "*value break*" might come at a point at which at least BMBSCI had an interest. In the early part of November 2013, at any rate, the fruits of the "*dry run*" marketing process were not known, and so there was still a realistic prospect of BMBSCI being *in the money*.

ii) It also seems to me, however, that by speaking to Mr Pheysey, Mr Manning *was* doing all that was necessary vis-à-vis BMBSCI. BMBSCI was not a limited company, but instead an LLP, and Mr Pheysey was one of its members. It therefore seems to me that, whatever Mr Manning may or may not have been told, and whatever he may or may not have thought, he was in fact speaking to someone with appropriate authority on behalf of BMBSCI. Mr Pheysey had his own responsibility to pass on relevant information to the other members, who were Mr Mercer and Fitzroy, the BVI entity associated with the Kandhari family. Moreover, it seems an entirely reasonable inference that he did so, because the broad marketing strategy developed by the Administrators was referred to in the letter sent on behalf of BMBSCI by Aughton Ainsworth on 19 November 2013.

228. Strictly speaking, the same cannot be said vis-à-vis BMBAR. Mr Pheysey had no obvious authority there, but if there was a deficiency in relation to BMBAR it seems to me it was more in the nature of a technical one, because there was a much smaller likelihood that the value break would come at a point that would benefit BMBAR, as second-ranked junior creditor. Even if that is wrong, I am not persuaded that much turns on it, because in practice information did find its way to BMBAR. As I have

mentioned above (see at [77]), Mr Hira's evidence was that he was in contact with Mr Mercer, who updated him in around early November 2013. And like BMBSCI, BMBAR was plainly aware of the Administrators' intended strategy, because it too instructed Aughton Ainsworth to send their letter of 19 November 2013.

229. I will refer to some of these points again in dealing with the question of causation (below at [315]-[325]).

Should the Administrators have called a creditors' meeting?

230. Sch. B1, para. 51 requires an Administrators' Statement of Proposals to be accompanied by an invitation to a creditors' meeting, but then certain exceptions are provided for in Sch B1, para. 52. Para. 52 provides that para. 51 shall not apply:

> " *... where the statement of proposals states that the administrator thinks –*
>
> *(a) that the company has sufficient property to enable each creditor of the company to be paid in full,*
>
> *(b) that the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of section 176A(2)(a), or*
>
> *(c) that neither the objectives specified in paragraph 3(1)(a) and (b) can be achieved*"

231. The Administrators justified their decision not to call a creditors' meeting on the basis that exception (b) applied as regards each of the Companies – i.e., the Proposals stated the Administrators' view that there would be no distribution to the unsecured creditors of either Company other than via the Prescribed Part.

232. The Applicants challenged this submission on two bases. The first was that there was no proper basis for the Administrators to have reached the view they did given the available information as to valuation. They again pointed to the historic valuations I have mentioned, and also to the Mr Sharpe-Neal letter. They also pointed to the guide prices, and emphasised that these were not intended to be valuations, but only a starting point for a bidding process, and were put forward with a view to encouraging competition.

233. The Applicants then have a second argument. They point to the fact that the Statement of Proposals indicated in terms that the Administrators were still pursuing Objectives A and B, namely "*rescuing the company as a going concern*", and "*achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration)".* They say the fact that certainly Objective A was still live is inconsistent with the idea that there would be no distribution to the unsecured creditors other than via the Prescribed Part. Objective A would likely be achieved through a sale of the Companies under a CVA. Given the likely structure of a CVA (see above at [74]), that *would* very likely have involved a distribution to the unsecured creditors other than via the Prescribed Part, because the unsecured creditors would have required a share of any stamp duty saving in return for their agreement to release their indebtedness. Thus, it was wrong for the Administrators to have made the statement they did in their Statement of Proposals.

234. I reject both these points.

235. To begin with, I note some relevant principles. The use of the word "*thinks*" in para. 52(2)(b) means that the Administrators' conclusion will be open to challenge only where it was made in bad faith or was irrational in the sense that no reasonable administrator could have formed that conclusion: see Davey v. Money per Snowden J at [255]. Further, in determining whether there will be sufficient assets for distribution, the administrator is entitled to form a judgment about what he or she considers "*likely*": see again Davey v. Money per Snowden J at [320]. The Applicants' expert, Mr O'Connell, applied that test in his own Report and accepted in cross-examination that it was the correct test to be applied.

236. The Valuation Argument: Turning then to the first point, I have no doubt that Mr Manning did actually *think* that there would be insufficient funds available for a distribution to the unsecured creditors of either of the Companies other than via the Prescribed Part, and I reject the notion that that view was held without any proper basis.

237. Mr Manning gave evidence as to his subjective state of mind when cross-examined, and said he thought it "*highly unlikely*" that there were going to be sufficient realisations to enable any payment to be made to the unsecured creditors. That evidence is obviously consistent with the contemporaneous materials, including the Statement of Proposals itself, and Mr Manning's email on the morning on 22 November 2013 concerning the process for approval of the Administrators' fees (where he said, in relation to SCP (38) Ltd, "*The unsecured creditors have no economic interest in the outcome and never will in this company …*").

238. As to good faith and rationality, I have already dealt above with the historic valuations of the Properties and the Mr Sharpe-Neal letter. Beyond that, I accept of course the general proposition that the guide prices set for the Properties were not as such valuations, and that the general strategy was to generate competitive tension and thus drive up the bidding to levels beyond the guide prices. I therefore also accept – as the Statement of Proposals itself indicated – that as at 22 November 2013 there was no final certainty about where the bidding process would end up, not least because it had not yet concluded – the 21 November deadline had passed and bids had come in, but they were still being assessed and there was still likely then to be a further bidding round "*for a select few*".

239. Nonetheless, it seems to me to have been perfectly possible even at that stage rationally to form the view that it was very unlikely there would ever be any distribution to the unsecured creditors – whoever they were:

    i) The total of the Companies' secured debt as at 14 October 2013 was approximately £76.1m, with interest accruing at in excess of £425,000 per month. A sale in, say, February 2014 would therefore have been at a point when secured debt would have totalled approximately £78.5m. One must add to that administration costs estimated at £2.5m, meaning that overall the Properties would have had to be sold for something in the region of £80m to produce a return for the unsecured creditors.

    ii) The evidence available to Mr Manning at the time, although of course uncertain, was consistent with the idea that sales at that level were very unlikely to be

achieved. For the reasons already given above, I think Mr Manning was justified in attaching little or no weight to the historic valuations, which had been shown to be unreliable in practice. By 22 November 2013, there had been in the region of 40 viewings post-administration, and a number of offers had been received (see [73], [84] and [102] above). Apart from one prospective offer of £71m ("*Aston Chase/Emile at Covalift*") which was not formalised and came without proof of funds, the highest offers were clustered around £60-£65m. On 21 November, Mr Simpson of Knight Frank had confirmed his opinion that the Properties had been adequately exposed to the market (above at [98]).

iii) I note in passing that the Statement of Proposals incorrectly stated the secured debt as at 14 October in the amount of approximately £72.5m. Even taking that figure (rather than £76.1m) as the starting point, however, does not in my view lead to any different conclusion, given the accumulating interest, administration costs and the level of offers received.

iv) I think that overall assessment is in fact reinforced by reference to the evidence given by Mr O'Connell. In dealing with what he called the "*estimated outcome statement strand*" (i.e., the Applicants' first point) he said " *... I think it would be a risky conclusion because the figures were so close, but he [Mr Manning] could have concluded that he thought there would be no return to the unsecured creditors*". That seems to me to endorse the idea that Mr Manning's view was within a range of rational outcomes.

v) For myself, I do not, in fact, think that Mr Manning's conclusion was a risky one by 22 November 2013. One of Mr O'Connell's points was that, say, a 15% increase on the total £65m guide prices would have given a figure of £74.75m, and that is beginning to approach a level at which a return to the unsecured creditors look more realistic. That is a fair point, but the question is really what appeared likely by 22 November, and by then – as it seems to me – a return at (or in excess of) that level was extremely unlikely, given the bids in fact received.

240. Before leaving the first point, I should deal briefly with an additional allegation. What was suggested by the Applicants was that Mr Manning may have been motivated to avoid calling a meeting of creditors, because he did not wish the body of creditors generally to have a role in scrutinising the Administrators' fees. In making that argument the Applicants relied on Mr Manning's email sent on the morning on 22 November 2013, referred to above at [105]. On proper examination, however, I find that allegation unsupportable. I have no doubt (for the reasons already given) that Mr Manning genuinely believed that there would be no distribution to the unsecured creditors of either SCP (38) Ltd of SCP (40) Ltd. Had he thought otherwise, I equally well have no doubt that he would have called a meeting. He had no interest in avoiding a meeting if one was in fact needed. The issue revealed by the 22 November email, on proper examination, is a rather technical one concerning a possible difference in treatment between SCP (38) Ltd and SCP (40) Ltd.

241. The issue arose because it seemed that although there were floating charge assets in relation to SCP (40) Ltd, there were no floating charge assets in relation to SCP (38) Ltd. As regards SCP (40) Ltd, the view had been taken that the existence of floating charge assets brought the matter within rule 2.106(5A) Insolvency Rules (as it then

stood), such that no approval for the Administrators' fees was needed from unsecured creditors. In his email, what Mr Manning was questioning was why the same logic did not also apply to SCP (38) Ltd, which was in the same position overall (there being no anticipated distribution to unsecured creditors), but appeared not to have any floating charge assets. He did not understand why that should make any difference, given that the unsecured creditors had no economic interest (and never would have any economic interest) in the outcome of the Administrations. It seems to me that was a fair question to ask, and that the view Mr Manning took was genuinely motivated and not based on a desire to avoid having a meeting if one was in fact needed. In the event, the issue appears to have dissolved because Mr Agius of Deloitte then identified some floating charge assets for SCP (38) Ltd. The wording of the final version of the Statement of Proposals reflected this uniform approach across the two Companies.

242. The CVA Argument: I come then to the Applicants' second point, which depends on a perceived logical inconsistency between (1) the statement that there would be no distribution to unsecured creditors other than via the Prescribed Part, and (2) the statement that the Administrators were still pursuing Objective A – meaning, more particularly, a sale of the shares in the Companies by means of a CVA.

243. The inconsistency is said to arise in two ways. First, because in the event of a sale of the Companies via a CVA, there would very likely have been a distribution of an agreed share of any stamp duty land tax saving, which would have been divided up between the purchaser and the creditors (see above at [74]). Second, any such distribution would by definition not have been a distribution under the Prescribed Part provisions in s.176A(2)(A) Insolvency Act.

244. The submission thus comes down to this, that while still maintaining that Objective A (CVA) was in play, the Administrators could not at the same time also "*think*" for the purposes of Sch. B1, para. 52(1)(b), that there would *not* be a distribution to the unsecured creditors, because if there was a CVA then there would be a distribution to the creditors.

245. The argument relies on Insolvency Act 1986, Sch. B1, para. 3. This requires an administrator to perform his functions with the objective of rescuing the company as a going concern (i.e., Objective A), unless (see para. 2(3)) he "*thinks … that it is not reasonably practicable to achieve that objective*". Thus, argue the Applicants, for as long as Mr Manning persisted in pursuing Objective A, he must be taken to have thought that a CVA *was* reasonably practicable; and if so, then he cannot at the same time have thought it unlikely there would be a distribution to the unsecured creditors, since if a CVA was achieved then there would be.

246. When cross-examined on this point, the Administrators' expert on insolvency practice, Mr Rollings, agreed that in principle (or as he put it, "*in the abstract*") it would be inconsistent to select Objective A but then not call a creditors' meeting relying on Sch. B1, para. 52(1)(b).

247. I think that is correct, as a general statement of principle. The tension between Sch. B1, para. 3 and Sch. B1, para. 52(1)(b), given the wording of the Statement of Proposals, leaves Mr Manning between a rock and a hard place. The question remains, however, where does that lead on the facts of this case?

248. I start with the evidence of Mr Manning. He said that as far as he was concerned, the prospect of a CVA was "*absolutely remote*" by the time of the Statement of Proposals.

249. He said that the point was only included in the Statement of Proposals:

> " *... in the hope that we could get something extra. But it was designed to get something extra and we didn't think it was likely at the time, but it was possible*".

250. The Administrators in their submissions pointed to various practical barriers to finalising a CVA, which they said justified the conclusion that it was a remote possibility only. These included not only the need for consent from the purchaser and the secured creditors, but also consent from a 75% majority of the unsecured creditors, and from 50% of the unconnected creditors (Insolvency Rules 1986, rule 1.19(4), as then in force).

251. I accept Mr Manning's evidence. As to his subjective state of mind, I accept that he did think at the time that a successful CVA was only a remote possibility (even if technically possible). Moreover, it seems to me that that view was rationally and reasonably held and was not in bad faith. Mr Manning had visibility on the bids received and was in a good position to assess what was or was not likely to be feasible. It was reasonable for him to assess that a CVA was extremely unlikely to come to fruition, given the additional complications which would necessarily arise and the level of interest in that structure actually evinced by the active bidders.

252. Having accepted Mr Manning's evidence, however, it seems to me I must also conclude there was a deficiency in the Administrators' conduct. But that deficiency was not a failure to call a meeting of creditors, it was the continued adherence to Objective A in the Statement of Proposals without any appropriate explanation or qualification. I think that, given Mr Manning's state of mind, the Statement of Proposals should have been much clearer in indicating that Objective A was not likely to be achievable, and in fact should have stated – since this seems to me to have been the substance of Mr Manning's evidence – that achievement of Objective A was not reasonably practicable.

253. It seems to me that is the right way to release Mr Manning from the double-bind he is otherwise placed in by the apparently contradictory indications in the Statement of Proposals. I reject the submissions made by both parties that some other solution is appropriate or necessary.

254. The Applicants' solution is effectively to say that the apparent continued adherence to Objective A in the Statement of Proposals trumps all other considerations, and so the Administrators should have convened a creditors' meeting. But this ignores Mr Manning's evidence (which I have accepted) about what he *actually* thought at the time.

255. The Administrators, on the other hand, say there *is* a difference between thinking that something is or is not likely (Sch. 3, para. 52(1)(b)), and thinking that something is or is not "*reasonably practicable*" – so that is possible at one and the same time both to think that a CVA is "*reasonably practicable*", but also think it unlikely to the point of being "*remote*". This however seems to me rather unrealistic, certainly on the facts of this case. There is obviously a difference in the precise language used in the two provisions, but even allowing for that, I do not see here how Mr Manning's evaluation

that a CVA was "*remote*" can comfortably be squared with the idea that it was nonetheless still "*reasonably practicable*". I am rather fortified in that view by the opinion expressed by Mr Rollings, the Administrators' own expert on insolvency practice, whose evidence in the Experts' Joint Memorandum was that the better objective to have identified would likely have been that in Sch. B1, para. 3(c), namely that of realising property in order to make a distribution to one or more secured or preferential creditors. I respectfully agree.

256. By Sch. B1, para. 49, if an administrator thinks Objective A cannot be achieved then he must explain his reasoning in the Statement of Proposals. That is to promote transparency, and to allow creditors who receive the Statement of Proposals both to understand the reasoning and, if they disagree with it, to challenge it at a meeting – which can include calling a meeting themselves if the administrators have not done so.

257. To my mind, this was the deficiency here. I have set out above at [109] what the Statement of Proposals said about Objective A. In stating a CVA was "*possible*", it seems to me the Statement of Proposals was confusing what was theoretically possible with what was "*reasonably practicable*" in the sense of being achievable in the real world. A CVA was not reasonably practicable or achievable if it was remote. A clearer explanation, with reasons, was needed. It could no doubt have said in terms that a CVA remained a remote possibility, but only that; but if the situation were to change, then there would be a further communication to creditors to update them.

258. My overall conclusion on this topic, therefore, is that the Administrators were justified in not calling a meeting of creditors; but failed adequately in the Statement of Proposals to reflect their actual thinking at the time, and to give reasons.

Were the properties adequately exposed to the market, and were the Administrators entitled to rely on the advice from Knight Frank and Savills that they had been?

259. What is perhaps most important in light of the overall approach I have taken is assessing whether the Properties were, in fact, sufficiently exposed to the market that one can be confident that market value was achieved.

260. This requires engagement with other of the Applicants' criticisms. The principal one is that Mr Manning acted unreasonably in truncating the 28 period originally settled on at the meeting on 29 October 2013. Knight Frank and Savills wanted a period of 28 days from the date of sending out their proposed "*best bids*" letter, but Mr Manning intervened and imposed a deadline of 21 November. The "*best bids*" letter was only finalised in the afternoon of 4 November, and the consequence was that Knight Frank and Savills had a period of only 17 days, or 13 working days, to engage with prospective bidders. The other, relevant criticisms are that the process of showing the Properties was mismanaged, and that the strict conditions on sale (as referred to in the Statement of Proposals) would have deterred prospective buyers.

261. The short answer to all these criticisms, as it seems to me, is ultimately the same, namely that in the end, and although there were some issues along the way, Knight Frank and Savills gave their confirmation that the Properties had been adequately exposed to the market and that the PIPTEL offer should be accepted.

262. As to the 28 day "*dry run*", it seems to me that Mr Manning did act unreasonably on 4 November 2013, in unilaterally imposing his own deadline of 21 November, when a 28 day period had been agreed at the meeting on 29 October, as communicated in the later email to Barclays. In so acting, Mr Manning to my mind demonstrated unnecessary impatience, which was likely fuelled by something of a personality clash with at least Mr Simpson, whose email of 1 November about management of access to the Properties had prompted Mr Manning's intemperate internal email of the same day to Ms Burns and others at Deloitte (above at [72] – "*I am not going to have these guys tell me what to do about viewings. They have their 28 days and should use them wisely*").

263. I also consider, for the reasons already explained above at [70], that at the time, Mr Manning was actually rather sceptical about whether a buyer would be sourced within the "*dry run*" period. As he had explained to Mr Bernstone of Aston Chase on the evening of 29 October, "*I would be amazed if there is nothing to sell within 28 days*". Given that apparent scepticism, it would have been natural enough for Mr Manning to want to press on quickly with the "*dry run*", so that further marketing could then be undertaken at the end of it if, as he thought, it turned out to be unsuccessful. That reading to my mind fits well with my assessment of Mr Manning's personality. He is sharp and commercially astute, has admirable energy and wants to get the job done, but that same energy can result in impatience and a degree of abrasiveness.

264. None of that, however, leads me to the conclusion that in the end, the decision made to sell the Properties was unreasonable, or represented a failure to obtain the best price reasonably achievable at the time, or was a failure to obtain market value.

265. That is largely because of the nature of the "*dry run*" period, and what it was intended to achieve. The Applicants criticise it (whether one takes 28 days or some shorter period) on the basis that it was obviously inadequate. But that ignores the fact that the adequacy of the "*dry run*" was always intended to be reviewed when it came to an end, with the possibility of a further period of marketing to follow – with an additional agent – if that was thought necessary. In other words, the proof of the pudding was to be in the eating. As matters turned out, the advice from Knight Frank and Savills at the end of the "*dry run*" was that the Properties *had* been adequately exposed to the market and that the prices achieved *did* reflect market value. The Administrators in my view were entitled to rely on that advice.

266. Overall, I find the Applicants' challenge on this issue rather too theoretical to be persuasive. It is based on the idea that a longer period than that in fact allowed was necessary because there was a pool of untapped potential which the approach adopted did not permit access to. But the points of criticism are made in a very general way, and without any attempt being made to address what actually happened, or to explain why the advice eventually given by Knight Frank and Savills must have been so misguided that Mr Manning should have disregarded it.

267. To give some examples, the Applicants in their Written Closing made the submission that by reducing the 28 day timeframe originally recommended, which was explained on the basis that it was needed to allow potential purchasers to travel from abroad, "*potential purchasers were necessarily excluded and/or would have been deterred from the process*." Likewise, the Applicants' valuation expert Mr Rusholme said that agents from Knight Frank and Savills would need time to reconnect, and when cultivating new people, would need time to cultivate the contacts. Mr O'Connell said that his "*gut*

feeling as an insolvency practitioner" was that "*it could be two or three months before some sheikh from the Gulf could come and see the property".*

268. These are very generalised points of criticism, however. They have some superficial attraction, but ultimately do not persuade me that there was in fact a pool of untapped potential available in late 2013 which Knight Frank and Savills failed to engage with. That is for the following reasons.

269. To begin with, these generalised allegations involve no real engagement with the specifics of what Knight Frank and Savills actually did. In fact, there was no real engagement at all during the trial with the detail of what Knight Frank and Savills actually did during the "*dry run*". I am not at all clear what constituency or constituencies of potential purchasers are said to have been left untapped as a result of their efforts. Neither Knight Frank nor Savills said there were any. The generalised criticisms thus ring rather hollow, without any specific examples to back them up.

270. On the other hand, as I have explained above, the evidence shows (i) apparently wide-ranging activity by Knight Frank and Savills, in fact going beyond contacting previously interested parties ([82] above), and (ii) apparently a high degree of market interest, in fact commencing before the "*best bids*" email of 4 November 2013 (see [73] above, and the reference in the context of the inquiry from Mr Nick Candy to "*the word*" being "*out now*"), and then extending beyond the 21 November deadline. There were some 41 viewings during the period of the Administrations, which resulted in a number of expressions of interest and offers being received, as I have described in detail above. In his oral evidence, the Administrators' valuation expert, Mr Asbury, said that although he thought the period allowed by Mr Manning was "*pretty challenging*", in fact the agents "*did pretty well and got a whole range of offers …*". I agree.

271. In advancing their case, the Applicants relied on the criticisms made by Mr Lindsay of Savills in his emails of 1 November 2013 ([71] above), and 21 November ([94] to [96] above). I have already dealt with most of the points made:

    i) The 1 November email was about the protocol for allowing access to the Properties: I consider the concerns expressed were overstated and unfair.

    ii) As to the 21 November emails, I also do not think it a valid criticism that Mr Manning ignored the agents' original advice to have a longer marketing period. The agents themselves later advised a shorter period.

    iii) I do, however, consider it a valid point of criticism that Mr Manning unilaterally imposed the 21 November 2013 deadline, when a 28 day period had been discussed and agreed at the meeting on 29 October.

272. Be all that as it may, however, what is more important is how the exchanges in the 21 November 2013 emails actually concluded, and how matters were then followed up. That broader context is critical.

273. It is useful to remember that the email from Mr Manning which prompted the first of Mr Lindsay's critical emails was a request in the following terms (see above at [93]):

> *"Do you believe that the properties have been fully exposed to the market and that there is any advantage served by continuing to market for a number of weeks or even months ? Equally, what is the downside risk."*

274. That was a perfectly reasonable and proper question for Mr Manning to ask, and indeed is the critical question in these proceedings. Mr Manning wanted an opinion on whether enough had been done, or more *should* be done? As I read his email, he was open-minded about the latter possibility; and that interpretation is reinforced by the view I have already expressed about Mr Manning being initially sceptical that the period recommended by the agents would be enough.

275. Mr Lindsay's immediate response ([94] above) did not properly engage with Mr Manning's question. Neither, I think, did his later email ([96]). Perhaps feeling defensive, given his recent sight of the 19 November letter from Aughton Ainsworth, his replies were a series of comments and criticisms – valid in one respect at least, but otherwise not – about the Administrators' own behaviour. One can certainly interpret Mr Lindsay's position as being that *not* enough had been done, but the weakness in his response was that it amounted only to saying, "*we were not able to do what we originally wanted*". That was not real the question, however. The real question was – given what has *actually* been done to date, is *that* enough or do we need to do more?

276. It seems to me this is the point Mr Simpson of Knight Frank picked up on. He was less defensive and was happy straightaway to express his own opinion that the Properties *had* been adequately exposed to the market ([98]). But he also made a sensible and pragmatic suggestion, which was endorsed by Mr Lindsay. The effect of it was to say – we are approaching the deadline for bids (the email exchanges were on the same day, 21 November 2013), so let's assess the bids when they come in and take a view on whether a longer marketing period is needed. We cannot form a final view about it at the moment because we do not yet know what we are dealing with. Mr Simpson's email said:

> *"We therefore recommend that all three parties (Savills, Knight Frank and Deloitte) work together to consider each bid on its own merit in order to be in the best position to give you the correct advice. I strongly feel that this is the best and most professional way forward to ensure that you can make a fully informed decision with our unambiguous approval, whether it be to accept a bid or continue with the marketing."*

277. Mr Manning agreed to that proposal in his email in response (above at [99]):

> "*Fine. We can consider all offers on our call at 12.30 tomorrow and decide the next steps based on what we are faced with*".

278. Pausing there, it seems to me that was a perfectly reasonable thing for Mr Manning to have done. It would have been irrational immediately to have committed to abandoning the present strategy, until the outcome was known. But Mr Manning was not closing the door on the possibility of a longer marketing period, if that is what the agents advised. The decision was to assess things in light of all the available evidence, once the fruits of the present process had been gathered in, and then decide on "*next steps*". As I have mentioned above, that in any event seems always to have been the point of

the "*dry run*" period, which was never set in stone and was always intended to be subject to review and extension if that was considered appropriate.

279. One must also look at what happened next. What happened next is that a series of offers were received on 21 November; then one more on 22 November. There was a meeting between Mr Manning, Mr Lindsay and Mr Simpson on 22 November, but no final decision was taken, because there was an expectation of further offers coming in the following week. Further offers did emerge the following week, between 25 and 27 November, including on 27 November an offer from the ultimately successful bidder, PIPTEL. The most promising bidders were then invited to make their best and final offers by 28 November, as a result of which PIPTEL increased its offer (by £250,000) and emerged as the favoured bidder.

280. On 29 November, both Knight Frank *and* Savills recommended proceeding with the PIPTEL offer by email ([126]). Mr Manning asked the key question again ([127]), namely whether " *... we have done all we can to market these properties and that taking them off the market or waiting for better offers would be a risky exercise as the offers received reflect the 'market value' of the properties*".

281. The agents responded to say yes ([128]), and went on:

> " *… bearing in mind these properties have been on the market for over two years, with the benefit of over 200 viewings, they have recently been extensively covered by the national media and we are still continuing to carry out numerous viewings it would be difficult to argue that these properties have not been fully marketed."*

282. They recommended again proceeding with the PIPTEL offer.

283. I have difficulty construing this email exchange as anything other than a confirmation by the agents that there *had* been adequate marketing and market value *had* been achieved. In dealing with the guide prices originally recommended by Knight Frank and Savills on 16 and 17 October 2013, the Applicants emphasised the point that they were expressly said *not* to be put forward as valuations. That is true, but it seems to me that now, an opinion on valuation *was* being expressed, and the Administrators were being told that market value *had* been achieved. Mr Lindsay, now having the benefit of seeing the outcome of the "*dry run*" exercise, had overcome his earlier reservations, I infer (given his absence) because he had concluded on reflection that many of them were not justified. In any event, he and Mr Simpson were given the opportunity to assess whether something beyond the "*dry run*" period was needed, and they said not.

284. The Applicants in their submissions sought to suggest that the advice given was in some way qualified - in the sense of the agents saying, "*we have done the best we can given the constraints you imposed on us*", or perhaps because the Administrators were pushing for a sale before Christmas (Mr Simpson's email at [128] above also says: " ... *bearing in mind we are coming up to Christmas waiting for other offers could certainly be risky*"). I reject these points. I simply do not read the advice given as being qualified in either of those ways. The straightforward question Mr Manning asked was whether everything had been done to achieve market value, and the advice was yes. No more was needed to be done and the time to sell was now. The reference to Christmas was to the obvious fact that if the PIPTEL sale was not pursued, it was unlikely that further

interest would be generated over the Christmas period, and that was "*risky*" in the sense that the Properties might then start to become stale again (the agents had already said in their first email of 29 November ([126] above), *"… another abortive sale at this point will devalue the houses further*"). There was no need to take the risk because enough had been done already.

285. In short, I think the advice given was perfectly straightforward, and I think it was perfectly reasonable for Mr Manning to rely on that advice. That, it seems to me, is the short answer to all the Applicants' criticisms of the "*dry run*" process. All of them, in one way or another, involve the proposition that certain buyers would inevitably have been excluded from the bidding process (because it was too short), or were put off from bidding (e.g., because of the conditions mentioned in the Statement of Proposals). But these submissions seem to me entirely generalised and speculative. The appointed agents did not think any materially relevant group had been excluded or put off, and they were well qualified to say so.

286. In any event, the available evidence points the other way, in that there is nothing to suggest that anyone who was potentially interested complained that they had insufficient time, or asked for more time. As regards the other factor which it is said deterred bidders, namely the conditions referred to in the Statement of Proposals, in practice they seem to have been disregarded – PIPTEL, for example, refused to provide the non-refundable deposit the Administrators asked for, and an alternative arrangement was agreed instead. No-one seemed surprised by that at the time. Such commercial terms are often negotiable if there is agreement on price. I am not persuaded that they acted as a real deterrent to seriously interested bidders. The agents plainly did not think so.

287. The Applicants challenged the idea that it was reasonable for the Administrators to rely on the agents' advice, on the basis Mr Manning had in many respects ignored their advice, and/or on the basis that the advice was not apparently competent, including because it was inconsistent with the more or less contemporaneous valuation figure given in the Mr Sharpe-Neal letter.

288. I disagree. I have already explained above that, save in one respect, I do not consider that Mr Manning unreasonably disregarded the agents' advice. I have also dealt above with the question of the Mr Sharpe-Neal letter, which I think Mr Manning was entitled to discount in his thinking.

289. I do not otherwise consider that the advice given was not apparently competent. The question being addressed was whether, whatever possible shortcomings there may have been in the "*dry run*" process, more time was now needed in order for market value to be achieved. Knight Frank and Savills were very well placed, perhaps uniquely well placed, to form a view about that question, in light of a number of factors. These included not only their strong reputations both in the St John's Wood area and internationally, most particularly in marketing to the community of high net worth individuals, but also their very long association with the Properties. In Mr Lindsay's case that went back even to the point in time when the plot was originally sold for development, but both agencies by late 2013 had had the benefit of marketing the Properties over a number of years and gauging customer reactions at first hand. They were in the best possible position to assess whether they had sufficiently reconnected with existing individuals who had expressed an interest in the Properties, or connected

with possible new parties. They were in the best position to gauge the nature of the feedback received, to gauge whether all promising leads had been followed up, and to gauge whether any possible target groups or individuals had been missed.

290. In the course of his evidence, Mr O'Connell at various points suggested that a degree of scepticism was necessary in dealing with Savills and Knight Frank, since they are estate agents and their interest is in effecting a sale. He said, for example, that "*you have to presume their interest is themselves*". In assessing the evidence overall, I do not attach any weight to such points, however. It is well established that estate agents are professional persons who owe duties of care to their clients, in this case the Administrators: see John D Wood & Co Ltd v. Michael John Knatchbull [2002] EWHC 2822. The advice given has to be looked at in that light. Further and in any event, I am entirely confident, based on my assessment of Mr Manning's character, that he would have brought an appropriate degree of pragmatism and scepticism to bear in evaluating the advice given by the agents.

291. In light of such factors, I do not consider it was unreasonable for Mr Manning to rely on what they said. Had they considered there was serious untapped potential, they would have said so. So too, no doubt, would Aston Chase, who were waiting in the wings, and would have been motivated to formalise their own retention as an additional agent had there been any pool of interest still left unexplored. Finally, I am reinforced in that overall view by the fact that the Savills and Knight Frank advice was given against the backdrop of the Aughton Ainsworth letter, and therefore in the knowledge that there was potential for the matter to become litigious.

292. The Applicants suggested that that would have made the agents more inclined to give advice which supported the effectiveness of their own actions. I disagree. The evidence to me suggests the opposite. It seems to me that Mr Lindsay in particular, given the defensive tone of his emails on 21 November (discussed above) would have been inclined to caution, and would very carefully have assessed the incoming bids with an appropriate professional scepticism, and had he been in any real doubt that market value had been achieved, would have been motivated to say so. He did not, and I think Mr Manning was fully entitled to take comfort from that.

Is the above analysis affected by the expert evidence on valuation of the Properties?

293. The expert evidence on both sides revealed the difficulty in valuing the Properties. In my judgment, both experts struggled to find direct comparables. This was because of the character of the Properties, and in particular their large overall size coupled with such a large proportion of the overall space (approximately 60%) being underground. This precise style of property was new in 2013, at least in the St John's Wood area.

294. The Applicants' expert Mr Rusholme valued 40 AR at £49,695,000, and 38 AR at £46,695,000. In summary, his methodology was as follows:

    i) He relied on two key comparables, namely 39 AR which sold on May 2012 for £27m (corresponding to £2,440 per square foot ("*psf*")), and 64 Avenue Road which sold in December 2013 for £28.5m (corresponding to some £2,460 psf).

    ii) 39 AR is on a smaller plot that the Properties, and has a lower overall size (at 11,064 sq ft, it is about half the size). It does however have subterranean space:

about 41% of the overall square footage is underground. 64 AR does not have subterranean space, but Mr Rusholme relied on it as indicating a more or less contemporaneous value for ground and above ground accommodation on Avenue Road, from which he was able to infer lower values for the lower ground and basement floors at 38 AR and 40AR.

iii) Taking the value achieved on the sale of 64 AR as his starting point – roughly £2,500 psf for the above ground accommodation – Mr Rusholme felt first that that figure should be increased for the above ground accommodation at the Properties, since they are better situated than 64 AR (which is next door to, and is overlooked by, a school), and on balance have other features which he considered made them more attractive.

iv) Having thus established a value for the ground and upper ground accommodation at £2,750 psf, Mr Rusholme then assessed the values of the lower ground and basement areas at lower figures. Here, Mr Rusholme felt that a different approach was needed. That was because, although there was a good comparable for the above-ground accommodation (i.e., 64 AR), there was no direct comparable for the below-ground accommodation. As to the best alternative, Mr Rusholme said that in his view:

> *" ...one that focuses on the quality of the property itself, having established the upper floor rates based on very good comparable evidence at 64, is a logical way of arriving at the deductions for the basement space".*

v) In applying this approach, Mr Rusholme accepted that there was no standard formula, and no RICS guidance note or indices. It was effectively an exercise of judgment. Although not direct comparables, he also relied as a form of cross-check on two other nearby properties on Acacia Road, namely nos. 15 and 26. These did have underground space (there was some dispute about how much, at least as regards no. 26), and so it was relevant to have regard to them. But the main thrust of his analysis, as I understood it, was an assessment of the overall quality of the accommodation. He gave a number of examples of the points he found persuasive. I will come back to that below (see at [301]).

vi) Applying this approach, Mr Rusholme adopted a figure of £2,250 psf for the lower ground floors of the Properties, and of £1,750 psf for the basements.

vii) That gave a total market value for 40AR of £49,695,000. In order to arrive at a value for 38 AR, Mr Rusholme deducted some £3m from that same figure, to account for the cost of finishing 38 AR, since although beyond the core and shell stage, it still required final fitting out. The £3m was arrived at on the basis of a figure of £2m for final finishing contained in a report from Norman O'Rourke (Quantity Surveyors) in November 2011, plus an additional sum of £1m.

viii) Mr Rusholme's approach placed no reliance on the pre-Administration marketing nor on any of the offers received as a result of the "*dry run*", since he regarded both as flawed.

295. The Administrators' expert, Mr Asbury, valued 40 AR at in the region of £35m, and 38 AR (given its state of development) at £21m. As to his methodology:

i) Mr Asbury's approach took account of a number of factors, including in particular the unusual design of the Properties and what he called the "*substantial proportion of subterranean accommodation*", as to which he considered the market (at least in the St John's Wood area of London) was not well established. In his Report he said that "*The absence of a reliable benchmark for this type of house would lead valuers and purchasers to take a cautious approach*". As to the pool of likely purchasers, he said that they are "*extremely discerning and demanding and their purchases tend to be highly discretionary*". Referring then to the lack of offers received prior to the Administrations, he said *"[t]his suggests it was not just a matter of price. It may well have been the case that the 'iceberg' character of the Properties and the style and standard of the finishes (even to No. 40) were not sufficiently impressive*". Then dealing with the eventual sale to PIPTEL, however, Mr Asbury said as follows:

> "*The Properties had, by December 2013, according to the estate agents, been the subject of around 200 viewings and had been viewed by around '40 of the world's wealthiest people'. The Properties had also been viewed by numerous prominent purchasing agents, so it is likely that most purchasers in the London market at that time with the budget to acquire the properties will have been aware of them. Knight Frank and Savills, in particular (although other agents had an involvement) are estate agents with international reach accustomed to dealing with Properties of their size, value and calibre*."

ii) There was a major difference of view between the experts as to the valuation of the subterranean floors. Thus, although Mr Asbury valued the ground floors and above in the same range as Mr Rusholme, at £2,575 psf, he considered the lower ground and basement spaces to have a much lower value, at £1,030 psf. (That was roughly the same figure identified by Savills in their 17 October 2013 letter, who said £1,000 psf: see [45] above).

iii) As to this, as well as relying on the range of general factors mentioned above at (i), Mr Asbury also relied on an exercise he had conducted to try and assess the relative value of subterranean accommodation in "*iceberg*" houses generally. Feeling unable to identify suitable properties in the St John's Wood area, Mr Asbury looked elsewhere, and took as examples properties in Gilston Road, Chelsea and Ilchester Road. Based on this analysis, Mr Asbury concluded as a rule of thumb that subterranean accommodation is likely to be valued at about 40% of the associated above-ground space. Applying that figure here leads to a value for the lower ground and basement spaces in the Properties of £1,030 psf. For 40AR, that gives an overall value of £35m.

iv) As to 38 AR, Mr Asbury again adopted a similar approach in outline to Mr Rusholme, but arrived at a very different figure because he made a more generous allowance for the amounts needed to bring 38 AR to a finished state. In doing so, he relied on various informal estimates given over time, which

> ranged from £4.5m to £11.5m. Mr Pheysey, for example, had told Mr Manning (according to Mr Manning's evidence) that it would cost circa. £4.5m to complete 38 AR. In their 17 October 2013 letter, Savills stated it would cost c. £5m plus fees, plus an allowance for the additional time to finish the house, and so recommended 38 AR be priced at £10m less than AR 40. Mr Asbury did his own calculation and thought the cost of works would be more in the region of £7,080,000, excluding finance, purchase and disposal costs. Overall, therefore, Mr Asbury considered £21m to be a fair assessment of the market value of 38 AR in 2013.

296. There is thus, as is often the case, a very marked difference between the views of the experts. Each was subjected to lengthy cross-examination on many matters of detail which revealed some shortcomings in their respective approaches. Mr Asbury, for example, accepted in cross-examination that applying his 40% rule of thumb to 39 Avenue Road (one of Mr Rusholme's key comparables) in fact resulted in a value for 40 AR of some £46m: 39 AR sold in May 2012 for £27m, corresponding to £2,440 psf, or £2,525 if indexed to November 2013 prices. But that was a price psf over the whole of 39 Avenue Road, including the basement space. If one assumes that the basement space is valued at only 40% of the above-ground space, that implies a value for the above-ground space of £3,432. Assuming then that the above ground space at 40 AR has the same value (£3,432 psf), and the subterranean space 40% of that value, one comes to a total value for 40 AR of approximately £46m.

297. What this reveals, to my mind, is a degree of artificiality in the approach based on a 40% rule of thumb. In the example just given, it gives rise to a distorted value for the above-ground floors at the Properties. Nobody at the time was paying £3,432 psf for accommodation on Avenue Road. In my view the 40% approach, although a useful attempt at trying to apply some rigour to the valuation of "*iceberg*" properties, is not a reliable guide. The data set used by Mr Asbury to establish his method was too small, and it gave rise to an obviously unreliable value for 40 AR when 39 Avenue Road was used as a starting point.

298. What this also reveals is that the process of valuation is more than a purely mechanical exercise. Both experts were agreed on that. Mr Rusholme said so expressly. Mr Asbury's approach, which overall took account of a range of factors, not only his 40% rule of thumb, was to the same effect. They were both seeking to identify what level of market interest there was actually likely to have been for the Properties, and how that would translate (in financial terms) into market value.

299. On this, an important point of difference between the experts was that in his analysis Mr Asbury was influenced by the actual marketing history, but Mr Rusholme was not. Mr Rusholme disavowed any reliance on the pre-Administration marketing initiatives, because they had been flawed, having relied on guide prices which were far too aggressive; and he disavowed any reliance on the post-Administration marketing initiatives – in particular the "*dry run*" – on the basis that they too were flawed, having been disorganised and having taken place in too much of a rush.

300. I have come to the view that I am unpersuaded by Mr Rusholme's basic approach, and although it has some shortcomings, overall prefer the view of Mr Asbury. In short, that is because Mr Asbury's approach, which seeks to take account of the marketing efforts actually undertaken, and the results actually achieved from them, seems to me more

grounded in reality. In contrast, Mr Rusholme's approach, which discounts the earlier marketing initiatives entirely, and attaches no weight at all to the results of the "*dry run*", is in my view too theoretical.

301. The point is well illustrated by examination of Mr Rusholme's evidence as to the lower ground and basement accommodation at 40 AR. As I have explained above, the main thrust of his approach was an assessment of overall quality of the accommodation, but taking account of the available comparables as a cross-check. In discussing 26 Acacia Road, for instance, he said the following:

> "*One of the comparables has a swimming pool in an outbuilding at the end of the garden and a gym next to, I think, the bedroom or staff accommodation next to the kitchen on the ground floor. Here, it has been purpose-built for the reason that it wants to attract the most discerning buyers possible in the market, and some of the richest people in the world. And I assessed the quality of that accommodation. It was extensive. It did have the drawback that it just had a couple of roof lights and no more than that. It had a facility where you drive your car through the gates from the road on to a marked-out platform area where your chauffeur can press a button and your car disappears down to two floors below, and one of the things I looked at as well is how that subterranean space linked to the rest of the house. And if you have 8,000/8,500 square feet of accommodation above which is dedicated to a family living area with your staff in accommodation, to use an old-fashioned term, downstairs, then you were creating something that would attract the best buyers in the world and would have a price and value that matched that. That is the approach I took on subterranean space.* "

302. As one can see, this is essentially a subjective approach. It is Mr Rusholme's own assessment, based on his experience, of what high net worth buyers are likely to want. The problem is that it has the same flaw which affected Mr Pheysey and Mr Mercer's decision to build, and indeed the Applicants' decision to invest – it is based on a view of what buyers *should* want, but it takes insufficient account (in fact no account at all) of the evidence about what they *in fact* wanted.

303. When cross-examined, Mr Asbury accepted that there were limits to what one could infer from the evidence about the pre-Administration marketing, because (1) buyers with the available funds who had thought the Properties were overpriced at £75m may have been put off, and (2) buyers in a different price bracket, say £35-£40m, may not have engaged with them at all. However, I am not persuaded that such points really carry much weight, and certainly do not provide sufficient reason for disregarding the earlier marketing efforts entirely. That would be to ignore the facts. I have in mind the statement made in Mr Simpson's email of 29 October (above at [63]) that after a total of three years and 160 viewings, "*it is highly likely that the buyer has already been shown over the house*". That is a contemporaneous assessment by a knowledgeable expert as to the level of exposure of the Properties had had to the market. Added to that is Mr Asbury's evidence that the limited pool of prospective buyers are "*extremely discerning and demanding*", and likely to make purchases on a basis he described as "*highly discretionary*". He did not go so far as to say that money is no object to such buyers, but common sense suggests that, given the level of exposure the Properties had

achieved, and the level of wealth available among the large group of people who had seen them, at least some meaningful level of interest would have been expressed had the Properties really engaged the enthusiasm of their target audience. That is particularly so in periods after July 2012 – well over a year before the Administrators were appointed – when the agents were instructed to invite offers. In fact, there was no meaningful level of interest in the price range suggested by Mr Rusholme's valuations.

304. It was also put to Mr Asbury that those individuals shown around the Properties in the pre-Administration period may have moved on and bought somewhere else in the meantime. That is rather more a point about the efficacy of the "*dry run*", and the utility of contacting the same people for a second time. Again, however, it does not persuade me that the "*dry run*" has no evidential weight and should be disregarded. For one thing, it seems unlikely that everyone among the persons originally shown around the Properties would have moved on and bought elsewhere; for another, the individuals we are concerned with are no doubt used to owning more than one property at a time; and for another, I have already determined (above at [82]) that the "*dry run*" was not limited only to contacting those who had previously conducted viewings, but was wider than that.

305. More generally as to the "*dry run*", it was also suggested that the manner in which it was conducted was consistent with it being a fire sale. I have already touched on one aspect of this (the process of allowing access to the Properties: see above at [187]). Overall, the point was not sufficiently well developed to be persuasive. To make it good one would need to understand precisely how the process adopted is said to have resulted in only a distorted picture of value being revealed. That would involve analysing in detail what the market perception of the process actually was, and critically evaluating the bids received. Neither point was a real focus of attention for the Applicants, however. Indeed they made no real effort to analyse the bids received, beyond saying they should be ignored.

306. The Administrators summarised the main bids as follows:

    i) 38 AR and 40 AR together: £65m (later withdrawn/no proof of funding), £62m (to include SDLT), £61m, £60m, £55m, £50m, £50m, £45m.

    ii) 40 AR alone: £36m (later withdrawn), c. £31m; £30m; £25m; £20m.

    iii) 38 AR alone: £20m; £20m.

307. The range is consistent with Mr Asbury's overall view of market value, both as regards the two Properties if sold as a pair, and also as regards their individual values (including Mr Asbury's £21m valuation for 38 AR). None of the bids, however, is consistent with Mr Rusholme's view. His valuations are supportable only if one ignores them entirely. I do not feel able to do that, given the conclusions I have already expressed above about the efficacy of the "*dry run*" period.

308. Neither am I persuaded that there is any significance in the fact that 40 AR was later sold to the Vaswani family in November 2014 (above at [143]) for some £40.3m - which the Applicants relied on as suggesting a market price for 40 AR in excess of the £35m estimated by Mr Asbury, and as implying a surprisingly low value – in the region of £20m – for 38 AR.

309. There are at least two answers to this in my view. The first is that Mr Haneet Vaswani is shown on the Savills schedule as having conducted a viewing on 28 March 2012 (albeit on behalf of a friend). Since he had viewed the Properties before, it is a reasonable inference that he (or others in his family group) were contacted again during the "*dry run*" period. If that is correct, as I hold it is, then whatever level of interest the Vaswani family had in about November 2013, the "*dry run*" took account of it. I do not think it makes a difference to the assessment of market value in November 2013 they may have taken a different view a year later, in November 2014. No-one suggested the Administrators should have waited for 12 months before trying to effect a sale.

310. Specifically as to 38 AR, it is obviously correct that a value of roughly £40m for 40 AR implies a value of roughly £21m for 38 AR alone, if one starts from a combined price of £61m for the two of them. However, a value of roughly £20m is consistent with the guide price originally suggested by Savills – which I accept was not a valuation, and of course was later revised upwards at the meeting on 29 October 2013; but still it was a considered figure put forward by experts with specialist knowledge of the market and the Properties. Also, notably, the two serious offers for 38 AR alone produced via the "*dry run*" were for £20m (see above at [306(iii)]). That suggests that Savills' initial view was correct. It also shows that Mr Asbury's view of market value for 38 AR is not a surprising one, but instead one which is consistent with the known facts about the actual level of interest in 38 AR alone.

311. In light of all those points, and because it takes account of the evidence of actual market interest in the Properties, I prefer the evidence of Mr Asbury, in the sense that it seems to me a better estimation of market value than that expressed by Mr Rusholme. I put it in those terms because I prefer to say that the market value for the two Properties together is actually that revealed by the sale price agreed with PIPTEL (£61.25m), rather than that estimated by Mr Asbury (£56m). At any rate, the difference between them is not material, because neither leads to any recovery for the Applicants.

Did any deficiencies in the conduct of the Administrations cause loss to the Applicants?

312. I have identified above a number of deficiencies, or possible deficiencies, in the Administrators' conduct:

    i) The lack of care which led to confusion about the identities of the Companies' creditors (above at [164]-[165]).

    ii) The possible failure to engage with BMBAR, as second-ranking junior secured creditor (above at [238]).

    iii) The unreasonable imposition of the 21 November 2013 deadline, when a 28 day period had been agreed at the meeting on 29 October 2013.

    iv) Consequent on (i), the deficiencies in the Statement of Proposals both as to the identities of the junior secured creditors and the amounts of their indebtedness. Similarly, a failure to acknowledge at all the indebtedness of the largest unsecured creditor, namely Mr Gupta/the Lailak Settlement (above at [165]).

v) The failure in the Statement of Proposals to provide a proper explanation as to the reason why a meeting of creditors was not deemed necessary (above at [257]).

vi) The failure to send copies of the Statement of Proposals to any of BMBSCI, BMBAR or Gupta/the Lailak Settlement (above at [165]).

313. It is necessary to determine whether any of those deficiencies caused loss to the Applicants. That depends on assessing whether the overall outcome is likely to have been different for the Applicants, had the Administrators' duties been fully complied with. I think not, for the following reasons.

314. To begin with, given the view I have taken that the Properties were sold for their market value, or (to use the alternative formulation), for the best price reasonably achievable, it follows that whatever deficiencies there were in the Administrators' conduct, they did not result in financial loss to the Applicants. The effect of any deficiencies came out in the wash.

315. There is also an underlying point. Implicit in many of the Applicants' complaints is the idea that they were deprived of the opportunity to participate in the Administrations in a more active way; and if that had happened, it would have led to a different outcome.

316. I am entirely unpersuaded by this point. That is because in my judgment, whatever the deficiencies in the Administrators' conduct, the fact is that BMBAR and BMBSCI *were* sufficiently aware of what was proposed in relation to the marketing of the Properties, and if they had considered there was a real prospect of value being lost, they could and would have behaved differently than they in fact did. There is no good reason to think they would have behaved in any different manner, or that there would have been a different outcome overall, if the Administrators had engaged with them in a more formally correct way, including by means of a creditors' meeting if BMBSCI and BMBAR had chosen to call for one.

317. As to BMBAR and BMBSCI having knowledge of what was proposed in relation to the marketing of the Properties, this is amply demonstrated by the following:

i) I have already mentioned above Mr Pheysey's status as a member of BMBSCI, an LLP (above at [227]). It is entirely natural to suppose that in that capacity he reported to the fellow members, who included Fitzroy (the Kandhari family vehicle), and told them what he was being told by Mr Manning.

ii) Mr Hira confirmed that he was aware of the Administrators' plans for marketing the Properties by about early November 2013, having been given a report by Mr Mercer (above at [77]). Mr Hira knew that a short marketing period was proposed.

iii) Finally, and conclusively in my view, the broad strategy was set out in the Aughton Ainsworth letter of 19 November 2013, sent to the Administrators on behalf of BMBAR, BMBSCI, and BMBPI (Mr Mercer and Mr Pheysey's development company). The letter included reference to guide prices (although they were mis-stated as being for "*offers over £35m*" in respect of both Properties), and also referred to a concern that the Properties were being sold

"*hastily at a knock-down price*", which suggests awareness of a short marketing period.

318. I was satisfied on the basis of his evidence that Mr Hira was an astute businessperson and an experienced investor. I am sure that Mr Kandhari (i.e., the Mr Kandhari involved at the time) was the same. Had they really been persuaded that the Properties were worth (in aggregate) not the £70m suggested by the (mistaken) guide prices the Aughton Ainsworth letter referred to, but instead the £95m mentioned in the Mr Sharpe-Neal letter (which was referenced in the Aughton Ainsworth letter), one would have expected them to be more proactive themselves, not in the sense of pursuing correspondence through solicitors, but instead in offering to fund the Administrations for an additional period or perhaps seeking to raise funds for a refinancing or even a purchase of the Properties themselves.

319. Nothing like that happened. When he gave evidence, Mr Hira said that he thought a "*calmer environment*" was what had been required to achieve "*full value*"; but he did not volunteer at the time to provide any additional funding with a view to bringing that about. Neither did Mr Kandhari (i.e. Hajeev Kandhari, who was involved at the time).

320. Their response to the situation was only to send a solicitors' letter, but that made no suggestion that some form of co-operation with BMBAR and BMBSCI was still possible. Rather, its purpose was to put down a marker that the Administrators' conduct was being scrutinised and that BMBAR and BMBSCI would take action if Barclays and the Administrators persisted in going about things in the wrong way. That is very different, obviously, to saying that they considered the Administrators to be going about things the wrong way, and would be happy to provide the funding necessary to enable them to go about things in the right way, although that would have been the obvious thing to do at the time had they had real conviction that material value was being lost.

321. Other factors indicate that Mr Hira and Mr Hajeev Kandhari are likely to have been cautious at the time. Their families had already invested substantially, and seen no reward for their investment. The later funding they provided, via BMBSCI, had been at very high rates of interest (20%-30%), suggesting the commercial proposition was regarded as having a high risk profile. Attempts at refinancing undertaken before the Administrators were appointed broke down. In light of these factors, set against the background of the long-term difficulties encountered in relation to the Companies, it seems to me that the Hira and Kandhari families would have been very cautious by November 2013 about investing further funds.

322. When asked in cross-examination whether he would have made additional funds available if asked, Mr Hira initially said yes, but did not provide a clear and unequivocal confirmation. On the same point, Mr Kandhari gave the impression that he would, but his evidence is much less valuable because he was not the person actually involved at the time, and in any event I find it implausible in light of the other factors I have mentioned above.

323. I thus find, on the balance of probabilities, that even if the Administrations had been conducted differently, BMBAR and BMBSCI would not in substance have behaved differently, and specifically would not have offered to make additional funding available for a more leisurely marketing period.

324. In such circumstances, I do not think there is any real prospect that in a counterfactual scenario in which the Administrators had engaged differently with BMBAR or BMBSCI as secured creditors, any different outcome would have been achieved. Even knowing what they knew, BMBAR and BMBSCI evinced no intention of undertaking any additional financial risk themselves. Had they known more about the level of market interest in the Properties, they would only have felt more discouraged.

325. Their own strategy and approach by November 2013 was essentially a passive one. Their conduct overall suggests they considered the commercial proposition represented by the Properties to be a very uncertain one, and while they were content to push some of the associated risk onto the shoulders of the Administrators, they did not wish to increase their own exposure any further.

Conclusion on the Applicants' Alternative Claim

326. For all the reasons above, my conclusion is that the Applicants' alternative claim also fails.

Overall Conclusion and Disposition

327. My overall conclusion is that, although there were some deficiencies in the conduct of the Administrations, the Applicants' claims fail and are dismissed.