Neutral Citation Number: [2020] EWHC 1080 (QB)

Case No: QB/2015/002014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 May 2020

Before:

John Kimbell QC
(sitting as a Deputy High Court Judge)

- -

Between:

CENTENARY HOMES LIMITED	**Claimant**
- and -	
(1) VICTORIA CLAIRE LIDDELL	
(2) JON HOWARD GERSHINSON	**Defendants**

- -
- -

Edward Bennion-Pedley (instructed by **Judge Sykes Frixou**) for the **Claimant**
Ivor Collett (instructed by **Kennedys Law LLP**) for the **Defendants**

Hearing dates: 14,15,16 January 2020

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Approved Judgment

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

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JOHN KIMBELL QC SITTING AS A DEPUTY HIGH COURT JUDGE

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John Kimbell QC sitting as a Deputy High Court Judge:

Introduction

1. The Claimant in these proceedings ('**CHL**') is a property development company. Two of the properties it developed are Warne Court, 8a Village Road, Enfield, Middlesex EN1 2FD ('**Warne Court**') and 26-30 Cubitt Street, London WC1X OLS (**'Cubitt Street'**). The director and sole shareholder of CHL is Mr Marc Rowan ('**Mr Rowan'**)

2. The Defendants are Fixed Charge Receivers ('**the Receivers**'). They are both chartered surveyors and were both at all material times partners at Allsop LLP, which is a well-known property consultancy firm. The First Defendant is now a consultant.

3. CHL obtained finance from the Bank of Scotland ('**the Bank'**) to develop Warne Court and Cubitt Street. CHL gave the Bank a legal mortgage over each property in standard terms as security for the loan facility. The Receivers were appointed by the Bank on 8 March 2012 under the mortgages when CHL defaulted on its repayment obligations to the Bank. By this time the sum due to the Bank from CHL was £4,397,000.

4. The Receivers sold Warne Court in July 2012 for £3,250,000 and sold four of the flats in the Cubitt Street development in 2013. The flats were initially offered for private sale through an estate agent but ultimately sold by public auction. Having discharged CHL's secured debt to the Bank and returned a surplus to CHL, the Receivership ended on 26 July 2013.

5. CHL claims that the Receivers acted in breach of their duties relating to the sale and management of both properties in a number of respects and that the breaches have caused CHL significant losses. The claims in respect of Warne Court were disposed of at an earlier stage in the proceedings by two judgments of Master Thornett dated 19 September 2017 and 13 April 2018 following an application for summary judgement by the Receivers. The sum claimed in these proceedings after those judgments is approximately £1 million.

Representation

6. CHL was represented by Mr Bennion-Pedley of counsel. The Defendant was represented by Mr Collett of counsel.

Factual Background

7. Cubitt Street lies between King's Cross Road to the east and Gray's Inn Road to the west. King's Cross station is within walking distance to the north and Chancery Lane Tube station is less than one mile to the south. For planning purposes, the site lies within the London Borough of Camden ('**the Council**').

8. CHL acquired the Cubitt Street site in 2004 for £2.4 million. It had previously been a factory. CHL obtained planning permission to construct a new four-storey building with a basement. The planning permission was for office/light industrial, so-called 'B1' use, in the basement and on the ground floor with eight residential units on the upper floors. The ground floor and basement were, however, subsequently converted to residential use. Cubitt Street in its final form therefore contained 14 residential flats. Flats 1 – 3 in

the basement, flats 4 – 6 on the ground floor, flats 7 – 10 on the first floor and flats 11 – 14 spread over the second and third floors.

9. Flats 7 – 14 were sold by CHL with 125-year leases in 2007 - 2008.

10. Flats 1 – 6 were let by CHL on assured shorthold tenancies.

11. CHL retained the freehold for the whole building.

12. Prior to the appointment of the Receivers, Cubitt Street had been managed by Ashley's High Maintenance ('**AHM**'), a company owned and controlled by Mr Rowan's daughter, Ashley. Following their appointment, it was the Receivers who managed the building. They appointed Allsop Residential Investment Management Ltd ('**ARIM**'), which is a subsidiary of Allsop LLP. The management of the building reverted to AHM at the end of the Receivership in July 2013.

13. CHL carried out work on flats 3 and 5, in particular by renewing the solid wood floor in both flats. They were also then sold in 2014 on 125 year leases.

The planning issue

14. The conversion of the basement and ground floor to residential use was the subject of extensive correspondence between CHL and the Council between 2007 and 2009. In a letter dated 16 April 2007, the Council indicated that it was minded to approve a change of use application made by CHL. The Council's formal approval for the change of use was, however, conditional on CHL paying approximately £16,000 in the form of a highways contribution.

15. CHL felt that it was unfair of the Council to demand payment of this sum because CHL had asked the Council's Highways Department for advice at an earlier stage and believed they had received permission from the Council to do the work. CHL had then carried out the work.

16. The Council did not accept CHL's argument. On 11 June 2007 the Council explained to CHL that the highways contribution condition remained. The Council wrote:

> "Unfortunately, regardless of your discussions with the Highways Department for the work you carried out, we still require you to pay the contribution".

17. CHL subsequently engaged a solicitor to argue its case but the Council refused to back down. A lengthy correspondence ensued but without any resolution.

18. In May 2009 the Council indicated that it was intending to close its file on the change of use application. A meeting proposed by CHL to discuss the issue did not take place. The position was therefore that by the time the Receivers were appointed, three years later in 2012, there was no planning permission in place for flats 1 – 6.

19. At the time the Receivers were appointed in March 2012 assured shorthold tenancies for flats 2 and 4 – 6 were due to expire by September 2012 (as shown in the table below paragraph 21).

The handling of the receivership

20. The day to day handling of the receivership was managed by Mark Randall. He was provided with a valuation report by the Bank from June 2010. It referred to flood damage in the basement in 2010 and a query about whether there was planning consent for the flats in the basement and on the ground floor.

21. Mr Randall consulted Richard Adamson from the Allsop auction team. On 22 March 2012, Mr Adamson sent Mr Randall a table of what sort of sums might be realised for Flats 1 – 6 if they were sold by a local estate agent with vacant possession. The information provided by Mr Adamson is summarised in the table below:

Flat	**Bedrooms**	**Floor**	**Size (sqft)**	**VP value**	**£/sqf value**	**End of AST**
1	3	LG	1054	£700,000	664	Jan/ 13
2	3	LG	962	£645,000	670	Sep/ 12
3	2	LG	797	£525,000	659	Jan/ 14
4	3	UG	995	£725,000	729	Aug/ 12
5	3	UG	965	£700,000	725	Sep/ 12
6	3	UG	936	£675,000	721	Jul/ 12
Total			5709	£3,970,000		

22. The initial strategy adopted by the Receivers was to sell Warne Court and then as many of the Cubitt Street properties as they needed to clear the £4.4 million debt. The Bank agreed this strategy. The Receivers expected to realise about £3.3 million by the sale of Warne Court. Mr Randall initially recommended giving notice to the tenants in flats 4, 5 and 6 that their flats might be marketed for sale from May 2012.

23. Mr Rowan was informed of the strategy by Mr Randall by an email sent on 27 April 2012.

24. On 31 May 2012, Mr Randall informed the Bank that best bids were being sought for Warne Court, and three flats from Cubitt Street were going to be entered into the next residential auction.

25. On 6 June 2012, Mr Randall asked the Allsop auction team to prepare for the auction of flats 4, 5 and 6 in an auction due to take place on 18 July. However, two weeks later a decision was made to auction flats 2 and 3 instead. In the meantime, flat 1 which had fallen vacant was being marketed with Winkworth estate agency.

26. Mr Randall wrote to Mr Rowan to inform him of the Receivers' plans on 3 July 2012. The recommended guide price for flat 2 was £450,000 - £500,000 and £400,000 - £450,000 for flat 3.

27. The successful bid for flat 2 was £535,000 and for flat 3 was £435,000. The purchaser for both flats was said to be a company called PPXT Investments Ltd. The bidder identified himself as Harry Barclay. The sales did not complete because the deposit cheques were not honoured. Neither the people behind PPXT nor Harry Barclay could be traced. The Receivers rescinded the sale contracts.

28. Flat 6 was then put on the market on 27 July with Winkworth with an asking price of £675,000. At around the same time, the Receivers paid for some work to be carried out at flat 1 on the advice of Winkworth, who said that it would improve its marketability.

The work was to make good a leak into the main bedroom and clear a patio. Some further redecoration work on the same flat was carried out in August 2012.

29. Flat 4 then became vacant and the Receivers instructed Winkworth to market it at the end of August 2012. The asking price was £690,000.

The situation in September 2012

30. On 6 September 2012, Mr Randall reported to the Bank about the situation in relation to Cubitt Street as follows:

Flat No.	**Current Position**
1	Under offer at £699,995
2	Expected to be vacated imminently and then will be placed on market with Winkworth
3	Still let under original AST
4	Now vacant. Winkworth instructed to market
5	Still let under original AST
6	Being marketed with Winkworth – asking price £675,000

31. The Bank informed Mr Randall that the outstanding debt was now £1.45 million with interest continuing to accrue. The Bank's view was that it would be necessary to sell a further three of the Cubitt Street flats, assuming the sale of flat 1 completed.

32. On 30 October 2012, the purchaser for flat 1 pulled out and the following month Winkworth advised that the asking prices of flats 1, 4 and 6 be reduced.

33. In January 2013 an offer for flat 2 in the sum of £625,000 was accepted. However, this sale also fell through because a damp and timber survey report obtained by the purchaser had highlighted potential damp and construction problems with the building.

34. On 5 March 2013, the Bank notified the Receivers that the remaining debt was £1,410,684.

35. On 8 March 2013 Mr Randall recommended putting three flats into auction with sitting tenants. His reasoning was as follows:

> "As we have been marketing the vacant units by private treaty for over six months now with only two abortive sales and little current interest, we feel that the auction option is the best way to ensure capital receipts to write down the outstanding debt in the short term."

36. In the meantime, the Receivers continued to seek to sell flats 1, 2 and 5 by private treaty through Winkworth.

37. At an auction held on 4 April 2013 successful bids were received for flat 4 (£500,000) and flat 6 (£496,000).

The 1 May 2013 update

38. On 1 May 2013 Mr Randall updated the Bank on the progress of the receivership. His update contained the following observations:

> "The problem with flats 1, 2 and 4 seems to be the lack of formal planning consent...
>
> The planning situation allied with the possible damp problem and rumoured contamination effectively makes private treaty sales all but impossible to achieve. To seek to remedy these issues, the extent of which is as yet unknown, carries a high degree of risk in terms of potential capital expenditure and lengthy delay in an appointment that has already been in place for over a year.
>
> In the circumstances, the Receivers are of the opinion that the flats should be offered on the basis of unconditional offers and the only way to achieve this is by sale by auction. We are therefore intending to include flats 1 & 2 (and possibly 3 if it appears that the sale of flat 4 will not complete) in the residential sale to take place on 30 May."

39. The sale of flat 6 completed on 7 May 2013. The sale of flat 4 completed on 17 May 2013.

40. The completion of the sales of flats 4 and 6 meant that the total debt to be cleared (once the Receivers' own costs and rental receipts were taken account of) was just over £485,000.

41. Flats 1 and 2 were accordingly entered into the auction scheduled for 30 May 2013. They had a guide price of £400,000 – £450,000. The reserve for both flats was £475,000.

42. In fact, Flat 1 sold for £589,000 and flat 2 for £595,000. Both sales completed and a surplus of £701,652 was returned to the Claimant at the end of the receivership. The fact that this surplus is significantly higher than the sale price for flat 2, became the foundation of CHL's complaint that the sale of flat 2 was unnecessary.

The witnesses evidence

43. I heard oral factual evidence from Mr Rowan for CHL and from Mr Gershinson, Mr Adamson, Mrs Liddell and Mr Randall for the Receivers.

44. I heard expert evidence from two valuers: Mr Rusholme for CHL and Mr Costa for the Receivers.

Mr Rowan

45. Mr Rowan was clearly still very angry about how he had been treated by the Bank and by his perception of how the receivership had been conducted. His witness statement dated 20 September 2019 contained a large number of paragraphs with complaints about the Bank, the Receivers, the Receivers' disclosure and even earlier hearings in the litigation. It also contained a large amount of commentary on documents and

argument. He was cross-examined at length about why planning permission had not been obtained for the conversion of the lower and ground floors from commercial to residential use and the building quality of Cubitt Street. Whilst he was at times somewhat tetchy and defensive in cross-examination, he answered the questions put to him fully and clearly had a very good memory for the construction details of Cubitt Street.

Mr Gershinson

46. Mr Gershinson's evidence was measured and careful. He was taken in great detail through the receivership. He clearly struggled to remember some of the details, which is no surprise given that the events in question are now more than seven years in the past. The Receivers' decision-making process was to a great extent documented in both internal emails and reports to the Bank. It was clear that he was the decision maker, who then left the implementation of strategy agreed with the Bank to Mr Randall. His evidence was helpful and straightforward.

Mr Randall and Mr Adamson

47. Mr Randall and Mr Adamson were both straightforward witnesses. Both gave internal advice to Mr Gershinson, which was recorded fully in contemporaneous emails and other documents. They gave balanced and measured evidence that was consistent with their witness statements.

Mrs Liddell

48. Although Mrs Liddell was one of the named Receivers, she made clear that she played no active part in the receivership. All decisions relating to the receivership were taken by Mr Gershinson.

The expert valuers

49. Both experts had prepared helpful reports that set out their views in a balanced and appropriate way. They had approached the valuation issues from slightly different perspectives. Both answered questions put in cross-examination in a way that made it clear they were keen to assist the court.

The List of Issues

50. The parties helpfully agreed a list of issues. I will address the issues in the order in which they were presented to the Court.

Issue 1: What duties did the Receivers owe to the Claimant as Joint Fixed Charge Receivers appointed by the Bank?

51. In his opening submissions, Mr Bennion-Pedley submitted that the Receivers owed CHL the following three duties:

    i) A duty to act in good faith and for proper purposes, namely for the purpose of preserving, exploiting and realising the assets comprised in the security.

ii) If selling a property, a duty to take reasonable care to obtain the best price reasonably obtainable.

iii) A secondary duty (which is to say a duty that is subordinate to a receiver's primary duty to manage the security for the benefit of the mortgagee) to exercise care to avoid preventable loss.

52. Mr Bennion-Pedley submitted that it was not necessary for a claimant to prove a breach of good faith in relation to either of his second or third duties. He referred to them as being discrete duties, by which he meant that they were independent of the primary duty of good faith.

53. Finally he submitted that it was a necessary corollary of his analysis of the duties of receivers that a receiver who sells property in circumstances in which no sale is in fact required to discharge the borrowing acts either: (i) outwith his powers (ii) in breach of his duty to act in good faith and for proper purposes and/or (iii) in breach of his duty to exercise care to avoid causing the mortgagor preventable loss.

54. Mr Collett submitted that a receiver's primary duty is to act in good faith and for a proper purpose. He submitted that any other duties owed to the debtor/mortgagor are:

i) secondary; and

ii) equitable only and in the nature of a good faith duty, requiring something akin to bad faith, not mere negligence, to show a breach of duty.

55. There was thus no dispute between the parties that the Receivers owed a duty to act in good faith and for proper purposes.

56. The key issue of law between the parties was whether either of the other two duties relied upon by the Claimant are also subject to the requirement to prove an absence of good faith or whether the duties are discrete.

57. On the key issue of law, I prefer the submissions of Mr Bennion-Pedley. They are, in my judgment, well founded in both case law and textbook commentary.

58. In para 13-006 of *Lightman & Moss, On the Law of Administrators and Receivers of Companies* (6th ed 2017) ('**Lightman & Moss'**), the editors discuss the duty of receivers and mortgagees to exercise their powers in good faith and for proper purposes. In para 13-016, the they go on to discuss the following question under the heading "Other duties":

> "Whether and (if so) in what circumstances the general duty of the mortgagee or receiver to act in good faith is supplemented by other duties, such as a duty to exercise powers with reasonable care or a duty to act fairly"

59. The following general principles are then stated:

i) A receiver can give priority to the interests of his appointer in deciding whether, and if so when and how, he should exercise the powers invested in him.

ii) Unlike a mortgagee, a receiver cannot simply remain passive: he has a duty to preserve and protect the charged assets. The receiver's power to manage is independent of the power to sell, and provided that the mortgagee is not prejudiced, the receiver must be active in the preservation of the charged property over which he has been appointed.

iii) If a receiver (or mortgagee) decides to exercise a power of sale, he will generally owe a duty of care to the mortgagor in respect of the manner in which he does so. This duty is usually expressed as an obligation to obtain the best price reasonably obtainable at the time of the sale.

60. In the detailed analysis of the case law that follows these general propositions, there is no hint of support for the proposition advanced by Mr Collett that the equitable duties of care in relation to management and sale summarised in paragraph 51 (ii)) and (iii) above require a claimant to show something akin to bad faith, not mere negligence, in order to establish breach.

61. In Silven Properties Limited v Royal Bank of Scotland [2004] 1 WLR 997, the Court of Appeal considered the nature and scope of the duties of mortgagees and receivers separately. The following appears at paragraphs [21] – [23] in the judgment of Lightman J (with which Tuckey and Aldous LJJ agreed):

> "[21] We turn to the question of the duties regarding mortgaged properties of receivers and in particular of receivers who under the term of the mortgage under which they are appointed are designated as agents of the mortgagor.
>
> [22] There is binding authority for the proposition that (again in default of agreement to the contrary) in the exercise of the power of sale receivers owe the same equitable duty to the mortgagor and others interested in the equity of redemption as is owed by the mortgagee: they are both obliged to take care to obtain the best price reasonably obtainable: see, eg, the *Cuckmere case [1971] Ch 949*, *Downsview Nominees Ltd v First City Corpn [1993] AC 295*, *Yorkshire Bank plc v Hall [1999] 1 WLR 1713*, 1728e–f, *Medforth v Blake [2000] Ch 86*, 98h-99a and *Raja v Austin Gray [2003] 1 EGLR 91*, 96, para 55…
>
> [23] In a number of respects it is clear that a receiver is in a very different position from a mortgagee. Whilst a mortgagee has no duty at any time to exercise his powers to enforce his security, a receiver has no right to remain passive if that course would be damaging to the interests of the mortgagor or mortgagee. In the absence of a provision to the contrary in the mortgage or his appointment, the receiver must be active in the protection and preservation of the charged property over which he is appointed: see *Lightman & Moss, The Law of Receivers and Administrators of Companies*, 3rd ed (2000), para 7-030. Thus if the mortgaged property is let, the receiver is duty-bound to inspect the lease and, if the lease contains an upwards-only rent review, to trigger that

> rent review in due time: see *Knight v Lawrence [1991] 1 EGLR 143*…

62. The language in which the duties of receivers are described by the Court of Appeal in paragraphs [22] and [23] is consistent with Mr Bennion-Pedley's submissions and inconsistent with Mr Collett's.

63. Mr Collett's submission that all duties owed by receivers are in the nature of good faith duties requiring more than proof of mere negligence amounts to a submission that unless a receiver is proved to have acted in bad faith he is safe. That very submission was made (in relation to mortgagees) and rejected by Salmon LJ in Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. [1971] 1 Ch 949, 966-969 (with emphasis added):

> "Mr. Vinelott contends that the mortgagee's sole obligation to the mortgagor in relation to a sale is to act in good faith; there is no duty of care, and accordingly no question of negligence by the mortgagee in the conduct of the sale can arise. If this contention is correct it follows that, even on the facts found by the judge, the defendants should have succeeded. It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him.
>
> There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: compare, for example, *Kennedy v de Trafford* [1896] 1 Ch 762; [1897] AC 180 with *Tomlin v Luce* (1889) 43 ChD 191, 194.
>
> The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law…
>
> …I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."

64. In Ahmad v Bank of Scotland [2016] EWCA Civ 602, the Court of Appeal adopted the following summary of the legal principles agreed by counsel at [38] (with emphasis added):

> i) "An administrative receiver or fixed charge receiver (a "receiver") is the agent of the company (the mortgagor or chargor) not the agent of the bank (the mortgagee or chargee);

ii) There is no contractual relationship or duty owed in tort by the receiver to the mortgagor: the relationship and duties owed by the receiver are equitable only. The equitable duty is owed to the mortgagee as well as the mortgagor;

iii) Whilst the receiver does owe an equitable duty to the mortgagor, his primary duty is owed to the mortgagee. His primary duty in exercising his powers is to try and bring about a situation in which the secured debt is repaid. The receiver is not managing the mortgagor's property for the benefit of the mortgagor, but the security, the property of the mortgagee, for the benefit of the mortgagee, and his powers of management are really ancillary to that duty. Since his primary duty is to deal with and realise the security in the best interests of the mortgagee (and in particular to try to bring about a situation in which the secured debt can be and is repaid), the receiver has only a secondary duty to the mortgagor to exercise care to avoid preventable loss. As such, he will only be required to protect the interests of the company or mortgagor where means are available, and may be given effect to, consistently with the performance of his primary duty.

iv) A receiver is free to sell an asset or property in the condition it is in and as he finds it; he is not under a duty or obligation to await or effect any increase in value or improvement in the property. Receivers are at all times free to exercise their right to proceed with an immediate sale.

v) If a receiver decides to exercise a power of sale, he will generally owe a duty to the mortgagor to take reasonable care to obtain the best price reasonably obtainable at the time of sale in so doing.

vi) He owes a duty in exercising his powers to do so in good faith and for a proper purpose, that is to say, for the purpose of realising the assets comprising the security and obtaining repayment of the sum secured. In this regard, breach of the duty of good faith involves something more than negligence or even gross negligence: it requires some dishonesty, or improper motive or element of bad faith to be established.

vii) An administrative receiver does not have a duty to consider a rescue of the company. Nor is he under any duty to trade on, or under any duty to conclude that trading on is not realistic before seeking to sell assets. As noted, the primary duty is owed to the mortgagee to try and bring about a situation in which the secured debt is repaid (and he is accordingly free to sell the assets as he sees fit in accordance with and in order to achieve that purpose)."

65. The underlined passages are consistent with and support Mr Bennion-Pedley's submission on the nature of the duties owed by receivers.

66. In McDonagh v Bank of Scotland and others [2019] 4 WLR 12, a case decided since the last edition of Lightman and Moss, which involved an allegation that LPA receivers sold a mortgaged property at an undervalue, Morgan J reviewed Silven and concluded (at para 143):

> "It follows from the above statements as to the general duties of a receiver that a receiver owes a duty in equity to the bank, and

> also a duty to the borrower, to take care to obtain the best price reasonably obtainable for the security.*"*

67. This corresponds exactly with the section from Lightman & Moss which I quoted above and principle (v) from para 38 of Ahmad v Bank of Scotland [2016] EWCA Civ 602.

68. I therefore reject Mr Collett's attempt to turn the legal clock back to its pre-Cuckmere state of uncertainty and to superimpose on either of the two 'other duties' relied upon by Mr Bennion-Pedley the qualification that they will only be breached if bad faith is proved. I accept Mr Bennion-Pedley's submission that the second and third duties he relies on are 'discrete'. They are 'other' in the sense they are separate from, and independent of, a receiver's duty to act in good faith and for a proper purpose.

69. I do, however, reject Mr Bennion-Pedley's submission that it followed from his analysis there is a duty on receivers only to sell so much of the charged property as is required to repay the mortgagee. He did not cite any authority to support a free-standing duty of this type. Such a free-standing duty would, in my judgment, conflict with the general principle that when deciding whether and, if so, how to exercise powers vested in him a receiver is entitled (and indeed obliged) to give priority to the interests of the mortgagee in securing payment.

70. It follows that, if CHL is to succeed in proving a breach of duty on the part of the Receivers for their decision to put two flats into the 30 May 2013 auction instead of one, CHL will have to show that this decision was either a breach of the primary duty of receivers to act in good faith and for a proper purpose or that the decision was a breach of one of the other duties identified in paragraph 51 above.

71. Although I have rejected his submission as to the scope of the good faith requirement, a number of Mr Collett's other submissions of law were, in my judgment, well founded.

72. Firstly, I accept that in determining whether the duty to obtain the best price reasonably obtainable the court should apply what is usually referred to as the Bolam test. Lightman & Moss at para 13.041 says this:

> "A mortgagee or receiver is only to be adjudged negligent if he has acted as no mortgagee or receiver of ordinary competence acting with ordinary care and (where appropriate) on competent advice would act. In deciding whether he has fallen short of his duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line. Thus, if two or more alternative courses of action are available, there is no negligence if the course taken might have commended itself to a competent mortgagee or receiver, even though subsequent events show that it was in fact the "wrong" course. However, the receiver or mortgagee would not escape liability simply by showing that some other receivers or mortgagees would have acted as he has. Rather, the receiver or mortgagee must have acted consistently with a practice that is respectable, responsible and reasonable, and which has a logical basis."

73. This statement (as it appeared in the 4th edition) was approved as "an accurate and succinct statement of the law" by Kenneth Parker J in Glatt v Sinclair [2011] Lloyd's Rep FC 140 and is consistent with the approach of Patten J in the earlier case of Bell v Long [2008] EWHC 1273 (Ch) esp at [14] and [57].

74. Secondly, I accept that receivers enjoy a degree of latitude not only as to the timing of a sale but also as to the method of sale to be employed. In Bell v Long, for example, the defendant receivers were held not to have breached their duty when they elected to sell four properties as an investment portfolio, having previously marketed each property for sale on an individual basis.

75. Thirdly, I accept that a receiver is entitled to sell the property in the condition in which it is in and in particular without awaiting or effecting any increase in value or improvement in the property.

76. This third point was settled in Silven. The issue in that case was whether the wider management duties imposed on a receiver may require a receiver to postpone a sale until after steps have been taken such as proceeding with an application for planning permission and/or the grant of a lease calculated to increase the price obtainable in a sum greater than the cost of taking those steps (plus the sum representing accrued interest over the period whilst those steps are being taken).

77. The answer given by the Court of Appeal was 'No'. The reason given (with emphasis added) was that:

> "[28] … The mortgage confers upon the mortgagee a direct and indirect means of securing a sale in order to achieve repayment of his secured debt. The mortgagee can sell as mortgagee and the mortgagee can appoint a receiver who likewise can sell in the name of the mortgagor. Having regard to the fact that the receiver's primary duty is to bring about a situation where the secured debt is repaid, as a matter of principle the receiver must be entitled (like the mortgagee) to sell the property in the condition in which it is in the same way as the mortgagee can and in particular without awaiting or effecting any increase in value or improvement in the property."

Issue 2: Did the Receivers, in all the circumstances, owe a duty to obtain an indemnity policy in respect of the lack of formal consent to the change of use from commercial to residential use of the lower and ground floors at Cubitt Street?

78. In support of his submission that the Receivers owed a duty to obtain an indemnity policy, Mr Bennion-Pedley relied on the following evidence:

    i) The Receivers identified that there was no formal consent for the conversion of the lowest two floors from business to residential very early on in the strategy report for Cubitt Street dated 30 March 2012.

    ii) The strategy report then stated (he asserts correctly) that the local authority could no longer take any enforcement action because the basement and ground floors had been in residential use for more than four years.

iii) The report suggested that investment buyers would likely take a robust view but that, if it became evident that the situation was adversely affecting the sale, the position could be regularised i.e. by making an applying for a certificate of lawful use.

iv) By early 2013, it was obvious to the Receivers that the planning issue was in fact affecting the marketing of the property because the view was taken that the lack of consent would put off the majority of domestic mortgage lenders.

v) The Receivers gave no thought to acquiring an indemnity policy so as to give comfort to buyers and their mortgagees, and the question is whether the Receivers were duty bound to do so.

79. He submitted further that on a very broad-brush basis, the valuation both experts attributed to the lack of formal planning consent was a 5 – 10% reduction against market value that would otherwise have been achieved.

80. Based on this evidential foundation, Mr Bennion-Pedley then submitted that the Receivers could and should have purchased an indemnity policy to give buyers security in relation to the planning issue and avoid this predictable 5- 10% loss of realisable value. He says that such an indemnity policy could have been obtained easily in a matter of days (if not hours) and that obtaining it would not have would have conflicted with the Receivers' duty to the Bank.

81. I reject Mr Bennion-Pedley's submission. The Court of Appeal expressed itself very clearly in Silven. The ratio of the case is set out in [28], namely:

> "Having regard to the fact that the receiver's primary duty is to bring about a situation where the secured debt is repaid, as a matter of principle *the receiver must be entitled (like the mortgagee) to sell the property in the condition in which it is in the same way as the mortgagee can and in particular without awaiting or effecting any increase in value or improvement in the property."*

82. The Receivers in that case had investigated ways in which the property might be improved and/or made more marketable and even took steps to do so. The Court of Appeal said this in relation to those investigations/steps (with emphasis added):

> "[29] The Receivers were at all times free (as was the Bank) to halt those steps and exercise their right to proceed with an immediate sale of the mortgage properties as they were."

83. In my judgment the decision in Silven is the complete answer to CHL's contention that the Receivers ought to have gone into the market to seek indemnity policies in an attempt to make the flats more marketable. It is another variation on the various attempts in cases at first instance to impose on receivers the duty to make the property more attractive, all of which have all been rejected: see e.g. Meftah v Lloyds TSB Bank [2001] 2 All ER (Comm) 741 744, 766, per Lawrence Collins J (receivers are not obliged before sale to spend money on repairs); Garland v Ralph Pay & Ransom [1984] 2 EGLR 147, 151, per Nicholls J (no duty to make the property more attractive before

marketing it). In these proceedings, Master Thornett gave summary judgment against CHL on their case that the Receivers ought to have applied for a certificate of lawful use.

84. Mr Collettt is right in my judgment to say that CHL's indemnity policy case is a recast of the argument already struck out by Master Thornett, namely that the Receivers were in breach of their duties by failing to apply for a certificate of lawful use in respect of flats 1-6. An application for a certificate of lawful use and an indemnity policy against enforcement for unlawful use are both means to make the flats more attractive and more marketable by giving a purchaser a greater degree of security on the planning issue. Both are steps that a receiver might take to make a property with a planning issue easier to sell or more marketable, but neither is a step that a receiver is duty bound to take.

Issue 3: Did the Receivers discharge their duties of maintenance during the receivership?

85. The allegations made by CHL fall under three discrete heads. The first is that the Receivers failed to diagnose and rectify a damp problem in flat 5. The second is a very similar allegation in relation to flat 3. The third concerns an alleged failure to respond appropriately to a water leak in flat 11.

Flat 5

86. The pleaded allegation in relation to this flat is that ARIM failed to deal properly with a complaint about a raised floor in this flat made in May 2012 – see paragraphs 18 and 19 of the Amended Particulars of Claim. It is alleged that ARIM's sub-contractors failed to correctly diagnose the cause. They ought, it is said, to have concluded that the damage was caused by "a leak from a water pipe" and remedied that leak. It is alleged that the tenant vacated the flat and it remained empty "throughout the receivership".

87. CHL claims the cost of work carried out in March 2014 by ECR Contracts which was said to be necessary to remedy damp in both flat 3 and flat 5. The sum claimed is £48,313. CHL additionally claims lost rent of £700 a week for a period of 31 weeks and 6 days from 26 July 2013 until 14 February 2014 amounting to £22,300.

88. In his witness statement Mr Rowan asserted that had the Receivers carried out a proper inspection of Flat 5 they would have concluded that the lifting in the lounge area must have been "the result of an outside influence". He asserted further that the Receivers "did nothing to remedy the damage to flat 5".

89. However, a rather different picture emerged from the contemporaneous documentary evidence. Based on that evidence, I make the following findings of fact in relation to flat 5:

    i) The Receivers were first notified of a problem with the floor in Flat 5 in May 2012.

    ii) A specialist company (Veritas) was sent to inspect. They concluded that the raised floor was due to an installation problem.

    iii) The tenant complained again in October 2012 and Veritas was again asked to investigate.

iv) On 23 October 2012 Veritas reported that without intrusive investigation works it was not clear what the cause of the problem was.

v) The Receivers instructed a different specialist contractor, Humphrey & Gray, to attend. They reported that there was visible swelling of the solid oak floor in the kitchen, hallway and living room. To assess whether there were any leaks that may have been causing the warping it would have been necessary to lift 45 square metres of floor and the architrave. The Receivers did not commission this work to be done.

vi) The tenant in flat 5 left on 3 December 2012. ARIM reported the flat was in "excellent condition", there were no leaks and the property had been drained down.

vii) On 20 December 2012 Winkworth reported that flat 5 was "unrentable in its current condition" because of a leak in the en suite bathroom that had caused the wooden floor in the hall, living room and kitchen to expand and buckle.

viii) Humphrey & Gray were engaged to repair the leak and that work was completed in January 2013 at a cost of £685.

ix) No further work was carried out.

90. Following the end of the Receivership CHL commissioned a report by a specialist company, BM Trada. They reported on 9 September 2013. Their findings were as follows:

i) There was warping of the floor due to "wetting from an as yet unverified source".

ii) The most likely source for the warping in the living area and hallway was a small and slow leak from a water pipe in the adjacent bathroom.

iii) The ridging in the kitchen and to the left of the doorway was due to wetting from as yet unverified sources and further investigation was required.

iv) There was no construction defect.

91. The report was therefore in substance as inconclusive as the Humphry & Gray report commissioned by the Receivers. BM Trada's report concluded by expressing the opinion that "the defects arose and then remained unattended to because there was a lack of adequate management and maintenance of the building".

92. Although the BM Trada report was drafted and signed in the form of a CPR Part 35 Expert Report, CHL did not seek permission to rely on it or on any expert evidence in support of its pleaded case.

93. In my judgment, the evidence adduced by CHL came nowhere near proving a breach of duty on the part of the Receivers for the following reasons:

i) The Receivers responded reasonably to reports of a warped floor in flat 5.

ii) The Receivers responded reasonably to and dealt with the only report of a specific leak at the property (20 December 2012).

iii) The cause or causes of the damp and the date on which it first appeared remained unverified even after the end of the receivership.

iv) CHL chose to call no expert evidence to prove that the allegation of negligent mismanagement or misdiagnosis had caused any damage that would not have occurred in any event.

v) There was no evidence that had the Receivers acted differently the replacement of the floor (ultimately carried out for CHL by ECR) would not have been necessary.

vi) There was no evidence adduced as to what was found when the floor was finally replaced.

94. In my judgment, it was not a breach of their duties to fail to carry out extensive and intrusive investigations into the cause of the warping in flat 5. Still less were they required to carry out the expensive process of replacing the floor. It was reasonable for the Receivers to concentrate on selling the flat as it was or to concentrate on selling the other less problematic flats.

Flat 3

95. The pleaded allegation in relation to this flat is that a complaint about a raised floor in flat 3 was made in May 2012 and not responded to until January 2013 – see paragraphs 21 – 23 of the Amended Particulars of Claim. It is accepted that the contractors correctly diagnosed the problem as having been caused by a leaking overflow pipe underneath a bath but it is alleged that the remedial works were "defective" and the boards rose up again and had to be replaced after the end of the receivership.

96. In relation to Flat 3 the lost rent is said to be £550 per week for 18 weeks and five days, amounting to £10,293.

97. Mr Rowan's oral evidence in general terms supported CHL's pleaded case. He added that dehumidifiers were deployed for seven days, which he considered inadequate. The floor was reported to be 'ridged up' again in May 2013. His witness statement also contained an allegation that, as a result of a failure to clear leaves, the damp proof course was breached.

98. As with Flat 5, the picture that emerged in the contemporaneous documentation was rather different to the picture painted by Mr Rowan. Based on that evidence, I make the following findings of fact:

i) In May 2012 a leak was reported through the door to the main bedroom.

ii) On 22 May 2012 ARIM arranged for Veritas to attend on a date requested by tenant and work was completed on 6 June 2012.

iii) In October 2012 the tenant reported the flooring coming up. ARIM instructed Veritas to attend.

iv) On 23 October 2012 Veritas attended flat 3 (and flat 5). They found no obvious solution to the problem. They concluded that it was necessary to lift the floor to investigate further.

v) In January 2013 the Receivers instructed Humphrey & Gray to proceed with investigative works in flat 3.

vi) On 30 January ARIM informed the Receivers that the contractors on site dealing with flooring had found a leak in a pipe which required capping. The pipe issue was rectified and a dehumidifier deployed before the floor work was done.

vii) On 13 February 2013 the Receivers were informed that the flooring work was complete.

viii) On 28 March 2013 ARIM reported that the floor was warped again.

ix) In April and May 2013 a number of investigations were undertaken including to the boiler. The result of the investigations was summarised in an email dated 14 May 2013 sent by Humphrey & Gray to ARIM.

x) On 16 May 2013 ARIM wrote to the tenant to acknowledge that the warped floor would be repaired but stating that a concern remained that there was an underlying issue that had not yet been identified.

xi) In June 2013 contractors attended the flat but the problem remained unresolved.

xii) In an email sent on 3 July 2013 ARIM reported to the Receivers that dampness was still present in the floor and air. The recommended course was to remove the wooden flooring and subflooring to the hallway, to dry out the concrete floor, resolve any leaks, apply waterproof sealant and replace with new flooring.

xiii) Quotes for the work were obtained in July 2013 but the Receivership ended before any work was carried out.

99. This chronology of events clearly demonstrates that there was a chronic problem with damp in flat 3. The Receivers did not ignore the problem. They responded in my judgment at all times responsibly by seeking advice as to what the cause might be and how to resolve it.

100. As with flat 5, when CHL became responsible again for the flat, they commissioned BM Trada to report. In its report BM Trada noted that:

i) The moisture readings suggested that moisture from the unconnected overflow pipe was either continuing to dry out or that there was moisture finding its way into the sub-floor from another source.

ii) Exploratory work should be carried out to identify the cause of the raised floor in the bedroom and living room.

No mention is made in the report of leaves causing breach of a damp-proof course.

101. BM Trada recommended that the flooring be lifted to permit a more thorough examination of the flooring immediately after the expected departure of the tenant "before the evidence is disturbed in any way".

102. As with flat 5, the report concluded as follows: "the defects arose and then remained unattended to because there was a lack of adequate management and maintenance of the building".

103. Despite the reference to the need for further investigation, no report was put in evidence by CHL as to what was revealed when the floor was removed by ECR. This is a surprising omission. If CHL had a case it wished to run against the Receivers for causing avoidable damage to either flat 3 or 5, the removal of the floors from both flats was the perfect opportunity to gather evidence as to the cause of the damp in both flats. This was not done.

104. However, some evidence about what was found during the rectification work did emerge in other proceedings. In 2016 CHL applied to the First-Tier Tribunal Property Chamber (Residential Property), for dispensation from the obligation to consult the leaseholders before seeking to recover the cost of work carried out to flat 3. In support of that application Mr Rowan filed a witness statement. The Tribunal's account of that evidence is as follows (with emphasis added):

> "In January 2014, while the landlord's contractors, ECR, were working on flat 5, the floors in flat 3 were lifted and at this point it first became apparent that the damp proof course had failed and remedial works were required…. ECR recommended that Cemplas to do the damp proofing itself."

105. The Tribunal rejected the application to grant dispensation in respect of the damp works. The Tribunal commented on the lack of "robust evidence of the cause of the dampness". The same applies to these proceedings. What is clear, though, is that the evidence that was presented to the First Tier Tribunal was not that an improperly repaired pipe had caused damp in the flat but rather that a damp proof course had unexpectedly failed.

106. In light of the foregoing, I have no hesitation in rejecting CHL's case that any breach of duty on the part of Receivers occurred in relation to flat 3 or that they can in any way be fixed with the costs of the floor rectification work carried out by ECR.

Leak from Flat 11

107. The pleaded case in paragraph 25 of the Amended Particulars of Claim is that there was a water leak in the bathroom of flat 11, as a result of which: "water travelled vertically down the spine wall into Flat 7 immediately below, and then down to flat 4 and flat 1 and 2 all of which suffered damage". No mention is made in that paragraph of water from flat 11 leaking into flats 3 or 5.

108. In the particulars of breach, the ambit of this allegation was widened slightly. In paragraph 36(4) the following allegation appears: "They failed to take any reasonable steps to manage and/or identify the water ingress and/or damp in flats 1, 2, 5, 7 and 11, save that insurers addressed the water ingress in flats 7 and 11. The Receivers

concluded, erroneously, that damp in flats 1, 2 and/or 5 was pre-existing and/or linked to a construction defect when the Receivers ought to have concluded that it was caused by the leak in flat 11."

109. The documentary evidence revealed that there was indeed a leak from flat 11 into flat 7 in or around November 2012. That leak was investigated by loss adjusters appointed by insurers. The only suggestion of a link between this leak and the damp in flat 5 is a single speculative remark in a note by ARIM made on 20 December 2012.

110. CHL offered no expert or other evidence that the leak in flat 11 caused damage to flat 5 (or any other flat). Mr Rowan's witness evidence did not go further than offer speculation about matters which, if they were going to be pursued seriously, needed to be addressed by expert evidence.

111. In paragraph 122 of his witness statement he said this (with emphasis added):

> "The leak at flat 11 was such that flat 7 had to be reduced back to its structural core and therefore it follows that water may have travelled down through the joints in the concrete structure and/or fire breaks within the super structure of the building".

His witness statement thus contained nothing more than speculation about a possible connection between the leak in flat 11 and flats 1 and 2.

112. The BM Trada report into flat 5 made no reference to the leak from flat 11 as a potential source of damage, let alone suggesting that it was the probable source.

113. In my judgment CHL therefore failed to begin to satisfy the burden of proof that the leak in flat 11 actually caused any damage beyond flat 7.

114. It also follows that the allegation that the Receivers ought to have pursued an insurance claim in respect of flats 1, 2 and 5 arising from the leak from flat 11 must also be dismissed.

115. Insofar as there was a more general complaint that the Receivers failed to pursue a claim under buildings insurance in respect of water ingress or damp in flats 1, 2, 5 and 3 (as appears to be pleaded in paragraph 36(7) of the Amended Particulars of Claim), I dismiss that too. This claim was never properly explained. At times it appeared that Mr Rowan's complaint was that inadequate buildings insurance had been taken out by the Receivers and at other times that claims that ought to have been made under it were not made. In relation to the former, it remained completely unclear what insurance it was said that the Receivers ought to have obtained and didn't, or why it would be a breach of their obligations to fail to obtain it. In relation to the alternative way of putting the case, it was for CHL to prove on the balance of probabilities that there was a buildings insurance claim that was not pursued when it could and ought to have been. In light of my findings in relation to flat 3, 5 and 11, CHL did not persuade me that there ever was such a claim.

Issue 4: Were flats 1, 2, 4 and 6 (or any of them) sold at an undervalue as a result of a breach of duty by the Receivers?

116. In addressing this issue in his closing submissions, Mr Bennion-Pedley started with the expert valuation evidence. He submitted that "both experts agree that the flats realised sums significantly less than they would have done if they had been sold free of the planning and disrepair issues". There are a number of problems with that submission. Firstly, I have already held that the Receivers were not in breach of their duty in relation to maintenance or the planning issue. It follows therefore that, even if the flats could have been sold for a higher price in a better condition and with more certainty in relation to the planning issue, that does not give rise to a claim for sale at an undervalue.

117. The Claimant's approach to the allegation of sale at an undervalue is that it starts in the wrong place. Mr Bennion-Pedley seeks to rely on Mr Rusholme's evidence that, based on an analysis of sales of comparable properties by estate agents, had the four flats been sold with vacant possession, by private treaty, with all repair and planning issues dealt with, the flats would have sold for £516,000 more than they did.

118. Mr Rusholme's counterfactual evidence is only relevant if CHL can establish first that the Receivers acted in breach of their duty by selling the flats or any of them without vacant possession or without resolving the planning or repair issues or by auction rather than private treaty. That this is the correct approach has been clear since the Court of Appeal decision in Roger Michael v Douglas Henry Miller [2004] EWCA Civ 282 at [141]:

> "[141] In the instant case the judge took the, to my mind, somewhat unsatisfactory course of deciding first what was the market value of the Estate at the relevant time (concluding that it was £1.75M) and then asking himself whether the respondents, through Mr Hextall, were negligent in achieving a price substantially less than that. The judge's approach might perhaps be appropriate in a case where the mortgagee accepts the first offer that he receives, without the property having been exposed to the market at all. In such a case, the likelihood is that the only evidence of 'market value' will be expert valuation evidence. But where, as in the instant case, the property has been exposed to the market and a number of genuine offers have been received, the more logical approach (to my mind) is to start by considering the steps which the mortgagee took to sell the property and then to consider whether, in all the circumstances, the mortgagee acted reasonably in accepting the purchaser's offer and contracting to sell the property at that price."

Mode of disposal and the "unnecessary" sale

119. I have already dealt with the case based on an alleged failure to deal with the lack of planning consent for the change of use from B1 to residential use and with the repair issues. I therefore now turn to deal with the various complaints which were made about the way the Receivers disposed of the flats 1,2,4 and 6.

120. In my judgment it is plain that the Receivers in this case attempted for six months to dispose of the flats by private sale via Winkworth with vacant possession. They reasonably pursued a twin-track approach of putting the flats into auction and as well as marketing them for private sale, but experienced problems with both approaches.

The reports of 8 March 2013 and 1 May 2013 sent to the Bank by Mr Randall in my judgment summed up the position the Receivers found themselves in fairly. It was not unreasonable for the Receivers to take the view by 1 May 2013 that the only way they were going to fulfil their primary duty to pay off the debt was to put two properties into auction. The Bank agreed that strategy.

121. I remind myself of the observation of Patten J in Bell v Long [2008] EWHC 1273 (Ch) that a degree of latitude must be given to receivers not only as to the timing of any sale but also as to the method of sale to be employed and that "the court must recognise that the mortgagee or receiver is involved in an exercise of informed judgment and if he goes about the exercise of his judgment in a reasonable way, he will not be held to be in breach of duty" [17].

122. Furthermore, even if Mr Bennion-Pedley can now retrospectively identify a way in which the receivership could have been conducted differently such as repairing the floor in flat 3 or 5 before selling or by selling one less flat in May 2013, that falls a long way short of proving a breach of duty by the Receivers. As Morgan J held in McDonagh v Bank of Scotland [2018] EWHC 3262 (Ch) at [140] "an error of judgment, without more, is not negligence or a breach of the relevant duty in equity".

123. In this case, I am not persuaded that there was (even when viewed in retrospect) any error of judgment on the part of the Receivers. They found themselves trying to dispose of flats which did not have planning consent and two of which (flats 3 and 5) had issues of damp affecting their wooden floors. With four sales having fallen through (two private sales and two at auction), it seems to me to be completely unsurprising that the Receivers ended up selling flats 1, 2, 4 and 6 at auction rather than private sale and leaving CHL to investigate further and remedy the floor problems in flats 3 and 5.

124. The auctioned properties were all properly described in the auction. The preparation for the auction and the auction itself were all entirely proper. Mr Bennion-Pedley's only criticism of the conduct of the auction was the use of registered bidders. However, given the incident involving the mysterious Mr Barclay at the auction in July 2012, which caused two sales to be rescinded, this measure in my judgment was an entirely reasonable response. It is also entirely possible that the fact that there were two registered bidders on each property was one of the reasons why the prices achieved were so high.

125. I would add that, even if I had accepted the proposition that there was a duty to take reasonable care to sell only the minimum number of flats to clear the debt, in my judgment the Receivers did not act in breach of that duty or any of their other duties by putting flats 1 and 2 into auction in May 2013. It was not put to Mr Gershinson or Mrs Liddell that any of their decisions as to the way in which any of the flats were disposed was taken in bad faith or for an improper purpose, including the sale of flats 1 and 2 in the May 2013 auction.

126. Given the outstanding debt and the failed sales (at the previous auction), they were entitled to take the view, as expressed by Mr Gershinson in cross-examination, that a sale is not a sale until it completes. The primary duty of the Receivers was to pay off the mortgaged debt. As it turned out, the prices achieved for both flats at the second auction were higher than expected and both sales proceeded to completion without any problem, but that seems to me to fall very far short of proving that it was unreasonable

for the Receivers to put both flat 1 and flat 2 into auction in May 2013. That assessment has to made prospectively based on where matters stood on 1 May 2013 rather than retrospectively. I therefore reject the claim that there was a breach of duty arising from the decision to put both flats 1 and 2 in the auction and to keep them in the auction even when the first one sold for higher than expected.

The erroneously transferred storage room

127. In the basement at Cubitt Street is an enclosed rectangular space which measures approximately 3 m x 2 m. It is bordered on one side by one of the two bathrooms for flat 2, on two other sides by the hallway of flat 2 and on its final side by a shared lobby area. The only access to the enclosed space is from the shared lobby. The enclosed space has no natural light.

128. This area was referred to a being a bicycle/maintenance room in the Amended Particulars of Claim but there is no evidence it was ever used for the storage of bicycles. Mr Rowan's evidence was that, prior to the appointment of the Receivers, the room was used as a storage cupboard by his daughter's building management company and was not an area to which either the assured shorthold tenants in flats 1 -6 or the longer leasehold tenants in flats 7 – 13 had any right of access. In paragraph 63.2 of his judgment Master Thornett referred to the storage room as containing "a ground floor janitor's WC, shower and sink".

129. When flat 2 was offered in auction the maintenance room was not included in the particulars. Flat 2 was presented at auction as having a floor area of $90m^2$.

130. However, in the course of drawing up the lease plan the solicitors mistakenly included the storage room within the area to be demised and the Receivers did not spot the error. Mr Rowan's witness statement was curiously silent about the fate of the storage room. In cross-examination he said that after the receivership ended CHL carried on using the room as before, but then added: "It was only several months later that the occupants [of flat 2] claimed title to it." The evidence before Master Thornett appears to have been that the new owners of flat 2 padlocked the storage room soon after the purchase of the flat in July 2013. When Mr Rowan was asked if CHL had had to find storage elsewhere, he said he couldn't comment.

131. In the course of the summary judgment hearing before Master Thornett, it seems that the judge raised the question of whether CHL could have mitigated its loss by seeking rectification. This prompted CHL to disclose an opinion it had obtained from counsel in November 2014 on this very issue. In this opinion, it is said that the new leaseholders of flat 2 had only asked CHL to stop using the storage room in January 2014. The conclusion reached by counsel on the evidence then available was that a claim for rectification was unlikely to succeed, but he also suggested that the prospects may improve if the Receivers were to co-operate with such a claim. CHL did not take the matter further and did not approach the Receivers to ask for their co-operation.

132. Master Thornett's view was that the Claimant's case on this point was entirely arguable and that CHL has sustained some form of loss which was not de minimis. He said it needed to be pleaded more specifically.

133. Unfortunately, CHL did not do what Master Thornett suggested. The only claim made in the schedule of loss is that flat 2 was sold at an undervalue (in part) because of the transfer of the storage room.

134. The expert previously instructed by CHL, Anthony Salata of Avison Young had expressed the view that "the conveyancing error probably did not have significant financial effects".

135. The Receivers in their Defence denied that anything untoward had occurred and their witness statements said nothing about this issue. However, the Receivers' position both in opening and closing was that it was an error for which they were liable but they submitted that CHL could not prove any loss. Mr Collett further submitted that the failure to pursue a claim for rectification was a clear failure to mitigate by CHL.

136. As to the expert evidence, Mr Rusholme's opinion was that the mistake constituted a loss of amenity for the other flats and was "problematic to the value of the freehold interest itself". His view was that future sales of flats in the property would each be depressed by around £10,000 - £15,000. Mr Costa did not say anything about this issue in his first report but said in a supplementary report that he did not understand how Mr Rusholme had calculated his figures.

137. I reject Mr Rusholme's evidence as to the loss of amenity. It was based on an assumption that the tenants of the flats had access to the area and used it for bicycle storage. That assumption was not supported by any evidence. The room was only ever used as a store room for the caretaker. None of the leases granted the leaseholders any right to use the area and there the mistaken conveyance to flat 2 would not cause the value of any of the flats to be depressed.

138. In my judgment, the effect of the conveyancing error was to give the leaseholder purchasers of flat 2 a windfall benefit in the form of an external good-sized store/utility room and to deprive the freeholder of storage/maintenance room.

139. In re-examination, Mr Rusholme expressed the view that the conveyancing error had added £40,000 - £50,000 to the value of flat 2. Because that figure was only offered in re-examination, Mr Rusholme was not cross-examined on it. Mr Costa was asked to comment in examination in chief. He thought that Mr Rusholme's figure was far too high. He suggested that the storage room might add £5,000 - £10,000 to the value of Flat 2. Mr Costa stuck to his view in cross-examination. However, he offered an alternative analysis based on a 20% of the £/sq ft value. This would generate a value of between £32,000 - £36,000 but this was not put to him as a figure. Ultimately, it seemed to me that Mr Costa's evidence was that the value the storage room added to flat 2 was no more than £5,000 - £10,000.

140. In my judgment it is artificial to seek to categorise the conveyancing error as a breach of the Receivers' duty to take reasonable care to obtain best achievable price for the property. There are cases falling under that heading where receivers have failed to market a property properly because the sales particulars fail mention features which they ought to have mentioned, but here the opposite has occurred. The property has always been described as a three-bedroom flat with a floor area of approximately 90 m2. It was never marketed as having an external storage/utility room, because it was never intended that this storage area was part of the sale.

141. The negligent conveyancing error caused a part of the freehold common parts to be transferred to a leaseholder for no consideration. The most obvious way to assess CHL's loss is as the loss of the chance of negotiating a sale or rental of the storage room with the owners of flats 1 – 3 in particular (but potentially any of the owners of flats 1 – 13). This is analogous to the way in which damages are assessed in claims for negotiating damages arising from the interference of property rights – see Morris-Garner v One-Step [2018] UKSC 20. It was this type of damage that both experts in effect ended up giving evidence on.

142. Because CHL has never pleaded case based on the loss of chance to negotiate a sale of the storage room or any other case of damage to CHL's reversionary interest, I did initially consider that the only appropriate award was one of nominal damages. However, it seems to me that the conveyancing error plainly led to the loss of a part of the common parts of the building, which was, as Master Thornett also thought, not a de minimis loss. Both experts also thought that CHL had lost something. They differed only as to how the loss ought to be valued. In these circumstances, in my judgment, an award of nominal damages would not be a just outcome.

143. I do not accept Mr Rusholme's off-the-cuff valuation of £40,000 - £50,000 which was untested in cross-examination. Taking all the evidence together, including that of Mr Salata, I propose to take the upper end of Mr Costa's bracket and award £10,000 as the value of the storage room that CHL was deprived of by virtue of the conveyancing error.

144. I reject the submission that CHL has failed to mitigate its loss by failing to bring a claim for rectification. The duty to mitigate does not extend to requiring a party to engage in uncertain or difficult litigation against a third party – see Pilkington v Wood [1953] Ch 770. Given the pessimistic advice received on the prospect of success in a rectification claim, it was in my judgment not unreasonable of CHL to decide against commencing proceedings for rectification.

Conclusion

145. For the reasons given above, the claimant is entitled to £10,000 in damages for the mistaken conveyance of the basement storage room to the purchasers of the 125 year leasehold interest in flat 2. The claim is otherwise dismissed.