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Case No: HT-2016-000073

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 12 July 2017

Before:

THE HON MR JUSTICE COULSON

- -

Between:

(1) The Governors and Company of the Bank of Ireland	**Claimants**
(2) Bank of Ireland (UK) PLC	
- and -	
Watts Group PLC	**Defendant**

- -
- -

Mr Paul Mitchell QC (instructed by **Elborne Mitchell LLP**) for the **Claimants**
Ms Jessica Stephens (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 8, 9, 10, 11 and 16 May 2017

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Judgment Approved

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. In these proceedings, the claimants ("the Bank") seek damages for professional negligence against the defendant quantity surveyors ("Watts") relating to a residential development in the heart of York. The developer, who borrowed money from the Bank ("the Borrower"), went into liquidation and could not repay the loan, causing approximately £750,000 loss to the Bank. It is the Bank's case that Watts' Initial Appraisal Report ("the IAR") was negligent and that, if it had been properly prepared, the Bank would not have permitted the drawdown of the loan to the Borrower, and so would not have suffered any loss. Watts deny negligence and raise further issues as to reliance, causation and loss. Watts also say that the Bank's negligent decision to lend to the Borrower in the first place was the real cause of the loss.

2. I deal with the issues between the parties in this way. In **Section 2**, I set out the events and documents relating to the original loan. In **Section 3**, I set out the events and documents relating to Watts' involvement and the final IAR. In **Section 4**, I set out briefly some of the relevant subsequent events relating to this development. In **Section 5**, I address the allegations of negligence. In **Section 6**, I deal with the issues of reliance and causation. In **Section 7**, I deal with quantum. In **Section 8**, I deal

with the case of contributory negligence. There is a short summary of my conclusions in **Section 9**.

3. I should deal with two matters at the outset. First, although the bundles were something of a dog's dinner, the trial could not have been more efficiently and competently presented by counsel on both sides. The conclusion of the evidence in four days was only possible because counsel properly concentrated on what mattered and ignored the secondary issues. I am very grateful to them both.

4. The second, more substantive point, concerns the incomplete nature of the Bank's factual evidence. The Bank did not call Mr David Rainford, who was the relationship manager responsible for this loan. He would have been a critical witness as to the circumstances in which the loan was sought and approved, and the conditions of approval[1]. His absence therefore meant that there were significant gaps in the Bank's evidence. No reason was given as to why Mr Rainford did not give evidence, although I note that he was the subject of lending criticisms by Edwards-Stuart J in ***The Governor of the Bank of Ireland v Faithful and Gould Limited*** [2014] EWHC 2217 (TCC) at paragraphs 62, 90, 129, 131, 150, 154, 192, 207 and 249. There was also an absence of evidence from anyone at the Bank who actually read and/or expressly relied on the final IAR in April 2008. These difficulties were exacerbated by the absence of documentation which must, at one stage, have existed. These omissions mean that I have had to weigh the factual evidence in this case with particular care.

2. THE LOAN

5. The site of the development was Clifford Street, York, directly opposite the Magistrates' Courts, one of York's finest Victorian buildings. The Borrower (and proposed developer) was Derwent Vale York Limited. This company was a special purpose vehicle, half-owned by Derwent Vale Developments Limited ("DVD") and half-owned by Modus Partnerships Limited ("MPL").

6. Although MPL was another new company, the documents stress the Bank's pre-existing relationship with the Modus group of companies, and their overall parent, Modus Ventures Ltd. The evidence was that the Modus group were, at the time, a large Manchester-based property development and investment group specialising in leisure/retail/shopping centre schemes and town centre urban regeneration projects. They were a long-established client of the Bank's Manchester office and were described by the Bank as "a key Manchester relationship". For the reasons noted below, I find on the balance of probabilities that, but for that pre-existing relationship, the Bank would not have made this loan to the Borrower.

7. The application for funding was made by MPL and DVD in writing in May 2007. There was a certain amount of urgency because the documents sought funding by 1 June 2007. The building on the site was a single storey document store with a basement. The proposed development of the site was designed to retain the shell of the existing building, and to build 4 further storeys on top to create a total of 11

[1] There was evidence from other Bank employees, such as Mr Catterson, to the effect that only Mr Rainford could answer certain questions of detail. As he put it, some aspects of the original loan proposal were "pretty unique to David Rainford".

apartments. The proposed square footage of the completed development, set out at paragraph 5.1 of the application document, was 8,858 square foot, very close to the figure of 8,939 subsequently calculated by the Bank's surveying expert, Mr Vosser. A lower figure of 7,733 square foot, noted in an appendix to the application form, clearly did not include the communal areas.

8. The application to the Bank made plain that the original scheme, for which planning had already been granted, might well be reconfigured to increase the anticipated profits. The document stated at paragraph 5.9:

> "A final note on the design and layout of the proposed scheme relates to the three apartments on the ground floor which extend up into the second floor. Obviously, Derwent Vale inherited this layout but it is felt by all that a much better configuration of these units could be achieved which, at the same time, would maximise the anticipated profit on the scheme. It is therefore proposed to apply for a variation to the Planning Consent to re-configure the layouts for these three units…"

9. The Bank's original Credit Paper Memorandum, in which David Rainford sought approval for a loan in respect of this development, was dated 1 June 2007. That memorandum noted, amongst other things:

   (a) That the loan was for £1.3 million to assist with site purchase and development costs for 11 apartments at the site;

   (b) That both the Loan To Cost ratio ("LTC") and the Loan to end Value ratio ("LteV") were outside the Bank's lending guidelines;

   (c) That there would be full repayment of the loan, assuming that the first 7 cheapest units were sold;

   (d) That there was associated exposure of around £20 million in relation to the Bank's existing lending to three other companies in the Modus group;

   (e) That MPL (who owned 50% of the shares in the Borrower) were recently incorporated and that this was the first joint venture agreement that they were undertaking in this way;

   (f) That the costs of the development were £1.8 million odd and that the value to be realised from the development ("GDV") was £2 million odd, making a profit for the Borrower of £200,000;

   (g) That the Borrower's liquidity was a 'key credit risk', but that the fact that Modus was behind them was a positive factor;

   (h) That Mr Rainford recommended the proposed loan.

10. The proposal was amended by Mr Rainford on 8 June 2007. The amended Credit Paper Memorandum was for an increased loan of £1.4 million. The increased amount of the loan meant that, not only were the LTC and the LteV outside the Bank's lending guidelines but, according to Mr Rainford's memorandum, so too was the ratio

between the LTC site value and the development costs. Thus, on the face of the revised memorandum, Mr Rainford was expressly noting that the proposed loan failed to comply with three of the four lending guidelines set by the Bank.

11. The amended memorandum explained that the amount of the loan had been increased because MPL considered that their internal rate of return ("IRR") on cash invested was too low. So they wanted the amount of the loan to be increased. The memorandum said that "it is acknowledged by client that by virtue of low profit margin on this scheme this does stretch out LteV at 69.4% albeit capital guarantee reduces this to 63%".

12. This last was a reference to a £200,000 capital guarantee to be obtained from MPL "as substitute previous requirement for completion guarantee". As Ms Stephens pointed out during her cross-examination of Mr Catterson, the man in the Bank's area credit department to whom both of these memoranda were addressed, it was rather odd to attempt to ameliorate the otherwise adverse LTV by reference to a £200,000 guarantee, which was neither part of the loan nor part of the value of the development. Mr Catterson eventually agreed with that, and accepted that the guarantee was simply "a mitigant to the credit risk" to the Bank. I return to this issue when considering the allegations of defective lending practices against the Bank, which are relevant to causation and contributory negligence.

13. The revised application for the £1.4 million loan was approved by Mr Catterson on the very same day it was written (8 June 2007). The relevant parts of his decision memo stated as follows:

> "The reduced site debt and provision of a £200k capital guarantee now addressed the initial site risk around the archaeological survey and its potential impact on marketability and value of our security.
>
> The new facility is approved subject to the conditions detailed in both your paper and memo plus:-
>
> - £200k capital guarantee to be in place prior to drawdown of the initial £200k of the site purchase (total £210k to allow interest roll up while the survey is undertaken).
>
> - Cost overrun guarantee in completion undertaking to be in place prior to the first drawdown of the development portion of the facility (the interest shortfall guarantee might be dropped).
>
> - Satisfactory archaeological survey report to be held prior to draw down of the development funding.
>
> - Repayment to be able to be effected by maximum 70% of sales based on the BPV estimated sales value (assuming that you pursue itself first).

> Your amended BIPS reflecting the new structure, is confirmed with the key P Drivers being the capital guarantee, Years Experience in Property (Modus) and the improved Level of Recourse."

14. Two points should be made about Mr Catterson's decision memo. One is that he stipulated that it was a condition precedent that the amount of the loan would be repaid in full by 70% of sales (assuming the cheapest units sold first). He indicated that, in this case, that meant 7 out of the 11 proposed apartments. Secondly, there is his reference to Modus' experience in property, which I find was a critical feature of the story: it was only because this proposal emanated from Modus – an experienced developer with a successful track-record and a major client of the Bank – that it was approved by the Bank in the first place.

15. Of course this element of the arrangement was, or should have been, a two-way street. There was Modus' track-record on the one hand, but on the other there was the Bank's exposure to the Modus group as a result of their earlier projects. So the fact that, according to the original Credit Paper Memorandum, the Bank had £20 million exposure to the Modus group (paragraph 9(d) above) was of real significance. This seems to have been belatedly recognised by Mr Catterson, who added to his decision memo the words "plus assoc. exposures" in manuscript. He said he should have included that in the memo itself. In reality, the evidence demonstrated that the Bank's existing exposure to Modus was not reflected in any of its decision-making, another matter which I address in detail when I consider the issues of causation and contributory negligence.

16. Showing just how keen they were to keep lending to Modus, on 8 June (i.e. the same day as the amended application *and* the decision), the Bank wrote to the Borrower, approving the loan facility, subject to particular conditions. The conditions precedent were stated in the loan facility letter as follows:

> "**Site Purchase Advance £210,000**
>
> 1. Bank appointed Panel Valuer to confirm minimum current site value of £435,000, minimum Gross Development Value of £2,014,500 and provide positive comment on location and market demand with specific comment to confirm absence of on-site car parking will not detract from marketability. Satisfactory comment to be provided in respect of environmental risk.
>
> 2. Sight of detailed planning permission for 11 apartments.
>
> 3. Provision of 2006 Audited Accounts for Modus Properties Ltd to confirm a minimum Tangible Net Worth position of £1 million.
>
> **Development Advance £1,190,000**

1. Bank appointed Quantity Surveyor to overview detailed costings for the proposed development and authorise tranche drawdowns.

2. Satisfactory Bank due diligence on financial standing/capabilities of main contractor in respect of shell build contract and capabilities of professional team.

3. Confirmation of satisfactory conclusion of archaeological survey within 3 months of drawdown of Site Advance facility.

4. Any cost overruns to be met by the Borrower/Guarantors upon identification by the Bank's appointed QS."

17. For reasons which were unexplained, the additional condition precedent stipulated by Mr Catterson in his decision memo, namely that repayment of the loan must be capable of being effected by a maximum 70% of sales (assuming the cheapest units sold first) did *not* feature in the offer letter. Mr Catterson said that he was unaware of this. He agreed that this amounted to the omission of an important condition.

18. On 14 June 2007, the Bank instructed Savills to provide a valuation in accordance with the facility letter (site purchase advance, condition precedent 1, set out in paragraph 16 above). The letter expressly asked for advice about the absence of on-site car parking and sought "specific comment to confirm that the absence of on-site car parking would not detract from marketability". Savills were *not* instructed to provide advice as to the value of the 7 cheapest units.

19. Savills had already provided a report on valuation for the Borrower. It was therefore curious that the Bank asked Savills to produce an independent valuation for their purposes as a lender. Whilst there may not have been a direct conflict of interest, there was clearly a risk of one. That explained why Mr Catterson said in cross-examination that he was "surprised and disappointed" to discover that Savills had been instructed to produce the valuation report for the Bank. Again, in the absence of any evidence from Mr Rainford or those involved in instructing Savills, the inescapable conclusion is that the Bank was anxious to lend to this Modus company without fuss or delay, and a valuation from Savills, who had already advised the Borrower, was a way of achieving that.

20. Savills' report was provided on 19 June 2007. They valued the GDV at £2,015,000. This was broken down in a table at section 15 which ascribed a value to each of the 11 apartments and which, when a sum of £30,000 was added for ground rents, totalled £2.015 million. The table revealed that the 7 cheapest apartments, valued at between £140,000 and £190,000, totalled just £1,122,000. Even adding the next cheapest (at £193,000) meant that the sale value of the cheapest 8 apartments would still not achieve 70% of the loan of £1.4 million. In other words, although Savills had not been asked expressly to provide this advice, it should have been apparent to Mr Rainford that Mr Catterson's 70% condition precedent was not going to be met.

21. The Savills report also dealt with car parking. They said that the absence of car parking "will deter some potential purchasers. Purchasers spending over £200,000 for

an apartment would expect the availability of a car parking space." Thus, on the face of it, site advance condition precedent 1 (the provision of confirmation that the absence of on-site car parking would not detract from marketability) had also not been fulfilled.

22. The Bank did not seem unduly troubled by this. In June, Mr Rainford sent the Savills' comment to Richard McGawley, the key person at MPL and one of the three major players within the Modus group. Mr McGawley did not deal with the matter and was chased two months later, at the end of August 2007. When he replied, he said that the apartments were at the lower end of the market and few such apartments came with designated parking. He referred to the nearest contract permit parking being 211 metres away from the site. Mr Catterson said in evidence that, having obtained the Borrower's views on the issue, he would have expected that comment to be referred back to Savills for their comment. But it was not. Instead the Bank treated the condition precedent as to parking as having been satisfied. In my view, that provides an important insight into the Bank's approach: on this issue, they preferred the opinion of Modus to the independent advice of Savills.

23. The failure in respect of the 70% was, potentially, even more calamitous. In a file note dating from the same period, two Bank employees (neither of whom gave evidence) erroneously confirmed that Mr Catterson's condition precedent – that the repayment was able to be effected by a maximum of 70% of sales (assuming the cheapest units sold first) – had been met. They confirmed this because, they said, the total site value was £2,015,000 and that 70% of that figure was £1,410,500. Since the loan was £1,400,000 (a figure that ignored interest) they confirmed that the condition precedent had been satisfied.

24. That file note completely misunderstood Mr Catterson's condition precedent. Mr Catterson confirmed in cross-examination that he was not interested in 70% of the overall GDV: after all, that was said to be £2,015,000 at the time of his decision memo, so he could have calculated 70% of that figure then, if that had been the purpose of his condition. But it was not. As he confirmed in cross-examination, he was anxious to ensure that the security for the Bank was represented by a result that, once the 7 cheapest units had been sold out of the 11, the Bank's loan would have been repaid. As I have noted, the Savills report made plain that this would not be the case. But because of the complete misunderstanding of the point by the Bank's employees, not only was this failure not reported, but instead a confirmation was erroneously provided that the condition precedent had been met.

25. One other point needs to be made about the Savills report. At section 11 of their report, Savills dealt with the question of the build cost. They referred to the budget cost plan provided by the Borrower which identified a figure (inclusive of contingencies and section 106 costs) of just less than £1 million (£999,099). They went on to say:

> "In accordance with your instruction the build costs have been adopted within our appraisal of the subject property. We would however recommend that the funder instructs an independent quantity surveyor to verify the costing assumptions prior to releasing the loan facility. In the event that these are deemed to

> be incorrect, our opinions of value as detailed herein may be affected.
>
> …
>
> In accordance with the [sic] your instructions, we have adopted these build costs.
>
> For the avoidance of doubt, we would stress that any variable in build costs may have an impact on the valuation figures as herein provided. …"

26. Notwithstanding this advice, the Bank did not instruct an independent quantity surveyor to verify the costing figures before advancing the Land Loan to enable the Borrower to purchase the site. Again, there was no evidence from anybody at the Bank involved in that decision. That was another gap in the story, because it was a condition precedent that the drawdown of the Land Loan would not happen until the GDV was the subject of the valuer's advice, and Savills' express advice was that the build costs needed to be verified by an independent quantity surveyor before their figures could be verified. On the face of it, this amounted to a further failure to comply with a condition precedent.

27. Notwithstanding all these various omissions, the Bank approved the drawdown of the Land Loan on 14 September 2007. On the same day, MPL entered into a capital guarantee for £200,000. In addition, MPL and DVD entered into a Cost Overrun and Interest Shortfall Guarantee, pursuant to which they undertook unconditionally to guarantee to pay any cost overruns. In this way, it might be said that the development did not have to be profitable for the Bank to proceed with the lending, because any cost overrun was underwritten by MPL and DVD.

3. WATTS' INVOLVEMENT AND THE IAR

3.1 The Instruction of Watts

28. The Bank instructed Watts on 10 January 2008. But some days before that, Mr McGawley and others at the Borrower began to provide information and documents to Watts. It is clear that this was because of their urgent need to begin drawing down the development loan. Somewhat oddly, the Bank did not provide any relevant documents to Watts themselves; instead all the documents came from the Borrower. There is no schedule or index of documents supplied and, perhaps predictably, there is now a dispute as to precisely what documents were sent to Watts and when. That is relevant to the first allegation of negligence and dealt with at **Section 5.3** below.

29. The Bank's formal instructions to Watts dated 10 January 2008 referred to the facility of £1,400,000 and noted that the construction period "is expected to last up to 12 months". The letter also said that construction was to be undertaken via a fixed price JCT contract with the final fit out to be undertaken by the client. There was a reference to warranties. The letter went on:

> "It is a requirement of the Bank that an independent quantity surveyor should act on the Bank's behalf in checking the

costings supplied by the Borrower and approving requests for drawings from the facility. I should be grateful if you could act in this capacity on behalf of the Bank.

Plans, specifications and details of sub-contractor/professional team can be obtained from the customer."

30. In relation to the IAR, the instructions were as follows:

"**(1) INITIAL REPORT**

Prior to any drawing from the loan facility, you will produce a report which will investigate and comment on the following:

(a) Appraisal of the customer's development proposal.

(b) Comment on the prepared Bill of Quantities/costs estimates and projected cashflow, noting any material Provisional Sums. In the absence of a detailed Bill of Quantities for the development, you must at this stage agree with the Borrower a schedule of drawdowns against identified staged completions, this schedule must ensure at all times that undrawn funds will be sufficient to complete the project. In the absence of a detailed cash flow forecast from the Borrower, please provide an agreed cashflow against which the project can be monitored.

(c) Specific comment to be made on build programme/cashflow and in particular the ability to complete the development on the staged/sectional basis proposed in line with cashflow assumptions.

(d) Verification of the construction cost estimate. Please comment on the cost per square foot relative to local area norms.

(e) Commentary on the procurement method, particularly on the proposed form of contract for, contractors, subcontractors and suppliers and the provisions and conditions included therein.

…

(h) Verification that the plans and specifications of the proposed development are consistent with the planning consents and building regulation consents which have been granted in connection with the development.

…

> (o) Bring to the Bank's attention any items which, in your judgment, may have an adverse effect on the success of the scheme."

31. There were also separate instructions as to the monthly reports to be provided during the lending period. Since those monthly reports are not the subject of the negligence allegations in these proceedings, it is unnecessary for me to set out those instructions here.

3.2 The First Draft Executive Summary of the IAR

32. The person at Watts dealing with the IAR in its early stages was Mr Stuart Russell, who gave evidence at the trial. I found him a straightforward witness with a good recollection of many of the relevant events, even though they occurred ten years ago. Naturally, there were some matters which he simply could not recall.

33. Mr Russell provided the first draft executive summary of the IAR to the Bank on 18 January 2008. He was asked why that had been sent so early. He said that it was to keep the Bank appraised of the information that they had received from the Borrower. He said it represented his initial view of the proposed development. The genesis of the first draft was as follows:

(a) In the morning of 17 January 2008, the Bank confirmed to Mr Russell that it needed the report "from the point of view of confirming costs to establish whether an equity input [from the Borrower] is required". The email from the Bank also said that the report "is therefore not urgent from a drawdown point of view".

(b) It appears that Mr Russell worked on the draft during the day of 17 January 2008. He also planned to work on it overnight because that afternoon he emailed a template appraisal report (dealing with another project) to his home email address.

(c) At 23:11 that evening, Mr Russell emailed the Borrower a series of questions and matters for them to comment upon. Amongst other things, this list made plain that, for quantity surveying purposes, Watts were assuming a medium specification; that whilst they awaited revised drawings, they were currently working from drafts; and that the fee for carrying out the appraisal would be £1,500 plus VAT. In addition, Mr Russell asked how far away agreement of the main contract was with the proposed main contractor, GEM.

34. The first draft of the IAR prepared by Mr Russell contained the following passages:

> "**0.1 Scheme Content** – we would consider that the scheme drawings and specification are not currently of a sufficient quality for the contractor to construct the work. We understand that the final layout drawings are in production…
>
> **0.7 Procurement** – we understand that the Borrower is currently reviewing this procurement option. He is awaiting the final price from the preferred contractor for both the shell

> works and the internal for the out work. The developer may manage the internal fit out section as a management contract if the contractor's cost is in excess of the proposed budget. We have not yet had sight of the preferred contractor's cost. If a third party contractor route is selected then this contract will be let on a JCT without Quantities contract…
>
> **0.10 Programme** – the programme provided to complete the works are 53 weeks (including enabling works, strip out and archaeology work. However this period is also subject of final negotiations with the preferred contractor. Only soft strip enabling works have currently been carried out…
>
> **0.19 Construction Costs** – we have received an elemental Budget cost analysis amounting to £999,099. In addition the Borrower has provided an appraisal which includes additional development costs in the sum of £773,205 (including land, fees, marketing and section 106). Our view is that the costs included are achievable for this type of procurement, with the exception of a contingency allowance. This assumes as 'medium' specification for the work. However we would wish to view the building Contract costs when agreed with the preferred contractor before providing final opinion."

35. Mr Russell's witness statement gave details as to how, during the day and evening of 17 January 2008, he had arrived at the conclusion that the overall cost budget was achievable. The relevant paragraphs of his statement set out the following process:

(a) Mr Russell undertook a three stage test, involving:

(i) his own independent cost check;

(ii) a comparison between the price per square foot from his independent cost check, and the Borrower's budget, to cost data held on Watts' IT system;

(iii) a price per apartment comparison between the Borrower's budget and similar projects on which Watts also held relevant data on their IT system.

(b) His independent cost check applied a rate of £120 per square foot for the net lettable floor area of 7,823 square foot and a lower rate of £90 for the communal space at the lower ground floor, making a total square footage of 8,939 and a total of £1,039,200.

(c) The second stage involved a "sense check" of the calculation noted above against the pricing information held on Watts' IT system. Mr Russell exhibited documents indicating the type of information available to him at the time that he undertook the calculations.

(d) In particular, he said that when undertaking this second stage, he had regard to three particular comparables, namely developments at Liberty House, Kendal; Albert Mill, Oldfield Road, Salford; and Otley Road, Bradford.

(e) The third stage involved a calculation of a rough price per apartment using the Borrower's costs budget. The figure was £90,000 odd. He concluded that this compared favourably with costs being achieved on other schemes with which Watts were involved.

The issue as to whether or not Mr Russell's evidence on this should be accepted was at the heart of the Bank's negligence case, and is addressed at **Section 5.6** below.

36. It appears that, even by late January 2008, the Borrower was desperate for the money because there was then a series of exchanges which indicated that they hoped that the drawdown would now take place. However, given the outstanding information, this did not happen.

3.3 Later Iterations of the Draft IAR

37. On 6 February 2008, Mr Sanders, a more junior quantity surveyor at Watts, produced a second version of the draft IAR. He sent that to Mr Russell for review. The document was then subjected to manuscript emendations by Mr Russell.

38. Paragraph 1.2.2 of this version of the report stated as follows:

> "The construction costs currently budget by the developer stand at £999,099. This figure is an apportionment of:
>
> - Preliminaries - £152,311
> - Existing Shell - £25,988
> - Shell Sub-Floors - £117,645
> - Shell Ground Floor and Sub-Floor - £47,269
> - Shell First Floor - £35,931
> - Shell Second Floor - £73,029
> - Shell Third Floor - £57,667
> - Shell Fourth Floor - £57,664
> - Shell Fifth Floor - £57,664
> - Shell Sixth Floor - £100,660
> - Apartment Fit-Outs - £191,265
> - Communal Fit-Outs - £40,069

- External - £41,931

We await the firm price from the preferred building contractor."

39. This paragraph remained the same throughout the further iterations of the executive summary and was included in the final IAR.

40. At paragraph 7.3 of the second version, there was a reference to cash-flow. It was said that the cash-flow "related to the construction contract sum from the preferred contractor." The cash-flow, spread across 13 monthly instalments, reflected the 13 elements referred to in paragraph 38 above. That correlation also remained the same in the final IAR.

41. On 13 March 2008 there was a further draft of the executive summary of the IAR which was sent to the Bank. This noted the late change in procurement route and the fact that GEM were no longer going to be the main contractor. Paragraph 0.1 of the executive summary said:

> "We understand that the Borrower is to construct the works using his own resources and directly employed sub-contractors. However, there will be a building contract in place between the Borrower and Derwent Vale Developments (as contractor)."

It appears that, notwithstanding the fact that the IAR was not in its final form, the Borrower was very anxious to start drawdown (see, for example, its letter to Watts dated 5 March 2008). The Borrower said that this was because it had spent its own money on the stripping out works being carried out on site.

42. On 12 March, Watts asked the Borrower for a whole series of documents and further information. The Borrower answered the same day in relatively skeletal fashion, noting amongst other things that "final layout drawings are still being worked in with steel frames/engineers details, however the draft sent to you previously are relatively unchanged…" The reply asked Watts to issue revised valuation 1 to the Bank in the sum of £87,000. The letter urged:

> "Must get the draw down through due to my cash-flow drying up from site expenses to date!"

43. On 13 March, Watts asked who the parties to the JCT contract were going to be. The Borrower replied that the parties were the Borrower as the employer, and DVD as contractor, and went on to say that the relevant solicitors had the originals. They confirmed that the build sum in the contract was £999,099. However, Watts' response of the same day pointed out that the existence of such a contract raised "all sorts of questions regarding warranties, Bonds and PI insurance". The Borrower confirmed in reply that it was providing a contractor warranty to the Bank.

44. On 18 March, the Borrower again chased Watts for their confirmation that the first valuation had been issued to the Bank for payment. Watts forwarded the Borrower's email to the Bank, asking whether there was anything further that the Bank needed from Watts. In addition, later that same day, Mr McGawley of Modus asked Watts

whether there was any way that they could talk the Bank into releasing funds. Mr Rainford at the Bank noted: "on basis form of warranty is agreed, would be prepared to take a view". Although that again showed that the Bank was anxious to appease Modus in any way they could, I do not accept Ms Stephens' submission that this email meant that the IAR was somehow irrelevant to the drawdown. By this time, the Bank had already seen, by way of a number of earlier drafts, precisely what Watts were going to say in the IAR.

45. There were further exchanges between the Bank and the Borrower on 18 March, in which Mr McGawley sought to argue that a figure for contingency was being allowed twice. The email from Mr Gibbons of DVD on 19 March makes plain that these exchanges were solely designed to get the £87,000 paid as soon as possible.

46. On 26 March, as part of the ongoing discussions between the Bank and the Borrower, Mr Rainford emailed Mr Catterson seeking approval for a £18,000 drawdown under the development facility, pending the finalisation of warranties. Mr Rainford said that this was recommended, in part because of "Bank QS certification held". It is unclear to what this refers: certainly Watts had not issued any sort of certificate in relation to the £18,000, or any other sum. Notwithstanding that, on 31 March, Mr Catterson approved the £18,000 drawdown. It is noteworthy that Mr Rainford's email also recommended this course "given Modus involvement". That again supports my view that the Bank were not casting a particularly critical eye over any of the detail, because of the involvement of Modus.

47. On 1 April 2008, the Bank asked Mr Russell whether the condition precedent had been achieved, to the effect that there was "confirmation of satisfactory conclusion of archaeological survey within three months of drawdown of the site advance". On 3 April, Mr Russell replied, saying he was unsure whether this related to the methodology of carrying out the works, or their completion. He said that if the intention of the condition precedent was that the archaeological works needed to be carried out, then that had not happened and that, if those works needed to be completed prior to funding then there would be a 'catch 22' situation because the Borrower had made plain that the works could not proceed until funding was in place. In this way, the up-to-date position in respect of the archaeological survey and works was understood on all sides. To the extent that the Bank hinted in closing that Watts had failed to comply with their instructions in respect of the archaeological works, I reject that suggestion; either they had or, if they had not, the Bank knew they had not and were unconcerned about it.

48. In addition, and for the avoidance of doubt, by this stage there was also a signed building contract. This was between the Borrower and DVD, as contractors. When the Bank asked Mr Russell for that document later in April he replied to say that the completed contract was now with the solicitors.

3.4 The Final IAR

49. The final version of the IAR was dated 8 April 2008 and sent to the Bank at that time. There was nothing of any consequence in the final IAR that had not already been stated in the ongoing drafts. Thus:

- Paragraph 0.1 made plain that DVD were now going to undertake the work themselves but that there would be a contract between them and the Borrower.

- Paragraph 0.7 said that, as a result of this, Watts felt that the scheme should be regarded as a 'self build' given the nature of the contracting party.

- Paragraph 0.9 said that although there would be a design and build contract in place although "the relationship between the contracting parties is such that the conditions of the contract will be largely unenforceable. We would note that we have not received a copy of the building contract".

- Paragraph 0.10 referred to the programme being 52 weeks and that only soft strip enabling works have currently been carried out. The indication was that "the scheme is due to complete by 31 January 2009."

- Paragraph 0.17 referred to the archaeological requirements. It said:

  > "Only when this archaeological dig is completed can a formal ground investigation take place. We understand from the Borrower that stage 1 of the Archaeological dig is complete to allow the casting of ring beams and piling. Stage 2 will follow imminently. The method statement for the archaeological works has been agreed."

50. In the body of the IAR, there was a repetition of the construction cost figure of £999,099. Watts said that they understood that this was "now the contract sum between the Borrower and Derwent Vale Developments Limited". Watts said that in their view those costs "are achievable for this type of procurement ('self-build')". The breakdown of the costs at paragraph 1.2.2 was in precisely the same form as set out in paragraph 38 above. As to the cash-flow, which was in the same form as set out in paragraph 40 above, Watts said that it "provides the expenditure profile we would normally expect from a scheme of this type."

51. In their conclusions, Watts said this:

> "9.1 We agree that the construction cost of £999,099 is a realistic estimate for a project of this type and nature, including the contingency allowance of £44,465.
>
> 9.2 Programme – we feel that the proposed programme of 52 weeks is reasonable.
>
> 9.3 We await clarification/further information relating to the following issues:
>
> 9.3.1 Review of the final versions of appointments and warranties.
>
> 9.3.2 Further scheme design drawings.
>
> 9.3.3 Building contract documents.

9.3.4 Clarification of insurance cover for sub-contractor design portion.

9.3.5 Warranties place for:

- Architect
- Structural Engineer
- Mechanical and Electrical Engineer
- Design Sub-Contractors (Timber Frame)

Assuming the Bank are willing to allow a drawdown of funds then we would recommend that £87,537 is drawdown from the facility."

4. SUBSEQUENT EVENTS

52. The first drawdown was received by the Borrower on 18 April 2008. Thereafter, Watts produced monthly reports dealing with valuation. Although Mr Vosser purported to make extensive criticism and comment upon those reports in his expert's report, there are no pleaded allegations of negligence against Watts dealing with that part of the development.

53. In May 2009 Watts advised the Bank that, although practical completion would be delayed until August 2009, there was at that stage no anticipated shortfall in the costs of construction.

54. At the end of May 2009, the Bank's "key Manchester client", Modus Ventures Limited, went into administration. By that stage, Modus owned 90% of the Borrower, and the Bank's exposure to the Modus group was £83 million. Inevitably the Borrower was placed into creditors' voluntary liquidation and building work ceased. Subsequently, a detailed report was commissioned by the Bank which identified a number of defects in the works on site.

55. It was only in July 2009 that York City Council ("the Council") pointed out a discrepancy between the design of the Clifford Street elevation, for which planning permission had been granted, and the design that was in the course of construction. The documents show that, in consequence, a retrospective planning application was made and was granted by the Council.

56. The Bank demanded repayment of the loan by the Borrower. No such repayment was made and receivers were appointed on 6 October 2009. On 1 April 2011, the property was sold for £527,473.

5. THE ALLEGATIONS OF NEGLIGENCE

5.1 The Law

57. The law is not in dispute. Thus:

(a) Watts owed to the Bank, either by way of an implied term of their appointment or at common law, a duty to take reasonable care in undertaking

their obligations. Since that duty would be expressed, in this case, as the degree of skill and care to be expected of an ordinary monitoring surveyor of reasonable competence and experience, it is in the application of that test that the court is assisted by expert evidence.

(b) The scope of the duty will be limited, because a valuer is not liable for every foreseeable loss that his client may suffer if he enters into an agreement to lend money as a result of a negligent valuation: see ***South Australian Asset Management Company v York Montague*** [1997] AC 191 and ***Nykredit Mortgage Bank Plc v Edward Erdman (No. 2)*** [1997] 1 WLR 1627. This is dealt with in greater detail in **Section 6.3** below.

(c) The valuer is not liable for losses that would have been suffered by the lender in any event, even if the valuation had been correct: see ***Bank of Ireland v Faithful and Gould Ltd*** [2014] EWHC 2217 at paragraph 116.

5.2 General Observations on the Expert Evidence

5.2.1 Introduction

58. It is necessary to make some general observations as to the expert evidence in this case relating to Watt's performance of their role. Although it is commonplace for counsel to submit that 'their' expert's evidence should be preferred wholesale to that of the expert on the other side, that is not usually a justified approach. But in this case, I have concluded that, for a variety of reasons outlined below, the written and oral evidence of Mr Vosser adduced on behalf of the Bank was unreliable. So, wherever he disagreed with Mr Whitehead, the expert called on behalf of Watts, I have concluded that I should prefer Mr Whitehead's evidence.

5.2.2 Independence

59. I concluded on the evidence that Mr Vosser was not a properly independent witness. It was clear that the Bank was his principal client, providing the vast majority of his work (and fees), and that he had spent most of the last few years acting for the Bank as an expert witness in actions against monitoring quantity surveyors arising out of the 2008-2009 financial crash. He told me that, until now, these had all been resolved by ADR, so that this was the first of those disputes which had come to court. He was, I think, unaware of the difference between acting as the Bank's advocate in, say, a mediation, and his duties to the court when giving expert evidence.

60. Mr Vosser's close relationship with the Bank was borne out by many things: his unrealistic approach to the allegations; his attempt to mislead the court; his application of the wrong test; his unreasonable intransigence which led to his refusal to make any concessions whatsoever; and the fact that many of his criticisms, which he did not withdraw, were so unpersuasive that the Bank, quite properly, declined even to plead them as allegations of professional negligence. I deal briefly with each of those matters in turn below. They support, either separately or cumulatively, my conclusion that Mr Vosser was not an independent or reliable expert witness.

5.2.3 The Lack of Realism

61. As noted above, Watts were paid £1,500 for producing the IAR. That modest fee reflected the fact that they were not expected to do their own detailed calculations of cost, time or cash-flow, but had instead to check the calculations and proposals which had been undertaken by the Borrower. I regard the size of the fee as good evidence of the limited nature of the service which Watts were expected to provide at the IAR stage.

62. That must be compared with Mr Vosser's approach. In addressing Watts' performance of this limited service, his first report, together with appendices, filled a whole lever arch file. He incurred fees of £24,000 in carrying out that report, and the Bank's solicitors incurred a similar sum in respect of their commissioning, checking and liaison work in connection with that same report. Thus, whilst Watts' IAR cost just £1,500, the report and associated work done to criticise it cost more than 30 times that amount. In my view, that is a clear indication that the criticisms which have been generated are based on an entirely unrealistic expectation of what it was that Watts were required to do.

63. Furthermore, Mr Vosser's criticisms were not limited to a single report. He produced a second detailed report and then, the week before trial, another lever arch file of new documents purporting to address the key paragraphs of Mr Russell's witness statement (paragraph 35 above). Mr Vosser said that this material was designed to show that the three properties considered by Mr Russell in January 2008 were not proper comparables, a point which he could have made in his second expert's report, but failed so to do. This excessive industry only confirmed my view that Mr Vosser was prepared to go to any lengths to shore up the Bank's case.

5.2.4 Attempt to Mislead

64. One of the major issues raised in Mr Vosser's expert report was his uncompromising view that Watts, as the monitoring surveyor, were obliged to start from scratch and produce their own detailed breakdown of the construction costs. He justified this approach by referring to the relevant RICS guidance, which he quoted as saying: "the Project Monitor…may have to develop his or her own elemental breakdown of construction costs to prove or disprove the Developer's figures".

65. However, that was a highly misleading quotation. The full passage reads:

> "**When involved with smaller developments and inexperienced Clients and Contractors,** the Project Monitor, **whilst strictly responsible to the Client, may also be asked to perform a hand-holding exercise with the Client and** may have to develop his or her own elemental breakdown of construction costs to prove or disprove the Developer's figures." (Words in bold **omitted** by Mr Vosser).

In other words, the passage which Mr Vosser purportedly quoted in his report deliberately excised the words which would have shown that this part of the RICS guidance was completely irrelevant to the facts of this case (because the Bank was not inexperienced, because the contractor/Borrower was not inexperienced, because this was not a small development, and because Watts were not being asked to perform "a hand-holding exercise"). This was a blatant misuse of a source document, in order to

present a criticism on a false basis. It was clean contrary to Mr Vosser's duty to the court.

5.2.5 Wrong Test

66. In my view, Mr Vosser's oral evidence made plain that he was applying the wrong test. He was not looking to see what a reasonably competent monitoring surveyor would have done in the circumstances, and to test Watt's performance against that benchmark. Instead, he repeatedly said that what he was doing was setting out what he claimed he would have done, line-by-line, figure-by-figure. That exercise produced a range of figures for construction costs between £1.445 million and £1.8 million. His evidence was that this was what he did, so this is what Watts should have done too. In this way, there were never any margins of error in Mr Vosser's analysis; no broader parameters within which a monitoring surveyors' performance was to be judged[2]. In his view, because they failed to advise that the construction costs would be £1.445 million or more, Watts were at fault. Accordingly, I doubted whether his evidence went to the right issue.

5.2.6 Unreasonableness

67. I consider that Mr Vosser's approach was thoroughly unreasonable. The agreed note demonstrated that he made no concessions at the experts' 'without prejudice meetings', using them instead – quite deliberately – to raise entirely new matters with his opposite number, Mr Whitehead. He made no obvious concessions in his oral evidence although in his closing submissions, Mr Mitchell accepted one (which may be important on causation: see paragraphs 107 and 144 below). I observed at the outset of the trial that I had never seen a Joint Statement between experts that contained no agreement at all. I find that the main reason why the Joint Statement in this case contained no such agreement was due to Mr Vosser's complete failure to make any concessions at all.

68. Some examples of his unreasonable approach may be noted. One concerned the nature and scope of design warranties. It was put to Mr Vosser in cross-examination that, this being a matter of legal rights and obligations, it would primarily be a matter for the solicitors. Mr Vosser disagreed and said that this was an important matter for the monitoring surveyor. He was plainly wrong about that: the terms of warranties are for lawyers, not monitoring surveyors. It was obviously unreasonable for him to maintain that stance.

69. Another example of Mr Vosser's unreasonableness concerned the events after the IAR. It is a striking feature of this case that the Bank's pleaded allegations go no further than the initial report produced in April 2008. They make no pleaded criticisms of the subsequent reports produced by Watts. And yet, despite that, Mr Vosser's first and second reports included lengthy sections which were concerned with these unpleaded allegations, which he continued to try and advance during his oral evidence. In my view, this was yet further evidence of unreasonableness, an expert insisting on making criticisms which the Bank have deliberately chosen not to plead.

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[2] Such as the plus or minus 10% habitually used in negligent valuation cases.

5.2.7 Summary

70. The duties of an independent expert are set out in the well-known passages of the judgment in ***The Ikarian Reefer*** [2000] 1 WLR 603. For the reasons set out above, Mr Vosser did not comply with those duties and I was not confident that he was aware of them or had had them explained. For him, it might be said that The Ikarian Reefer was a ship that passed in the night.

5.2.8 Mr Whitehead

71. During his oral closing submissions, Mr Mitchell sought to make criticisms of Mr Whitehead, and to suggest that he had been an unreasonable advocate for Watts' position. Although these submissions were advanced with typical moderation and skill, I do not accept them.

72. In my view, Mr Whitehead complied at all times with his duties to the court. I did not regard him as an advocate of Watts' case. He made proper concessions where appropriate. If, as Mr Mitchell complained, Mr Whitehead's response to Mr Vosser's criticism of Mr Russell's three comparables at the 'without prejudice' meeting was terse (as recorded in the Joint Statement), then that is hardly surprising, given that this was not a matter with which Mr Vosser had dealt in either of his written reports.

73. For all those reasons, therefore, where there was a significant disagreement between Mr Vosser and Mr Whitehead, I preferred the evidence of Mr Whitehead.

5.3 Issue 1: The Planning Allegation

74. The first allegation of negligence/breach of contract was that Watts failed to advise in their final IAR that the proposed scheme differed from that which had received planning permission in 2006. The Bank say that the drawings for the Clifford Street elevation, for which permission had been granted, showed five vertical stacks of windows, whilst, by January 2008, floor plans showed that the developer proposed a reconfiguration of the units which involved six vertical stacks of windows on that elevation.

75. The first issue was whether or not Watts had received the floor plans showing the six stacks of windows before the production of the IAR. The difficulty for the Bank on that issue was twofold. First, at the time, they had wholly failed to control what information was provided to Watts, despite the fact that they were Watts' employer (see paragraph 28 above). Since information had been provided to Watts by the Borrower in an extremely haphazard manner, it was difficult to ascertain what Watts had been given and when. The Bank was unable to adduce any factual evidence of its own that the relevant drawings had been provided to Watts in January 2008 or shortly thereafter.

76. This difficulty was compounded, rather than ameliorated, by Mr Vosser's expert report. Although Mr Vosser purported to decide this issue against Watts, and stated with complete confidence that they had the relevant drawings at the relevant time (to which he referred in an appendix to his first report), it became apparent on an analysis

of those drawings that they all post-dated Watts' IAR and so failed to establish the point he was attempting to make about timing[3].

77. The best that the Bank could do was to rely on Watts' response to their application for pre-action disclosure of 20 January 2012. The documents provided (pursuant to the consent order agreed as a result of that request) included drawings which showed both schemes, and a compliment slip from the Borrower, dated January 2008, purporting to enclose "planning drawing and drafts". It was the Bank's case that this demonstrated that Watts did have both sets of drawings at the time of the production of the IAR.

78. I do not agree that this is what these documents show. The documents provided by Watts at the pre-action disclosure stage were not identified by reference to when they were received. The compliments slip did not say what particular drawings it enclosed. The position was confused in 2008, and has remained so since, something which, in my view, was only confirmed by Mr Rushton's answers in cross-examination. Taking all the evidence into account, therefore, I conclude that the Bank has not shown that the relevant documents were in Watts' possession before the completion of the IAR.

79. Other evidence supports that view. In particular, no set of drawings was provided to Watts which were clearly marked or stamped as the drawings approved by way of planning consent. It may be that the Borrower was itself unsure about that, because of course planning permission had been obtained before they were involved (hence the reference to DVD 'inheriting' the scheme, noted in the proposal quoted at paragraph 8 above). At best, there were drawings on which someone had written "Planning App Drawing" (showing the five window stacks). The drawings showing the six stacks were not elevations but floor plans, and they were unhelpfully marked "draft".

80. It may be that the best information in relation to the state of the drawings in early 2008 comes from the IAR itself. There, Watts say that the drawings "are not currently of a sufficient quality for construction of the works" and they go on to say that they understand that final drawings "are in production". This would have conveyed to any reader of the IAR that the drawings were still in a state of flux and that further work on them was ongoing. That also militates against a finding that Watts should have advised on the content of any earlier drawings as if that content was a fixed entity.

81. For these reasons, I have concluded that the Bank has failed to show that Watts had the relevant drawings at the time of the production of their final IAR. The Bank has no-one to blame but themselves for this outcome. Their control of the documents that were sent to their own professional advisor was non-existent. On that basis, the first allegation of negligence/breach against Watts must fail.

82. If I am wrong about that, and it had been shown that Watts were in possession of the relevant floor plans, on the one hand, and the elevation plans on the other, then I find that they should have pointed out to the Bank that the proposed scheme in 2008 involved a departure from the planning consent, because six window stacks were shown on the Clifford Street elevation, rather than five. Mr Whitehead properly

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[3] Mr Vosser said this was "sloppy" but, although he now had no evidence on which he could rely, he refused to concede the underlying point.

accepted, without any hesitation or qualification, that if these drawings had been in Watts' possession at the time, then this was something that they should have pointed out to the Bank.

83. Accordingly, if – contrary to my primary view – Watts had the relevant drawings, then I would uphold the first allegation of negligence against Watts. There are then important matters of reliance and causation which arise, with which I deal in **Section 6.2** below.

5.4 Issue 2: The Programme Allegation

84. The second allegation of negligence/breach concerns the programme. The Borrower had produced a programme which showed a construction period of about 52 weeks. The criticism of this was that the period was too short and that Watts should have assumed a programme of about 15 months. On analysis, I find that this second allegation of negligence cannot be sustained. Mr Mitchell came close to conceding that in his closing submissions.

85. In his report(s), Mr Vosser does not identify any particular part of the Borrower's programme which he considered to be so over-optimistic that Watts were negligent in failing to spot the problem. He does not identify any programme duration that was too short or which failed to take into account some element of the known works. When he came to give oral evidence, he gave the impression that he was looking at the detailed programme for the first time.

86. Mr Vosser's actual criticism of Watts in this regard could not be more general. At paragraph 4.1.1.37 of his report he said that:

> "In my view a reasonably competent surveyor, reviewing the proposed programme, taking into account the constraints of the site in terms of working space, archaeological works, complexity in terms of working inside an existing basement and generally, the periods allocated to activities, and overlaps indicated in activities, would conclude that at best the programme was ambitious, and realistically at least three to four months short of a likely total construction period of fifteen to sixteen months."

Needless to say, Mr Vosser provides no detail as to the period of 15/16 months to which he referred, or how he calculated that period.

87. In my view, this is a wholly insufficient basis on which to allege the negligent endorsement by Watts of the Borrower's programme. Mr Whitehead sets out in detail, at paragraphs 5.03 to 5.07 of his report, how and why the 52 week period was reasonable. He expanded on those passages in his oral evidence. I accept that evidence, the detail of which was not significantly challenged.

88. In particular, I consider that there was considerable force in Mr Whitehead's conclusion that a monitoring surveyor, when faced with a detailed programme prepared by the developer who is going to be responsible for carrying out the works, is likely to set great store by that programme. It would only be if some element of the

construction works was demonstrably missing or that some programme duration was significantly underestimated that the monitoring surveyor would be tempted to drill down into the detail.

89. During the course of his oral evidence, the only additional point made by Mr Vosser was that, at the time that the final IAR was completed, the archaeological works had not been commenced. This, he suggested, was reason alone to explain his 3 to 4 month additional duration. In my view, this was another example of Mr Vosser advocating the Bank's case, whether right or wrong. There were a number of reasons why that argument was a thoroughly bad one.

90. The main reason was that the archaeological works were expressly included within the 52 weeks. Accordingly, the fact that those works had not been commenced by the time of the final IAR was nothing to the point, since the programme itself operated on the basis that this work would be done during the overall period of 52 weeks.

91. During his cross-examination of Mr Whitehead, Mr Mitchell took a slightly different point in relation to the archaeological works, and pointed out that they were inaccurately programmed because they were shown in a block, whereas they would in fact have been carried out in conjunction with excavation and piling. That may have been right as a matter of programming logic, but as Mr Whitehead noted in his answers, that simply meant that, in terms of duration, it was necessary to look at not only the archaeological excavations (line 10 on the programme), but also lines 11 and 12 (piling works and foundations respectively). Those three activities came to a total of 62 days, as shown on the programme. It was not suggested to Mr Whitehead that 62 days for those three operations was obviously too short; nor is there any evidence to that effect.

92. Accordingly, for these reasons, I reject the second allegation in respect of the programme. There was nothing which should have caused Watts to conclude that the 52 weeks was not reasonable or appropriate.

5.5 Issue 3: The Cash-Flow Information Allegation

93. The third allegation was that the cash-flow information provided by the Borrower was (and should have been identified by Watts as being) inadequate. It was said that the cash-flow information bore no relation to the reality of the carrying out of these works on site. Again, for the reasons set out below, I consider that this allegation was not sustained; again, it was not at the forefront of Mr Mitchell's closing submissions[4].

94. As noted at paragraph 50 above, there was a breakdown of the developer's costs in the final report at paragraph 1.2.2 which was in the same form as earlier drafts (paragraph 38 above). The first element was preliminaries. Thereafter, the elements were the existing shell, the shell sub-floors, the shell ground floor and sub-floor, the shells of the first, second, third, fourth, fifth and sixth floors, one-by-one, and the fit out. The Bank's case was that, because the works would not be carried out in this way, the Borrower's cash-flow schedule (which mirrored these work elements, and the figures

[4] Mr Vosser never himself plotted expenditure over time and maintained only one criticism, that the cash-flow was done floor by floor.

ascribed to them, on the basis of monthly payments), was unrealistic and should not have been endorsed by Watts in the IAR.

95. Mr Whitehead was adamant that, with one minor concession, this criticism was unfounded. He accepted that the preliminaries would be incurred throughout the works, so that it might be said that the payment for the preliminaries up front did not properly reflect cash-flow. But thereafter, as he put it, the cash-flow "demonstrated the works as they went up through the building". He said that it was entirely reasonable for the Borrower to have concluded that each of these elements would have taken about a month so that, as they worked up through the building, these would be the relevant figures for the cash-flow analysis. In my view, there was no answer to that straightforward evidence.

96. Mr Mitchell's cross-examination of Mr Whitehead appeared to be based on the premise that the works would not necessarily have been carried out floor-by-floor and that, for example, all the windows might have been installed at the same time. Mr Whitehead disagreed with that. There was no other evidence to support a different construction methodology. Furthermore, that is perhaps a good example of the sort of detailed forensic analysis which a monitoring surveyor would not ordinarily be required to carry out at the IAR stage.

97. Accordingly, I conclude that the Borrower's cash-flow analysis was a reasonable reflection of the amounts that would be required in order to complete these works. I do not consider that any proper criticism can be made of Watts for reviewing and accepting this analysis.

5.6 Issue 4: The Construction Costs Allegation

98. This is, of course, the main criticism of Watts. They endorsed the Borrower's estimated cost figure of £999,099. It is the Bank's case that they were negligent to do so. In my view, it is possible to approach this issue in a number of different ways. But each lead to the same conclusion: that, as a monitoring surveyor, Watts were not negligent in considering that the Borrower's figure of just under £1 million for the construction costs was reasonable in all the circumstances.

99. The starting point must be, as Mr Whitehead observed, that Watts were carrying out an overview process 'rather than taking the whole thing apart and doing it themselves'. The figure of £999,099 was the figure put forward by the developer who was responsible for carrying out the project and who had no incentive whatsoever in underestimating the cost. If this was the figure that the Borrower (half-owned by the Bank's key customer, Modus) considered, with all their experience, to be a reasonable one, then the starting point must be that the figure was likely to be reasonable.

100. Secondly, there is the significance of the contract sum. Mr Whitehead explained in his cross-examination that the fact that first GEM, and then DVD, were prepared to carry out this work pursuant to a fixed price contract for the sum of £999,099 was another reason to conclude that the figure was likely to be right. A fixed price contract means what it says: in the absence of delay claims or variations ordered by the employer, there will be no reason for the contract sum to be any higher.

101. During his cross-examination of Mr Whitehead, Mr Mitchell suggested that, whilst that might have been a realistic assessment in respect of the position when GEM were going to carry out the works, it was unrealistic once it had become apparent that, because DVD were going to do it, this was going to be a form of "self-build". But Mr Whitehead did not accept that. He said that the fixed price would remain an important element of the valuation process whoever was going to do the work, and that the monitoring surveyor would use that fixed price as the basis for the monthly valuations. Again, I accept Mr Whitehead's evidence. It seems to me to be common sense.

102. Thus, the fact that the figure was put forward by the Borrower, who – as developer – would be responsible for the works, and the fact that the figure was going to be subject to a fixed price contract, both indicate to me that Watts were entitled to take this figure as a realistic starting point.

103. Thirdly, there are Mr Vosser's criticisms of the figure. In my view, on a proper analysis, Mr Vosser's evidence does not show that Watts fell below the standard to be expected of a reasonable monitoring surveyor.

104. Mr Vosser said that Watts should have done their own calculation from scratch, doing first a BCIS stage 1 calculation and then a detailed stage 2 calculation of the estimated costs. Mr Whitehead disagreed, saying that in an ordinary case, a monitoring surveyor was not obliged to do his own detailed calculation of the cost and that there was nothing in the present case to require Watts to do so here. Mr Whitehead's view was firmly in accordance with clauses 3.6 and 5.1 of the RICS Guidance Note to Project Monitoring dated March 2007[5], a point made by Ms Stephens in her closing submissions. I therefore find that Watts were not obliged to undertake a stage 2 exercise.

105. In what he called his stage 1 analysis, Mr Vosser arrived at a total figure of just over £1 million, namely £1,036,924. On the basis of his own figure, therefore, no criticism could possibly attach to Watts for supporting a figure that was just £37,000 less than that. It also compares closely with the figure of £1,039,200 calculated by Mr Russell at the time (see paragraph 38 of Mr Russell's witness statement, referred to at paragraph 35(b) above). Thus, in order to be in a position to criticise Watts' endorsement of the £999,099, Mr Vosser was obliged to increase his stage 1 figure by a number of add-ons, including allowances for the work being done in a city centre, self-build costs, contingencies and the like. That got him to a figure £1,442,342 if the work had been done by DVD (nearly half as much again) or £1,622,968 if the work was done by a third party. But Mr Whitehead's answer to all those purported add-ons was straightforward: since the £999,099 figure was being put forward by an experienced developer with detailed knowledge of the site, he said that Watts would be entitled to assume that all these elements were already allowed for in the figures.

106. In my judgment, this explanation was unanswerable. It is always possible to embellish any construction cost estimate by adding all sorts of percentages and contingencies. What matters in this case, for the stage 1 calculation, is what could reasonably have been assumed to have been allowed for in the original figure. I accept Mr Whitehead's evidence that, to the extent that Mr Vosser's add-ons were

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[5] When read *without* Mr Vosser's deliberate deletions (see paragraphs 64-65 above).

legitimate items (and he did not accept them all anyway), Watts were entitled to assume that they were already allowed for in the £999,099. Stripped of these bogus 'additions', Mr Vosser's figure was so close to the figure originally produced by the Borrower that it is, in my view, the best evidence that Watts were not negligent in coming to the conclusion that they did.

107. Two other points should be made about this element of Mr Vosser's analysis. Although in his reports Mr Vosser indicated that Watts should have gone on to do a detailed stage 2 calculation of construction costs, in his oral evidence he accepted that, in reality, they would not have done that, and would instead have gone back to the Bank. That was an important change of case, because it was not at all clear what the Bank would then have done if Watts had sought further instructions at that stage. It would have depended on the figures themselves. I deal with that further in **Section 6.2** below.

108. In addition, Mr Vosser (and the Bank's) wholly unrealistic claim reached its apogee with Mr Vosser's stage 2 figure of £1,736,165 (paragraph 4.2.1.33 of his report)[6]. He suggested in his report that Watts should have calculated this figure pursuant to their appointment and (despite the apparent concession noted in paragraph 107 above), the Bank continued to rely on this figure at paragraph 199 of their closing submissions. It is, in my view, a meaningless figure: there is simply no way in which, as a monitoring surveyor, Watts should have undertaken the extensive calculations necessary to arrive at such a sum. I also agree with Mr Whitehead that the figure is excessive in any event.

109. The fourth reason why I do not consider that Watts were negligent in endorsing the £999,099 figure arises out of the detailed evidence of Mr Russell, set out at paragraph 35 above. This concerned his sense check and his three comparables, which led him to conclude that the £999,099 figure was not unreasonable. The support for that figure provided by his factual account was yet another reason to conclude that Watts had properly considered the figure put forward by the Borrower and reasonably concluded that it could be endorsed.

110. It appears that, somewhat belatedly, the Bank decided that they had to attack each element of this part of Mr Russell's evidence. Thus, they said that this was not what he did at the time; they made criticisms of both the rate and the square footage; and they said that the three projects to which he referred were not properly comparable. In my view, on a proper analysis, these attacks were unfounded.

111. Although Mr Mitchell said simply (at paragraph 141 of his written closing submissions) that "In the Bank's submission, Mr Russell never undertook his 'three stage process'", in the circumstances of this case, that was an allegation, not that Mr Russell was somehow mistaken, but that he was lying (and lying in an elaborate fashion), in order to support Watts' position. That was not suggested to Mr Russell in those terms, and I do not accept that submission. Mr Russell had no reason to lie, particularly as he no longer works for Watts. As I have already noted, I found him to be an honest and reliable witness who freely confessed when he could not recall a

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[6] Mr Vosser had an even higher figure of £1,830,702 at paragraph 4.2.1.35 of his report, which he said was an underestimation of 37.5%.

particular part of the story. I therefore accept that the exercise at paragraph 35 of his statement was what he did at the time.

112. There is another, rather more subtle reason why I have concluded that what Mr Russell said he did at the time was entirely plausible. Although Mr Vosser's criticisms of the three comparables were typically over-stated, I accept that there were many differences between the three projects which Mr Russell said he had regard to as comparables, and the proposed development at Clifford Street in York. Given Watts' profile in the construction industry at the time, and the projects on which they were working or on which they had data, I consider it most unlikely that, if Mr Russell or Watts were going to fabricate a series of comparables after the event, so as to justify what they did at the time, they could not have found a better and more persuasive list of projects. In other words, the fact that the comparables are of some assistance, but are by no means decisive of themselves, only supports Mr Russell's credibility.

113. I consider that the attack on the nuts and bolts of Mr Russell's calculation was misconceived. As to the rate of £120 per square foot for the main lettable areas, this was so close to Mr Vosser's £128.58 per square foot that no sensible criticism can be made of it. As for the square footage, Mr Russell referred at paragraph 37 of his statement to the overall square footage being 8,939. That was the same as the figure used by Mr Vosser in his own report, so one might have thought that that dealt conclusively with the point. In fact, the Bank had another point to make about square footage, which I deal with separately at **Section 5.7** below.

114. Since the rate and overall square footage were so close to or the same as Mr Vosser's own figures, that left the Bank with the general assertion that the three comparables were not, in fact, properly comparable. As noted above, I accept that they are of some use, but they are not precisely similar projects.

115. One difficulty with any more sustained attack on the comparables was that Mr Vosser never properly made it. Although he produced a second report some months after Mr Russell's witness statement, he did not criticise the comparables (indeed, it appears that he deleted from the final draft of that report the paragraphs that did make such allegations). There was some discussion about the issue in the experts' Joint Statement, but this had at least some of the hallmarks of an ambush of Mr Whitehead (because the matter had not been raised by Mr Vosser in his reports). Moreover, the documentary material that supported Mr Vosser's views was not provided until the week before the trial, without any proper explanation for the delay. Even then, Mr Vosser did not produce any sort of commentary to explain how and why the projects were not comparable. This was an underhand way of dealing with this part of the case.

116. In my view, elements of the three projects were comparable, even if there were some important differences. No building project is the same as another. The three other projects involved some new build (as the York project did) and some refurbishment (as the York project did). At least one (Salford) was in a city centre. They were all recent at the time of the IAR. They were therefore projects which Mr Russell was entitled to take into account when arriving at his figures, although they could not (and did not) dictate his conclusions.

117. For all these reasons, I consider that Watts were not negligent in concluding that the Derwent York figure for construction costs of £999,099 was achievable.

5.7 Square Footage

118. Although it did not emerge clearly from the pleadings or the Bank's opening, during the cross-examination of Watts' witnesses, and particularly during his oral closing submissions, Mr Mitchell focused heavily on the square footage figure used by Watts in 2008. He argued that Watts understated the square footage at the time, which led them to underestimate the likely construction costs. To sustain this allegation, he relied principally on paragraph 72 of Watts' response to the Bank's letter of claim in the pre-action protocol process, dated 9 December 2014, which indicated that, in 2008, Watts had divided the construction costs of £999,099 by what was referred to as "the declared floor area (6,803 square foot)", and arrived at a net cost per square foot of £146.86. The response letter said that this was higher than the norm, and the inference in the letter was that this had given Watts' comfort that the £999,099 figure was accurate. So the allegation was that, in 2008, Watts had relied on an incorrect (and too low) figure for the relevant square footage, which inevitably meant that they had underestimated the construction cost.

119. There was no doubt that, because of the response to the letter of claim, and the fact that the 6,803 square foot figure can be found in Watts' monthly reports (provided after the IAR), there was some forensic basis for this argument. But it seems to me that the Bank's new case ignored a number of other considerations.

120. First, it was not put in those terms to Mr Russell, despite the clear words of his witness statement and his reference to the (correct) figure of 8,939 square foot. Instead, the point was put to Mr Rushton as part of the attack on the reliability of the letter of 9 December 2014. That ignored the fact that Mr Russell – the one person who would have known what square footage he utilised in 2008 – no longer worked for Watts at the time that the letter was prepared, and had no involvement in its production. It would be wrong and unfair to hold Watts to an assertion in a solicitors' letter which was not pleaded and had not been prepared by the person who had been involved at the time.

121. Thirdly, although there is some interchangeability between the descriptions of declared floor area, net lettable floor space and the like, both in the letter of December 2014 and in the earlier reports and documents produced by Watts after the IAR, it seems to me tolerably clear that Watts were aware that the 6,803 square foot related to the actual amount of residential space that was going to be sold, and that there were other areas which were not included in that figure, but which required to be included for any calculation of build cost.

122. Accordingly, whilst I accept that there has been some imprecision as to how various square footage calculations were described, I do not accept that Watts ever used, or thought it appropriate to use, the 6,803 square footage figure in order to calculate construction cost. Accordingly, I reject this argument, which seemed to lie at the heart of the Bank's eventual case on this topic.

5.8 Summary on Issues 1-4

123. For the reasons set out above, I have rejected the Bank's case on Issue 1 (planning); Issue 2 (programme); Issue 3 (cash-flow); and Issue 4 (the construction costs). If (contrary to my primary finding) Watts did have all the relevant drawings, then I uphold the Bank's allegation of negligence in respect of Issue 1.

6. CAUSATION

6.1 Introduction

124. For the reasons set out in **Section 5**, I have rejected the four allegations of negligence/breach of contract against Watts. In those circumstances, this claim must fail. However, if I am wrong about each or all of those four allegations, I should go on and consider the issues of causation.

125. I address these issues in this way. At **Section 6.2** I deal with the issues concerning the Bank's alleged reliance on the IAR and the foreseeable consequences of the four allegations of negligence/breach of contract. In **Section 6.3** I deal with what loss, if any, would be recoverable from Watts in law if the Bank had made out both breach and causation. And in **Section 6.4** I deal with what I consider to be the true cause of loss in this case.

6.2 Reliance and the Consequences of the Four Allegations

126. I start with reliance. Watts say that the Bank has failed to prove that it relied in any way on the IAR. They say that, in those circumstances, the Bank's case against them must fail in any event.

127. It is certainly right that the Bank did not call anyone who read/relied on the IAR. But I find that, on the balance of probabilities, the Bank did rely – at least in general terms – on the IAR produced by Watts on 8 April 2008. There are a number of reasons for that conclusion.

128. First, I consider that the events of March/April, set out in paragraphs 41-47 above, demonstrate that the IAR was looked at and read by employees at the Bank. In particular, they asked Watts a series of detailed questions about the IAR, which must have been prompted by a consideration of the report in the form in which it was then.

129. Although the first drawdown may have been permitted prior to receipt of the final IAR (see paragraphs 44-46 above), that has to be seen against the background of the provision by Watts to the Bank of a number of draft versions of the IAR between January and April 2008. It would be artificial, in a commercial situation such as this, to conclude that the single trigger for the case on causation can only be the final version of the IAR, particularly in circumstances where the Borrower was forever pestering both the Bank and Watts to release monies as soon as possible.

130. Finally, I accept Mr Mitchell's submission to the effect that, in cases like this, the court should assume (unless the evidence points to the contrary) that an employer relies on the professional advice that he has paid for and been provided with. Taking all the evidence into account, I consider that such an assumption is warranted here. So for all these reasons, I conclude that, in general terms, there was reliance on the Watts' IAR.

131. The next question, however, is this: assuming reliance on the IAR, to what extent is the loss claimed the result of each or any of the four breaches addressed in **Section 5** above. In other words, has the Bank been able to demonstrate that, as a result of those four breaches, not only would there have been no drawdown on the development loan, but they would also have demanded repayment of the land loan from the Borrower?

132. I can deal shortly with the answer to that question in respect of Issue 2 (programme) and Issue 3 (cash-flow). I asked Mr Mitchell during his closing submissions whether the Bank suggested that, leaving aside the other two allegations, they maintained a case that, if the content of the IAR in relation to the programme or the cash-flow had been different, the Bank would not have proceeded with the development loan. He fairly accepted that the Bank could not make such a case. I respectfully agree with that concession. Indeed, it seems to me to be fanciful to suggest that, if Watts had advised that, say, the programme of 52 weeks might be a little short, or that the cash-flow should be re-jigged in a different way, that the Bank would not have allowed drawdown on the loan. In other words, even if my principal view was wrong, and Issues 2 and 3 had been made out against Watts, they lead nowhere for causation purposes.

133. In relation to Issue 1 (planning), Mr Mitchell maintained that, even if that was the only allegation on which the Bank was successful, the pleaded loss would have been caused. He said that, if Watts had pointed out the discrepancy between the documents for which planning permission had been given, and the scheme that it was proposed would be built, the Bank would not have permitted any drawdown and there would have been no loan. On the evidence, I cannot accept that submission.

134. First, I am in no doubt that the Bank knew – or at least must be taken to have known – that the building to be built on the site was going to be different to that for which permission had earlier been obtained. They also knew that that was in order to maximise the return. That approach was expressly noted in the Borrower's original application for credit (see paragraph 8 above). In that sense, it appears that the Bank was in a better position than Watts, because the Bank had been told in terms of the intention to deviate from the planning consent. No such information was vouchsafed to Watts. Thus, if Watts had pointed out an example of this approach in the IAR, and said that six window stacks and not five were proposed for the Clifford Street elevation, I find that it is more likely than not that the Bank would have indicated that this was something of which they were generally aware.

135. Secondly, I consider that it is most unlikely that, even if the Bank did not know about this specific change beforehand and had been alerted to it by Watts, they would not have permitted the drawdown on the development loan. If the saga about the car parking condition precedent is any guide – and I believe that it is – the Bank would have gone back to the Borrower for advice about this change, and the Borrower would have explained that the proposed changes to the layout (which gave rise to the six window stacks) would maximise the recoverable profit on the development. That could have been the only explanation as to why and how the change had come about in the first place. I find on the balance of probabilities that the Bank would have accepted that explanation, and the development loan would have progressed to drawdown.

136. Further, I also consider it likely that, if the Bank had reverted to the Borrower on this issue, they would have provided the Bank with additional comfort by saying that retrospective planning permission was likely to be granted, which is what happened (see below). The Bank would also have known that they had a guarantee from MPL in respect of any increases in construction cost that might have been caused. So the Bank would, in all probability, have gone ahead in any event.

137. In the unlikely event that the Bank had come back to Watts (rather than the Borrower) for further advice on this issue, it is more likely than not that Watts would have said that the discrepancy in itself presented no difficulty, provided of course that the Council was prepared to grant retrospective planning permission. That is in many ways the clinching point because, in this case, once the discrepancy was known to all, a retrospective planning application was made to the Council, and permission was granted. In other words, this was not a case where a failure to build in accordance with the planning consent had a significant or deleterious effect on the value or progress of the development. On the contrary, once the point emerged into the open, planning consent in respect of the six window stacks was granted.

138. In all those circumstances, I find on the balance of probabilities that if (contrary to my primary view) Watts should have pointed out to the Bank the discrepancy between the two schemes in the IAR, that would not have prevented the development from going ahead and the drawdowns being made in accordance with the details of the loan agreement between the Bank and the Borrower. Issue 1 is therefore irrelevant for causation purposes.

139. That leaves Issue 4, the question of the construction costs. The only evidence I have on the consequences of that breach is generic, from a number of the Bank's factual witnesses – none of whom were involved in April 2008 – who have asserted that, if the Bank had received the advice which Mr Vosser said should have been given relating to all four allegations, the transaction would not have gone ahead.

140. A typical example of this strand of the Bank's evidence can be found at paragraphs 41 and 42 of the statement of Mr Catterson[7]. At paragraph 41 he referred to the four allegations of breach against Watts which he said came from the expert opinion (Mr Vosser) received by the Bank. He then said at paragraph 42, "had Watts advised Bank appropriately of the matters above, the Bank would not have advanced the development funding to the borrower." Of course, one difficulty for the Bank is that that evidence does not differentiate between the four allegations and would appear to require proof of all four breaches before any loss could be recovered. That would mean that, on my findings, the claim would fail for causation reasons in any event.

141. At paragraph 43 of his witness statement, Mr Catterson dealt specifically with the development costs. He said:

> "…if Watts had advised the Bank that the developer's budgeted costs were too low by an amount of the order of 34% then the loan as proposed would not have proceeded. The viability of the whole scheme would have been called into question and a

[7] Because this general evidence is the same in a number of the witness statements adduced on behalf of the Bank, I use Mr Catterson's statement simply by way of example.

> fundamental review and reassessment of the whole proposal would need to have been undertaken."

The 34% is based on paragraph 41.2 of Mr Catterson's statement, again expressly based on Mr Vosser's opinion, that the figure of £999,099 was some £592,187 too low[8]. It is not entirely clear where that figure can be found in Mr Vosser's report (there are so many different 'correct' figures for the construction costs advanced by Mr Vosser), but I accept the general premise that Mr Vosser had advised the Bank that, in his opinion, Watts should have told them that the likely construction costs would be at least £1.59 million.

142. Contrary to Ms Stephens' submissions, I am prepared to assume that, if the Bank had been told that, instead of £999,099, the construction costs were likely to be about £1.59 million then, on receipt of the IAR, they may not have permitted immediate drawdown. But in order for Issue 4 to be causative of the loss claimed, it requires the Bank to show that, not only were Watts negligent in endorsing the £999,099 figure, but that Watts should have undertaken a detailed calculation that demonstrated that the construction costs were approximately £1.59 million (which was at the low end of Mr Vosser's various figures) *and* that this would have meant that the drawdowns would never have been permitted.

143. For the reasons set out in **Section 5.6** above, there was no evidence which could have justified a finding that Watts should have themselves calculated a figure of £1.59 million. So even if the endorsement of the £999,099 was negligent, there was no basis on which Watts could or should have done their own detailed calculation to arrive at £1.59 million. That in turn means that the general evidence of Mr Catterson (and the other Bank witnesses) does not establish a case on causation, because it is only by reference to such a figure that they say the loan would not have been permitted. The fundamental difficulty for the Bank is that that there is no other, intermediate figure, either pleaded or in the evidence. I have already noted the absence in Mr Vosser's report of any margins of error (see paragraph 66 above).

144. The difficulty inherent in this part of the Bank's case led to two attempts at trial to run an alternative case on causation. As set out in paragraph 107 above, Mr Vosser changed his evidence orally, to say that, rather than doing their own stage 2 calculation, Watts should have gone back to the Bank after the stage 1 calculation. But then what? As Mr Mitchell fairly conceded in his closing submissions, there was no evidence from the Bank as to what would or might have happened thereafter. I certainly cannot assume that the Bank would have stopped the development at that stage: for one thing, there was no evidence to that effect; for another, their reaction would obviously have depended on what the Watts advice as to cost might have been. If, for example, their advice about the likely cost had been at a figure of just over £1 million (rather than the Borrower's own figure of just under £1 million), then the figures were so similar that I consider it overwhelmingly likely that the development would have gone ahead anyway.

145. Further support for my conclusion that different advice about construction costs was unlikely to cause the Bank to stop the development can be found in the existence of

[8] That would make the 'correct' estimate £1,591,286, yet another figure for the construction costs apparently put forward by Mr Vosser.

both the £200,000 guarantee and the cost over-run guarantee, which the Bank had required from MPL and the Borrower respectively. Those promises, together with Mr Catterson's ill-fated 70% condition precedent, bear out Ms Stephens' submission that the Bank was less concerned about the actual construction cost than by the means by which the loan would be repaid. That also provides a complete answer to the Bank's other attempt to get round these causation difficulties, apparent from paragraphs 198-200 of Mr Mitchell's closing submissions, which suggested that the real problem with the IAR was that it somehow failed to provide certainty. Not only was that allegation neither pleaded nor opened, but it was also not established by the evidence. Certainty (amongst other things) was provided to the Bank by the guarantees noted above; by the fixed price contract; and by the involvement of their 'key client', Modus.

146. For these reasons, I conclude that, even if proved as a matter of liability, Issue 4 fails as a matter of causation. In this way, even if any of Issues 1-4 had been proved as a matter of liability, it has not been shown that they caused any of the loss claimed.

6.3 Is Any Loss Recoverable In Law?

147. A related question is whether the loss claimed by the Bank is recoverable from Watts as a matter of law. This led to a significant argument about the so-called ***SAAMCO*** cap (see paragraph 148 below).

148. In ***South Australia Asset Management Corporation v York Montague Limited*** [1997] AC 191, the House of Lords addressed the problem of what damages are recoverable in a case where (i) but for the negligence of a professional advisor his client would not have embarked on some course of action, but (ii) part or all of the loss which he suffered by doing so arose from risks which was no part of the advisor's duty to protect his client against. In the course of his speech in that case, Lord Hoffmann said:

> "Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action. (211 A-B)…
>
> …a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. (214 C-E)."

In elaboration of this, in ***Nykredit***, Lord Hoffmann said at page 1638:

> "The principle approved by the House [in ***SAAMCO***] was that the valuer owes no duty of care to the lender in respect of his entering into the transaction as such and that it is therefore insufficient, for the purpose of establishing liability on the part of the valuer, to prove that the lender is worse off than he would have been if he had not lent the money at all. What he must show is that he is worse off as a lender than he would have been if the security had been worth what the valuer said."

149. The decision in ***SAAMCO*** has recently been the subject of consideration by the Supreme Court in ***BPE Solicitors v Hughes-Holland*** [2017] UKSC 21. During the course of his judgment in that case, Lord Sumption said:

> "34. The decision in ***SAAMCO*** has often been misunderstood, not least by the writers who have criticised it. The misunderstanding arises, I think, from a tendency to overlook two fundamental features of the reasoning.
>
> 35. The first is that where the contribution of the defendant is to supply material which the client will take into account in making his own decision on the basis of a broader assessment of the risks, the defendant has no legal responsibility for his decision. Lord Hoffmann made this point in the ***Nykredit*** case. Speaking of the decision in ***SAAMCO***, he said (p 1638):
>
> > "The principle approved by the House was that the valuer owes no duty of care to the lender in respect of his entering into the transaction as such and that it is therefore insufficient, for the purpose of establishing liability on the part of the valuer, to prove that the lender is worse off than he would have been if he had not lent the money at all. What he must show is that he is worse off as a lender than he would have been if the security had been worth what the valuer said."
>
> This is why in ***SAAMCO*** itself Lord Hoffmann had rejected the distinction made by the Court of Appeal between "no transaction" and "successful transaction" cases. It was "irrelevant to the scope of the duty of care": p 218C-D, G.
>
> …
>
> 39. Turning to the distinction between advice and information, this has given rise to confusion largely because of the descriptive inadequacy of these labels. On the face of it they are neither distinct nor mutually exclusive categories. Information given by a

professional man to his client is usually a specific form of advice, and most advice will involve conveying information. Neither label really corresponds to the contents of the bottle. The nature of the distinction is, however, clear from its place in Lord Hoffmann's analysis as well as from his language.

40. In cases falling within Lord Hoffmann's "advice" category, it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is to consider all relevant matters and not only specific factors in the decision. If one of those matters is negligently ignored or misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover all loss flowing from the transaction which he should have protected his client against. The House of Lords might have said of the "advice" cases that the client was entitled to the losses flowing from the transaction if they were not just attributable to risks within the scope of the adviser's duty but to risks which had been negligently assessed by the adviser. In the great majority of cases, this would have assimilated the two categories. An "adviser" would simply have been legally responsible for a wider range of informational errors. But in a case where the adviser is responsible for guiding the whole decision-making process, there is a certain pragmatic justice in the test that the Appellate Committee preferred. If the adviser has a duty to protect his client (so far as due care can do it) against the full range of risks associated with a potential transaction, the client will not have retained responsibility for any of them. The adviser's responsibility extends to the decision. If the adviser has negligently assessed risk A, the result is that the overall riskiness of the transaction has been understated. If the client would not have entered into the transaction on a careful assessment of its overall merits, the fact that the loss may have resulted from risks B, C or D should not matter.

41. By comparison, in the "information" category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers). In such a case, as Lord Hoffmann explained in ***Nykredit***, the defendant's legal responsibility does not extend to the decision itself. It

> follows that even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction, he is liable only for the financial consequences of its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else's decision."

150. In the present case, Mr Mitchell said that this case fell into the 'advice' category, because the Bank left it to Watts to consider what matters should be taken into account in order for the Bank to decide whether to allow the drawdowns to take place. Ms Stephens argued that this was an 'information' category case, where a professional advisor contributed a limited part of the material on which the Bank was going to rely in deciding whether or not to allow the drawdowns, but the process of identifying the other elements in the overall assessment of the commercial merits of the loan was a matter for the Bank.

151. In my view, this case was plainly in the 'information' category. The appointment of Watts was entirely focussed on the provision by them of certain kinds of information (see paragraph 30 above). Further, it follows from my analysis in **Section 6.2** above that it can only have been the information as to the construction costs – the endorsement of the £999,099 – which could ever have given rise to a claim. That was a part of the material that the Bank was going to rely upon in deciding whether or not to allow the drawdown but, self-evidently, it was just a part of the overall consideration. There were a number of other matters which were highly relevant to that decision which were nothing to do with Watts.

152. Those included the likely value of the apartments (a matter on which Watts had no input and in respect of which, for the reasons set out in **Section 6.4** below, should have warned the Bank not to enter into the transaction at all). There were also the additional costs in respect of the development such as the purchase cost and so on, which were again nothing to do with Watts, and in respect of which the Borrower's own lack of financial resources should have also alerted the Bank to a problem. Other matters, such as the overall profit margin and the like, were known only to the Borrower and the Bank, and were again nothing to do with Watts.

153. Thus, although – on this premise – the question of the construction costs was important, Watts would still only be liable in law for the financial consequences of that information being wrong, and not for the financial consequences of the Bank entering into the transaction.

154. The problem for the Bank is that no loss has been identified as arising from the single allegation that Watts' information in relation to the construction costs of £999,099 was erroneous. This has been pleaded and pursued by the Bank as an "all or nothing" case:[9] the full financial consequences of the failed loan are sought, and no lesser or

[9] Sometimes known as a 'no transaction' case, although that is a distinction abjured by Lords Hoffmann and Sumption.

alternative sum. That claim cannot succeed: for the reasons noted in **Section 6.2** above, there are far too many obstacles in its way. Moreover, it is difficult to see how any specific loss could flow from the information about the estimated construction cost, because the Bank had obtained a guarantee in respect of cost overruns, so had sought to cover themselves on this very issue. If the guarantee was worthless, that was the Bank's responsibility, not that of Watts. For these reasons, even if I was wrong on liability and causation, I conclude that, on an application of ***SAAMCO*** and ***BPE***, no loss has been identified by the Bank as being recoverable in law from Watts.

155. I should stress that, in reaching that view, and despite both parties' reference to it, I have not been influenced by the decision of Edwards-Stuart J in ***Lloyds Bank Plc v McBains Cooper*** [2016] EWHC 2045 (TCC). Although that was a case about a monitoring surveyor in which there was some debate about ***SAAMCO***, the defendant's liability arose out of the subsequent monthly reports, not the IAR. Furthermore, parts of the judgment in that case are now under appeal.

6.4 True Cause of Loss

156. Further and in any event, on a separate but related issue, I am in no doubt that the cause of the entirety of the Bank's pleaded loss was the Bank's botched consideration of the loan application and the fundamentally flawed decision to lend to the Borrower. I find that this was a project on which the Bank should never have made a loan and in respect of which there was always a real risk that the Bank would not recover its loan if something happened to Modus. That of course is precisely what happened.

157. I set out below an analysis of the principal errors that the Bank made in lending any money to the Borrower in respect of this proposal. This list is not intended to be exhaustive but it is designed to focus on what, in the real world, should have sent sufficient alarm bells ringing for Mr Catterson, or someone else at the area credit department, to reject Mr Rainford's proposal.

158. However, before embarking on that exercise, I ought to say something about the expert evidence on the lending allegations. This was not a case about lending practices in 2007; it was a case about the Bank's alleged failures to follow their own lending policies and guidelines. Watts relied on a report from an experienced lending expert, Mr Stewart Hamilton, who then gave oral evidence. He criticised the Bank for a number of failings in respect of the loan. I am sure Mr Mitchell would not mind me saying that, despite the care and skill with which he was cross-examined, the overall result of Mr Hamilton's oral evidence was that he maintained his principal criticisms of the Bank. He emphatically rejected the line taken by Mr Mitchell that, in the circumstances, it would have been embarrassing or risky of the Bank to ask for more information from the Borrower or the Modus group when considering whether or not to make the loan. I was also quite satisfied, despite the sometimes strenuous suggestions to the contrary, that Mr Hamilton had the appropriate experience and knowledge to make the criticisms that he did. For the detailed reasons that he gave, the fact that he had never worked for a lending bank was quite immaterial.

159. The Bank had obtained reports from their own lending expert, Mr Sandy Harrison. He was due to give evidence on the last day of the trial. But when the time came, Mr Mitchell indicated that he did not propose to call Mr Harrison. In those circumstances, of course, the Bank's room for manoeuvre in relation to the lending

aspect of the case was reduced still further. A likely explanation for the decision not to call Mr Harrison was Mr Mitchell's realistic appraisal of the Bank's difficulties on this subject.

160. I turn then to the detailed failures. First, the Bank should have realised that this was an entirely new type of project for Modus. This was not how they had worked before, as the Credit Paper Memorandum made clear. Their success had been on large pre-let developments, most of which were commercial. They had no experience of speculative residential development. In addition, they had little experience of working in partnership with another company, evidenced by the fact that MPL had only just been set up.

161. These novel features of the proposal ought to have alerted Mr Rainford and Mr Catterson to the need to scrutinise it carefully: this was not a typical Modus scheme, so different considerations applied. Sadly, that did not happen. Instead, everything was waved through (all on the same day) because of the Bank's pre-existing relationship with Modus. It is clear from the contemporaneous documents that the Bank was frightened of upsetting or embarrassing Modus by asking too many impertinent questions, which echoed Mr Mitchell's approach in his cross-examination of Mr Hamilton. In my view, given the novel nature of the proposal, the Bank was obliged to ask many more searching questions than it did.

162. Secondly, even on the face of the amended Credit Paper Memorandum, the proposed loan failed to comply with three of the four guidelines set by the Bank and Mr Rainford (paragraph 10 above). Of course, some flexibility is always required, and the Bank's internal lending policy made that plain. But failing to meet three out of four guidelines is a very unpromising starting-point for a credit application. And yet it appears that these failures were not regarded with any concern by Mr Rainford or Mr Catterson. The only plausible explanation for that is the Bank's almost blind trust in Modus.

163. Thirdly, it was apparent from the documentation that, on any view, the margins here were very tight. The proposal was based on a spend of £1.8 million and a recovery of £2 million, making a gross profit of £200,000, or 10%. That was a very modest profit for a speculative residential development before the 2008/2009 crash.

164. This restricted margin should have been apparent to Mr Rainford and Mr Catterson because the amended Credit Paper Memorandum of 8 June made clear that a larger loan was required, because otherwise MPL's internal rate of return was too low (paragraph 11 above). That again suggests that there was always insufficient 'fat' in this proposal. In passing, it is also noteworthy that nobody at the Bank queried the fact that they were being asked to make a bigger loan because the Borrower was unhappy with its IRR on the modest sums that it was prepared to invest in this project. If it did not look very good for the Borrower, the Bank should have asked why they were making up the shortfall? Again that omission can be put down to Mr Rainford's absolute faith in anything involving Modus.

165. Fourthly, and linked to the preceding point, is the question of the guarantee. The £200,000 capital guarantee was used in the application by Mr Rainford to ameliorate the adverse LTV (paragraph 12 above). Mr Hamilton, Watts' lending expert, said that this was inappropriate. I respectfully agree. The fact that there was a capital

guarantee might have provided the Bank with additional comfort if something was going to go wrong, but it was plainly and obviously irrelevant to the value of the development and therefore should not have been taken into account in calculating the LTV. Without it, of course, the LTV was even worse from the Bank's perspective, and the failure to meet the Bank's guidelines even more significant.

166. I also find that the guarantee was of no intrinsic value anyway, because it was provided by Modus Properties Limited, another new company who had not embarked on this sort of project before. Plainly, for the guarantee to have any potential value (for it to be a substantial mitigant), it needed to come from a bank or insurer or, at worst, Modus Ventures Limited, the main company in the Modus Group. In the absence of such a guarantee, it is difficult to see why the Bank could or should have placed any reliance on a promise from a new company, who owned 50% of the shares of the Borrower. This aspect of the lending arrangements has the feel of a paper exercise, designed to make the proposal look superficially more attractive to the Bank, but without any substance at all.

167. Fifthly, there was the fact that the Bank had a £20 million exposure to three other Modus companies. On this topic, there was a good deal of evidence about the Bank's guidelines and the extent to which this exposure was or was not relevant. In my view, on analysis, the Bank's suggestion that they were entitled to ignore this exposure was untenable.

168. Essentially, the Bank argued that they were entitled to ignore the £20 million 'associated exposure' referred to in Mr Rainford's Credit Paper Memorandum and Mr Catterson's manuscript note (paragraphs 14-15 above) because, pursuant to the Bank's lending policy, this was not 'linked lending'. The relevant part of the Bank's internal policy provided:

> "These situations typically involve:
>
> - Common ownership (i.e. greater than 50%)
>
> - Dependency by several Borrowers (person or legal entity) on a single repayment source
>
> - Cross-collateralisation of security."

Mr McGonnell, one of the Bank's witnesses, recalled this policy and said that effectively, where company X only owned 50% of the shares in the Borrower, then the other exposure to company X or any companies associated with X was irrelevant. I expressed my surprise at his interpretation of the policy, and he was quick to tell me that it had since been altered. In any event, I reject his interpretation for four reasons.

169. One: this was not the approach that Mr Rainford and Mr Catterson adopted as a matter of fact. If questions of linked lending and total group exposure did not apply to companies where Modus did not own more than 50% of the shares, then there would have been no need for Mr Rainford to include these in the memorandum, and there would have been no need for Mr Catterson to add his manuscript note in relation to associated exposure on the Decision document (paragraph 15 above). They clearly

thought that it was of some relevance that a Modus company owned 50% of the shares in each of the three companies referred to in the credit paper.

170. Two: they were plainly right to think that it was relevant. It would have been absurd if the Bank could have lent unlimited monies to Modus companies simply because each of the vehicles which Modus used to bring about their developments were companies where their share ownership was never more than 50%. Such a lending policy defies common sense. In any event, it would also have been contrary to the Bank's actual policy, which expressly required those considering the loan to take into account 'the dependency by several Borrowers on a single repayment source'. Here, the single repayment source was Modus Ventures Limited. MPL did not themselves have any money. So the fact that the Bank was lending to other Modus companies highlighted the dependency of all those companies on the parent, Modus Ventures Limited.[10]

171. Three: if the Bank's policy had been adhered to, the loan would not have been made. For one thing, Mr Catterson's authority to approve loans only went up to £5 million. If, as I consider he should have done, Mr Catterson had taken into account the associated exposure as 'linked lending', he would have realised that this loan application was beyond his authority and would have referred the matter to someone more senior, as set out in his witness statement. He could not recall what he had done about that and there is no record that it was ever referred up the line. On that basis alone, it is right to say that this loan should never have been authorised in the way that it was.

172. Four: there was an essential tension running all the way through the Bank's case in relation to Modus (paragraph 15 above). On the one hand, the Bank emphasised the importance of their relationship with Modus and the commercial imperative of not upsetting them. They relied on Modus' extensive experience as successful property developers. But on the other hand, they were anxious to disregard all their other lending to Modus companies and to treat this as a one-off application for a loan. In my view that was nonsensical. The two things were plainly linked. If there were plusses in the Bank's relationship with Modus (and I accept that there were) there was a plain downside: the amount of the Bank's existing exposure to the Modus group if something went wrong.

173. Turning back to the Bank's lending failures, the sixth separate failure by the Bank when approving the loan was the failure to incorporate Mr Catterson's condition precedent relating to the 70% sales requirement into the facility letter, and the Bank's admitted failure to police that condition precedent at all (paragraphs 14, 17, 20, 23 and 24 above). Until June 2008, when the point was belatedly spotted by Ms Davies, the Bank had not only failed to include the condition in the offer letter, but had also wrongly confirmed that the 70% condition had been met. Whether 7 or even 8 properties are used as representing the 70%, Mr Catterson's condition precedent was not met. That again was another reason why the loan should never have been made. If the Bank had properly operated Mr Catterson's condition precedent, they would have seen from the Savills' report (paragraph 20 above) that it had not been met and

[10] Ms Stephens made a powerful case, at paragraph 95 onwards of her written closing submissions, that if Mr McConnell's interpretation had been right, the Bank's policy would have been in breach of the FSA rules applicable at the time.

that, on its own or in conjunction with everything else that I have outlined above, this would have led them to conclude that there should be no drawdown to permit the Borrower to buy the site.

174. Seventhly, there is the clear caveat in the Savills' report that, before any drawdown could be made, the construction cost needed to be verified (paragraphs 25-26 above). That did not happen, and the drawdown was permitted. In my view, this demonstrates two things: the Bank's cavalier attitude to their own conditions precedent; and the fact that, by the time Watts became involved, the project was up and running, the site bought, and the stripping out works being carried out. Projects of this kind engender a momentum of their own. In my view, it is not unrealistic to say that, by the time Watts were first involved, the die was pretty much cast.

175. Finally, there is the failure on the part of the Bank to police the condition precedent in respect of car parking (paragraphs 21-22 above). I do not consider that this failure could, on its own, lead to the conclusion that, if the Bank had acted properly, the loan would never have been made. But I agree with Ms Stephens that it amounts to yet further evidence that the Bank was willing to override its own conditions to avoid the risk of upsetting Modus. That was not a sensible or commercial way to proceed.

176. For all these reasons, therefore, I have concluded that this loan was only made to the Borrower because of the Bank's failings, outlined above. Those failings meant that the Bank took on an unacceptable and unnecessary risk. Following the financial crash in 2008/2009, that risk eventuated. In my view, the Bank can blame no one but themselves for that result. That is a further but separate reason why the claim against Watts must fail in its entirety. To that extent, I consider that this case is similar to ***BPE***, where the claim failed for similar reasons.

6.5 Summary on Causation

177. For the reasons set out above, even if I had upheld any of the allegations of negligence against Watts, I would have dismissed the claims on grounds of causation (**Section 6.2**); and/or recoverability in law (**Section 6.3**); and/or because the Bank were the real cause of its own loss (**Section 6.4** above).

7. QUANTUM

178. It is unnecessary for me to deal with quantum in view of my other findings in this case. If, contrary to my analysis in **Sections 5 and 6** above, the Bank had been able to recover against Watts the total losses from this transaction, then I accept the Bank's modified figure – taken from Mr Mitchell's opening – of £754,413.39.

8. CONTRIBUTORY NEGLIGENCE

179. Again, in view of my other findings, it is unnecessary for me to deal with contributory negligence. But if, contrary to my analysis in **Sections 5** and **6** above, the Bank had been able to recover the sum noted in the preceding paragraph then, for the reasons noted in **Section 6.4** above, that recovery would then have been the subject of a significant discount for contributory negligence.

180. In ***BPE*** I note that the Court of Appeal concluded that the case failed because the losses were caused by the claimant, not the defendant, but that, if they were wrong about that, the relevant percentage for contributory negligence was 75%. That percentage was not challenged in the Supreme Court. I take the view that, although 75% is about the maximum that can be deducted in circumstances such as this, it is amply justified here. Thus, if the Bank had been entitled to recover £754,413.39, that would have been the subject of a 75% reduction for contributory negligence, to reflect the matters noted in **Section 6.4** above.

9. CONCLUSIONS

181. For the reasons set out in **Section 5** above, I reject the allegations of breach of contract/negligence (Issues 1-4) made against Watts.

182. For the reasons set out in **Section 6.2** above, I conclude that the Bank has failed to make out a case on causation arising out of Issues 1-4.

183. For the reasons set out in **Section 6.3** above, I find that the losses claimed are not recoverable from Watts as a matter of law in any event.

184. For the reasons set out in **Section 6.4** above, I find that the true cause of the loss was the Bank's lending failures, which were nothing to do with Watts.

185. For the reasons set out in **Section 7** above, if I am wrong on liability, causation and recoverability in law, the maximum recoverable would have been £754,413.39, which, as explained in **Section 8** above, would then have been the subject of a 75% reduction for contributory negligence.

186. For all these reasons, the Bank's claim against Watts is dismissed.