Neutral Citation Number [2015] EWHC 3189 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th November 2015

Before:
Mr. William Trower QC
(sitting as a Deputy Judge of the High Court)

Between:

Claim No HC-2012-000158
and HC-2013-000475

EDWARD ASTLE & OTHERS

Claimants

-and-
CBRE LIMITED

Defendants

And Between:

Claim No HC-2014-001666

STEPHEN ABBOTT & OTHERS

Claimants

- and -
(1) EVANS RANDALL INVESTMENT MANAGEMENT LIMITED
(2) EVANS RANDALL (UK) LIMITED
(3) EVANS RANDALL INTERNATIONAL LIMITED

Defendants

And Between:

Claim No HC-2014-001693

STEVEN ABBOTT & OTHERS

Claimants

-and-
CBRE LIMITED

Defendants

And Between:

Claim No HC-2014-001055

ZARTHUSTRA JAL AMROLIA

Claimant

-and-
(1) EVANS RANDALL INVESTMENT MANAGEMENT LIMITED
(2) EVANS RANDALL (UK) LIMITED
(3) EVANS RANDALL INTERNATIONAL LIMITED
(4) CBRE LIMITED

Defendants

Mr Philip Jones QC and **Mr Giles Richardson** (instructed by Harcus Sinclair)
for the Claimants
Mr Ewan McQuater QC and **Mr Matthew Parker** (instructed by Jones Day)
for the Evans Randall Companies
Mr Adam Kramer (instructed by Clyde & Co LLP)
for CBRE Limited

Hearing dates: 20th, 21st and 22nd July 2015

APPROVED JUDGMENT

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

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MR WILLIAM TROWER QC

Mr William Trower QC:

Introduction

1. These are applications by Evans Randall Investment Management Limited ("ERIML"), Evans Randall (UK) Limited, Evans Randall International Limited (together the "Evans Randall Companies") and CBRE Limited ("CBRE") for summary judgment and/or to strike out all or part of the claims made against them. The Claimants are most but not all of the individuals (the "Investors") who invested in a Jersey-based trust, the Control Centre Exempt Unit Trust (the "Trust").

2. During the course of 2004, the Government launched a fire control centre project (the "Project"), part of which involved the acquisition and development of 5 sites to become regional fire and emergency rescue centres ("Fire Control Centres"). The sites were located in Cambridge, Castle Donington, Durham, Wakefield and Wolverhampton.

3. As part of the Project, the freehold or long leasehold interests in the Fire Control Centres were acquired by a Jersey limited partnership, the Control Centre Limited Partnership (the "Partnership") through its general partner The Control Centre General Partner Limited ("CCGPL"), a company owned by Evans Randall Limited. The limited partner in the Partnership was Bedell Corporate Trustees Limited ("BCTL") in its capacity as trustee of the Trust. I should add that, when the evidence refers to the Partnership, strictly speaking it is sometimes referring to CCGPL in its capacity as general partner of the Partnership. For the most part the distinction between the two does not matter.

4. The Trust also had an interest in another Jersey-based sub-trust, the Capital Unit Trust (the "CUT"), which itself held the freehold of a property in Cirencester (the "Cirencester Property"), which was to be developed into an office building to be leased to St. James' Place Wealth Management Group Plc, then majority owned by HBOS. The trustees of the CUT were BCTL and Atrium Trustees Limited.

5. In March 2006, Bank of Scotland ("BoS") advanced to the CUT a 5-year term loan of a sum in excess of £14 million in relation to the Cirencester Property. In July 2006, BoS advanced to CCGPL as general partner of the Partnership a 5-year secured term loan of a sum in excess of £100 million in order to finance the acquisition and development costs of the Fire Control Centres. The loan to value covenant under this facility was 82% of the open market value of the Fire Control Centres.

6. In addition to these facilities, fixed interest rate swaps were put in place and BoS advanced working capital facilities in relation to the Cambridge Fire Control Centre and separately in relation to the Cirencester Property. It also advanced bridging facilities and a mezzanine facility, both of which were intended to be repaid on the receipt of monies to be subscribed for the acquisition of units and Loan Notes to be issued by the Trust.

7. The units and Loan Notes were issued in accordance with the provisions of an Information Memorandum (the "IM") issued on 3 October 2006 by ERIML. The issue sought to raise £37,500,000. Investors were issued Loan Notes to the extent of 99.3% and units to the extent of 0.7% of their investment. The Loan Notes took the form of unsecured notes bearing a deferrable coupon of 6% and repayable in 2026.

8. CBRE had been engaged by BoS to provide expert valuations of the Fire Control Centres and the Cirencester Property (together "the Properties") for loan security purposes. The valuations were provided to BoS on various dates between December 2005 and June 2006. CBRE's conclusions were then summarised in the IM, such that in a section entitled "Investment Overview" it was disclosed that CBRE had valued the Fire Control Centres at £126,350,000, and the Properties as a whole, taking into account the value of the Cirencester Property, at £143,910,000.

9. One of the terms of the offer made in the IM was that the Investors were required to accede to an intercreditor agreement by which they were prevented from demanding repayment of any sum due and owing under the Loan Notes until all amounts outstanding under the senior facility, the bridging facility, the mezzanine facility and the various agreements between Evans Randall and the Trust had been discharged in full. This subordination reflected the fact that the terms of the Limited Partnership Agreement provided for all gross receipts of the Partnership to be distributed in a waterfall under which its obligations (including CCGPL's obligations to BoS) were to be paid before discharging any obligations or making any distributions to the limited partner (i.e. the Trust acting through BCTL).

10. The extent and effect of this subordination was also spelt out in the body of the IM as follows:

> *"Investors cannot demand repayment of sums due and owing under the Loan Notes until all amounts outstanding under the Senior Facility, the Bridging Facility, the Mezzanine Facility the Advisers' Agreements and amounts owing to unsecured creditors are fully discharged to the satisfaction of [BoS] and [ERIML] respectively.*
>
> *"No income will be distributed to Unitholders and no interest arising will be paid to Loan Noteholders until such time as the obligations within the Intercreditor Agreement are discharged.*
>
> *"Unitholders and Loan Noteholders are required to accede to the terms of the Intercreditor Agreement so that they are bound by it."*

11. Copies of the IM were provided by ERIML to a firm of independent financial advisers, then called Bespoke Financial Planning LLP ("Bespoke") for provision to Bespoke's own clients. Bespoke did this in return for the payment of fees in respect of any investors which it secured to invest in the Trust and was paid approximately £2.3 million in this

regard. The Claimants are all clients of Bespoke, or other financial advisers introduced to the investment opportunity by Bespoke.

12. The IM contemplated minimum investment participations of £500,000, although in the events that occurred significantly smaller participations (some of no more than £50,000) were accepted. The total amount actually raised from Investors was £33,775,000. Of this total £26,775,000 was invested by the Claimants.

13. Evidence adduced on behalf of ERIML asserts that the provision of the IT infrastructure for the Project was a shambles, and following a series of delays and difficulties the Project was cancelled in December 2010. The effect of the Project's cancellation was that the relevant public sector tenants never occupied the Fire Control Centres, and there was no longer a prospect that the leases would be renewed on the terms contemplated by the IM. Meanwhile, following the 2008 financial crisis there had been a collapse in commercial property values.

14. When the Partnership term loan fell due for repayment in July 2011, the outstanding indebtedness to BoS was approximately £100 million. The Partnership was unable to refinance the debt, which led to an event of default in February 2012, followed by the appointment of receivers over the Properties on 10 February 2012. Shortly thereafter, pursuant to a letter of request issued by the Royal Court of Jersey, CCGPL entered administration in England. By the time of the default the Partnership's outstanding indebtedness, including the significant liabilities owed under the swaps, totalled £123.3 million.

15. The evidence does not identify the true value of the Fire Control Centres at the time of the default. I have, however, seen a CBRE desktop valuation of the Properties as at 31 December 2010. This valued the Fire Control Centres at £108,520,000 and the Cirencester Property at £14,100,000. If these figures are correct, this means that by the end of 2010 the aggregate value of the Fire Control Centres was £17,830,000 less (and the value of the Cirencester Property was £3,210,000 less) than the value ascribed to them in the IM. On 9 September 2011 the Cirencester Property was sold for £14,350,000, a marginal increase over the figure in the desktop valuation.

16. I have also seen evidence which indicates that, based on these valuation figures, the Partnership would have required a further £34.3 million of equity to ensure that the loan to value ratios in the BoS facility were achieved. If, as may have been required, the loan to value ratios were reduced to 70% (or even lower), the figure for new equity would apparently have increased to £47.4 million (or even higher). This explains why there were difficulties in refinancing the debt, but the Claimants have also adduced evidence which challenges these figures and seeks to explain why it is not right for ERIML and CBRE to contend that there was no way in which the Investors would ever have received anything from the Fire Control Centres, even if they had been worth what the valuation report said at the date of the investment.

17. I do not think that it is appropriate (anyway on a summary judgment application) to draw the conclusion that it necessarily follows that the structure could only have survived if the amount of extra equity identified by ERIML had been obtained. Nor do I think that it is safe to assume that the other side of the coin is necessarily correct either (viz that with a debt of £123.3 million the Partnership could only have survived if the Fire Control Centres had been worth c.£150 million). All of these conclusions, which are drawn in ERIML's evidence, require the court to engage in a speculative exercise as to what would have happened in a number of different hypothetical situations, which I am not at this stage of the proceedings in a position to carry out.

18. I should also add that evidence adduced by the Evans Randall Companies explains that substantial capital allowances had already been realised by the Claimants, and to ensure that these could not be clawed back by BoS, the Partnership Agreement had been amended in December 2011 so as to reduce the Trust's interest in the Partnership to 0.01%. In any event, although not all of the assets of the Partnership have been sold, it is common ground that the Claimants will have lost everything that they invested in the Trust, save for the potentially significant tax and other benefits referred to.

The Claims

19. The Claimants collectively have commenced a number of sets of proceedings against the Evans Randall Companies and CBRE. The details of which claimant has sued which defendant in which action do not matter for the purposes of these applications, but there are now five separate actions, commenced on various dates between 23 November 2012 and 3 November 2014. In three of them CBRE is now the only defendant against which the proceedings have been served, in one of them the Evans Randall Companies are the only defendants and in one of them the Evans Randall Companies and CBRE are all defendants. All of the actions are being managed together for case management purposes, and the relevant statements of case stand as pleadings in all five actions.

20. The Re-Amended Particulars of Claim contend that ERIML owed a duty of care to those potential investors who received (or whose agents received) copies of the IM to "*take all reasonable care to ensure that the facts stated therein were true and accurate in all material respects and that there were no material facts the omission of which would make misleading any statement therein whether of fact or opinion*".

21. It is also pleaded that the IM was issued by ERIML for the purposes of section 21 of the Financial Services and Markets Act 2000 ("FSMA") and that in consequence ERIML was under duties pursuant to various provisions of FSMA and/or the Conduct of Business rules ("COB") and the Conduct of Business Sourcebook ("COBS"):

21.1. to ensure that the IM was fair, clear and not misleading and/or that ERIML had taken reasonable steps to ensure that this was the case;

21.2. to ensure that the information within the IM was sufficient for, and presented in a manner which was likely to be understood by, the average member of the group to whom it was directed or by whom it was likely to be received, and that it did not disguise, diminish or obscure important items, statements or warnings; and/or

21.3. to ensure that the IM included a fair and adequate description of the nature of the investment or service, the commitment required and the risks involved.

22. As against CBRE, the Claimants plead that CBRE consented to its valuations being used for the preparation of the IM and that it knew or ought to have known that information summarised from those valuations would be relied upon by potential investors, including the Claimants, in determining whether or not to invest in the Trust. The consequence is said to be that CBRE owed a duty of care to the Claimants (amongst others) "*to ensure that the preparation, formulation and presentation of the valuation information within the [IM] had been or was carried out with reasonable care and skill and that the valuation information so prepared, formulated and presented within the [IM] was itself carried out with reasonable care and skill*".

23. It is accepted by all parties that, for the purposes of these applications, I must assume that these duties were owed to the Claimants by ERIML and/or CBRE as the case may be. It is right to record, however, that neither ERIML nor CBRE accept that it owed any such duties to the Claimants and if the case goes to trial the existence and extent of such duties will be in issue. In any event each points out that there is no allegation that the duties it owed extended to advising the Claimants as to whether or not to invest.

24. The breaches of the duties relied on by the Claimants all relate to allegations (a) that the valuations accorded to the Properties at pages 11 and 12 of the IM were materially over-stated (with a knock-on impact on investment yields) and (b) that there were a series of specified factual errors which, amongst other things, caused such over-statements. It is also said that in a number of respects those errors were reflected in other material misstatements in the IM. In short summary, the errors relied on are as follows:

24.1. There was an incomplete presentation of figures relating to the incidence of stamp duty (which caused a valuation over-statement of some £3,590,000).

24.2. There was a failure to take into account an appropriate allowance for the existence of rent-free periods in respect of the Fire Control Centres.

24.3. The valuation of the Fire Control Centres was based on assumptions that the leases would be perpetual with the First Secretary of State as lessee and that the leases

would generate a highly beneficial level of rent for an extended period. Neither of these assumptions was justified.

24.4. The IM represented that the leases for each of the Fire Control Centres would be granted to the First Secretary of State with a consequentially strong covenant, when in fact the lease of the Castle Donington Fire Control Centre was granted to another public sector body with a weaker covenant, namely East Midlands Fire and Rescue Control Centre Limited.

25. The Claimants also contend that there are a number of other peculiar characteristics of the leases of the Fire Control Centres including, in particular, differences in their respective terms, which were not taken into account by CBRE when formulating its valuations. It is also said that the existence and effect of those provisions were not accurately reflected in the IM with the consequence that a number of statements within the IM were materially misleading, in particular as to the nature of the underlying assets.

26. It is relevant to a point I shall deal with later in the judgment that the Claimants contend that the misstatements in the IM did not go only to valuation. They assert that they also relate to the nature of the counterparty and the nature of the assets in which their money was being invested. In that sense they go more generally to the viability of the transaction promoted by the IM. In these circumstances, the breaches of duty alleged against ERIML is that it failed to take all reasonable care to ensure that the facts and information stated in the IM were true and accurate in respect of the matters referred to above, and were not misleading. There are similar pleas in relation to ERIML's failure to comply with its duties under COB and COBS, thereby giving rise to a liability to compensate under section 138D of FSMA.

27. So far as concerns CBRE, it is contended by the Claimants that CBRE was in breach of the duties pleaded in that a competent expert valuer exercising reasonable care and skill would not have overvalued the Fire Control Centres and the Cirencester property in the manner pleaded, would have ensured that the valuation information within the IM did not contain such overvaluations, and would have ensured that the valuation information on the investment yields within the IM properly reflected the risks to the value of the Fire Control Centres arising from the peculiar characteristics of the leases.

28. It is common ground that I must assume that ERIML and CBRE committed each of these breaches of duty. However, this assumption is made for the purpose of these applications only, and, if there is a trial, ERIML and CBRE will contest each of the breaches alleged against them.

29. So far as concerns the pleading of loss against ERIML, the Claimants contend that they relied upon the facts and information contained within the IM in determining whether or not to make an investment. They go on to plead that, if the IM had not contained the untrue and/or inaccurate facts and information it did contain, and/or had not omitted the

facts, which rendered statements contained within it misleading, they would not have invested. They then allege that their investments have in fact lost all or materially all of their value and therefore claim against ERIML the entire value of the investments they made. As I explained earlier in this judgment, that amounts to the sum of £26,775,000.

30. So far as the claim against CBRE is concerned, the Claimants allege reliance on the IM, including the information in relation to the valuation of the Properties, and contend that, but for CBRE's pleaded breach of duty, the Claimants would not have invested. It is then said that they have suffered loss and damage to the extent of the value of the investment actually made by each of them (i.e. £26,775,000 in aggregate). There is also an alternative claim for the difference between the amount they each in fact invested and the amount they would have had to invest to acquire proportionately the same interest as they each did acquire in the units and Loan Notes if CBRE had not overvalued the Properties.

31. Both ERIML and CBRE plead in their Defences that losses suffered as a result of the Claimants investing in the Trust, including the losses incurred as a result of cancellation of the Project, the losses incurred through falls in the value of the Fire Control Centres as a result of a collapse in the property market and the losses incurred as a result of the Partnership's inability to refinance the BoS debt all fall outside the scope of their duty to the Claimants. This reference to the scope of their duty is a reference to the principle established in *South Australian Asset Management Corporation v York Montague Limited* [1997] AC 191 ("*SAAMCo*"), which relates the quantum of recoverable loss against a negligent information-provider to the scope of the duty to which he is subject, and is the principle which provides the foundation for the main part of the present applications.

32. In their Replies to the Defences of both ERIML and CBRE the Claimants seek to meet the *SAAMCo* point by an allegation that the difference between the true value of the Fire Control Centres and the valuations disclosed in the IM exceeded the amount of their investment. They reserve the right to amend their case, but presently contend (although do not yet plead) that the Fire Control Centres were worth a maximum of just £100,070,000 at the time of the IM, which was £26,280,000 less than the amount at which they were valued. On the basis that the difference exceeds the amount of their investment, they plead that both ERIML and CBRE are liable for the full amount of their loss.

33. As I shall explain, it is the Claimants' case that, if and to the extent that the *SAAMCo* principle applies in the same manner as it applied to the valuer in that case (and they contend that the scope of ERIML's duty is different), this difference between the valuation figure and the true value is the only limitation on the loss to which they say they are otherwise entitled viz. the value of their lost investment. The Claimants therefore adopt a different characterisation of the reason for their loss. They say that the reason is simply that the debt to BoS was greater than the value of the Fire Control Centres.

34. It is accepted by ERIML and CBRE that, for the purposes of these applications, I must assume that the Claimants have established not just the duties and their breach, but also

that the Claimants would not have invested in the Trust if the breaches had not been committed. They stress, however, that none of these matters are accepted for any other purpose, that the allegation that the Claimants would not have invested at all if they had know of any one of the inaccuracies is particularly remarkable and stretches credibility, and that all will be contested if the actions proceed to trial.

35. CBRE does not, however, accept that the Claimants have a real prospect of establishing that, based on the allegations of negligence relied on, the Fire Control Centres were overvalued by the amount claimed. It also points out that the Claimants constitute only 71.4% of the total Investors and that therefore the logical position is that the overvaluation would have to be £37.5 million in order for the amount available to their proportion of the total rights against the Fire Control Centres no longer to operate to reduce their recoverable loss. As I understand it, ERIML does not go so far as to submit that the Claimants have no real prospect of establishing an overvaluation of £26,280,000 as at the date of the IM. It does, however, make clear that its case is that an overvaluation of that figure caused by the complaints actually made is highly improbable.

The Applications: *SAAMCo*

36. Against this background, ERIML submits that, since the decision in *SAAMCo*, it has been well-established that, where a person negligently provides inaccurate information, he will generally only be liable for loss which is attributable to the inaccuracy and not for all of the loss that may have been suffered as a result of entering into a transaction in reliance on that information. This is because of limitations in the scope of the duty of the negligent information-provider. His liability does not extend beyond the consequences of the information being inaccurate, and in particular does not extend to enable recovery of all loss that may have been suffered as a result of entering into a transaction in reliance on that information. It follows that, in the present case, there is no arguable basis for contending that the scope of its duty extended to render ERIML liable for all of the consequences of investing in the Trust.

37. In support of this submission, ERIML points out that the case pleaded against it makes no allegation that the Claimants suffered any loss as a result of the information in the IM being wrong (as opposed to the loss suffered as a consequence of entering into the transaction). It goes on to contend that the evidence makes clear that they could not have made any such plea that would have survived a strike out, because it is plain that, even if the IM had been entirely accurate (which ERIML says it was), the Claimants would still have lost all of the value of their investments.

38. ERIML submits that the reason for this is that the losses suffered by the Claimants were caused by factors other than the overvaluation. Furthermore, the Claimants' rights to recovery from the Partnership's interests in the Fire Control Centres (being the assets that

are alleged to have been overvalued) were subordinated to the rights of BoS and the Partnership's unsecured creditors. This means that they are (and always were) in a very different position from a mortgage lender advancing money on security in respect of which it had the first right of recourse on a default.

39. By the time that the loan came to be refinanced in 2012 (it having fallen due in 2011), it was clear that the Claimants had lost the entire value of their investment. The reason that ERIML and CBRE say that this happened was that commercial property values had collapsed, the Project had been abandoned and the Partnership refinancing had failed. Critically to their case, they contend that it is obvious that this would have happened even if the Fire Control Centres had in fact been worth the amount reflected by the valuation contained in the IM. Even if the Fire Control Centres had been worth £126.35 million at the time of the valuations, the Partnership would have had no prospect of refinancing because of the loan to value ratios, and the Claimants' investment would, even on that hypothesis, have been lost in its entirety.

40. On this basis, it follows that no part of the loss sustained by the Claimants is a consequence of the valuation information being inaccurate. In summary, it is said by ERIML that if the valuations had been accurate, BoS would have been better off, but the Claimants would have been in exactly the same position.

41. CBRE's application for summary judgment is based on similar arguments. It is, however, worth citing one passage from its evidence because it neatly encapsulates what CBRE contends to be the consequence of the difference (in this context) between the position of the Claimants and the position of a standard mortgage lender, anyway one with first ranking security. Mr Thomas White, CBRE's solicitor said in paragraph 22 of his witness statement:

> *"Put shortly, it is not disputed that the valuer's scope of duty is limited to the loss occasioned by a decrease in the security available to the claimant, and no valuer negligence in the present case caused any such decrease in security available <u>to the Claimants</u>, because there is no security available to the Claimants after the Bank of Scotland has been satisfied, nor would there ever have been."*

42. The role, which CBRE played in the various transactions, was different from the role fulfilled by ERIML. It advised on the value of the Fire Control Centres in the context of the BoS loans to the Partnership, and, apart from the inclusion of its figures in the IM, had no direct relationship with the Investors. There is, however, some evidence from Bespoke that raises an issue as to whether CBRE was truly independent and insufficiently disinterested when valuing the Fire Control Centres. However, I do not consider that this evidence has any relevance to these applications. This is because CBRE accepts that at this stage I must assume that CBRE owed a duty of care to the Claimants in relation to the information in the IM for which they were responsible, and the Claimants accept in their

pleadings that the scope of that duty was limited to the consequences of that information being wrong.

43. This gives rise to arguments as to whether those differences of role were reflected by differences in the scope of the duty undertaken by ERIML and CBRE. There is a sharp divergence of view between ERIML and the Claimants as to the precise scope of ERIML's duty and as to whether it is right to apply the same *SAAMCo* principles as would be applicable to a mortgage lender claiming against the negligent valuer of their security. This is a point to which I will return.

44. The Claimants contend that it is important to have in mind that the basic position is that they are entitled to be put into the position that they would have been in if the Defendants had acted with due care and skill. They submit that, at this stage of the analysis, the court is not concerned with putting the Claimants into the position they would have been in had the information provided been correct. On the basis of the assumptions that I am required to make for the purposes of this application, this means that the starting point is that each Claimant is entitled to damages assessed at the amount advanced less the amount recovered. As it is accepted by all parties that the Claimants have lost the entirety of their investment, this means that their basic loss is the full amount of their investment.

45. The Claimants accept that, where the *SAAMCo* principle applies, there is a qualification to this basic starting point. However, although they accept that the *SAAMCo* principle applies in relation to the claim against CBRE, they contend that it is sufficiently arguable that the principle does not apply at all to the claim against ERIML for the case to go to trial against ERIML in any event.

46. The Claimants' primary submission, however, is that the *SAAMCo* principle has been mischaracterised by ERIML and CBRE. They contend that they suffered an immediate measurable loss at the time of their investment because the units and Loan Notes were in fact worth less than they were represented to be worth; they did not get what they should have got. The asset in which they invested was worth approximately £26 million less than the value it was represented to be. Since then the extent of their loss has crystalised, as they will make no recovery at all from their investment. They submit that the true nature of the qualification established by *SAAMCo* is that the basic amount of damages to which they would otherwise be entitled will normally be limited to no more than the amount of the overvaluation at the date of the transaction or valuation. They stress that for these purposes it is important to look at the position on day one. In particular they submit that the court should not engage in a speculative analysis as to what the effect might be on the Claimants' loss at the date of trial if the valuation information had been accurate at the time it was provided.

47. The Claimants' justification for this approach is that, on any view, the scope of the Defendants' duty was to take reasonable care in the information that they provided in the IM. The context in which they did this was one in which the Investors were acquiring an

asset (i.e. an interest in the Trust) which they were entitled to assume was worth what the Defendants said it was worth, not some lesser figure. It must follow that the scope of the duty permits the Claimants to recover the loss that they actually suffer to the extent of the discrepancy between the actual value and the amount given in the valuation. Put another way, they submit that the element of their actual loss, which is attributable to the inaccuracy of the information, is the difference in value between the valuer's figure and the actual value at the relevant time.

48. The difference between these two approaches gives rise to dramatically different results in a case such as the present. If the Claimants are correct, they have an arguable case that they are entitled to the full amount of their lost investment (£26,775,000), because this figure is no more (anyway to a material extent) than the amount that they assert to be the difference between the IM valuation of the Fire Control Centres and their true value. If ERIML and CBRE are correct, the Claimants have suffered no loss recoverable against them, because ERIML and CBRE will also be able to prove that, even if the valuations had been accurate, the Claimants would have been in exactly the same position. It follows on this argument that the Claimants will have suffered no loss that is properly attributable to the inaccurate information contained in those valuations.

The Principles on an application for Summary Judgment

49. As these are applications for summary judgment by defendants, I must approach them having in mind the principles helpfully summarised by Lewison J in *Easyair Ltd v. Opal Telecom Ltd* [2009] EHC (Ch) at para 15, as approved by the Court of Appeal in *A C Ward & Sons Ltd v. Catlin (Five) Ltd* [2010] EWCA Civ 1098 at para 24 (per Etherton LJ). In particular:

49.1. If the court considers that the claims have realistic (as opposed to fanciful) prospects of success, it should not give judgment for the defendants, but should allow them to go to trial. This must not involve a "mini-trial" dressed up as an application for summary judgment, although that does not mean that the court is required to take everything said or adduced in evidence by the Claimants without critical analysis.

49.2. The court should not make a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence available and so affect the outcome of the case.

49.3. If the applications give rise to a short point of law, and the court is satisfied that it has all the evidence necessary for its proper determination, it should grasp the nettle and decide it.

50. There was no real dispute between the parties that these cases set out the correct approach, although Mr Jones QC for the Claimants also drew my attention to passages from the speeches of Lord Browne-Wilkinson in *X (Minors) v. Bedfordshire County Council* [1995] 2 AC 633, 740G/H-741D and *Barrett v. Enfield London Borough Council* [2001] 2 AC 550, 557E/F- 558C. In both of these passages, Lord Browne-Wilkinson stressed that, if the law is not settled but is in a state of development, it will normally be inappropriate to decide novel questions on hypothetical rather than actual facts. He made this point in the context of cases in which the relevant issue was whether or not a common law duty of care existed.

SAAMCo

51. In order to understand the basis of the applications made by ERIML and CBRE, it is necessary to examine in a little more detail the legal principles on which they rely. They were described by Lord Hoffmann in *SAAMCo*, in the following well-known passages:

> *"Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences that are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate."* (p.213C-D)
>
> *"… 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. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them."* (p.214 C-D)

52. It follows that a claimant seeking damages for breach of a duty of care must "*prove both that he has suffered loss and that the loss fell within the scope of the duty*" (per Lord Hoffmann in *SAAMCo* at p.218B/C). Where the relevant duty is simply a duty to inform, and not a duty to advise on whether a transaction ought to be entered into, an application of the "but for" test of causation will not of itself entitle the claimant to recover. He must prove that the loss is a consequence of the information being wrong. This principle has subsequently been described by Lord Hoffmann (in *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61, 68F) as one which requires the court to "*decide whether the loss for which compensation is sought is of a kind or type for which the contract-breaker ought fairly to be taken to have accepted responsibility*".

53. *SAAMCo* itself was a decision relating to three separate actions in which valuers were sued by mortgage lenders for negligent overvaluations. Between the time of the valuation and the time the properties were sold the market suffered significant falls thereby increasing the losses suffered by the lenders. However, the language used by Lord Hoffmann in *SAAMCo* is of more general application. I was referred to cases in which the principles had been applied in a claim by reinsurers against brokers (*Aneco Reinsurance Underwriting Ltd v. Johnson & Higgins Ltd* [2001] 2 All ER (Comm) 929), a claim against a valuer by a purchaser as opposed to a lender (*Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas* [2011] EWHC 2336), a Part 20 claim by a bank against its lawyers (*Haugesund Kommune v. Depfa ACS Bank (Wikborg Rein & Co, Part 20 defendant) (No 2)* [2011] 3 All ER 655) and a claim by mezzanine lenders to a property company against the agent bank in a complex lending structure (*Torre Asset Funding Ltd v the Royal Bank of Scotland Plc* [2013] EWHC 2670 (Ch)).

54. These cases all emphasise that whether the *SAAMCo* principle is applicable at all, and if so how it is to be applied, will turn on the precise scope of the duty of care to which the negligent defendant is subject. If the duty is limited to take care in providing information, as opposed to a duty to take care in giving some more general advice, the defendant should not normally be liable for what is properly to be characterised as the consequences of something other than the information being wrong.

55. I have not been referred to any case in which the *SAAMCo* principle has been applied where investors have acquired units or loan notes on the basis of a prospectus which includes a negligent valuation of assets held by the issuer, being assets the true value of which was relevant to the investors' decision on whether or not to invest. However, the Claimants advanced no reason as to why similar principles are not capable of applying in such circumstances. The application of those principles may be more complex than in the simple case of a bank lending on the basis of negligently overvalued security, and this is particularly the case where (as here) the Investors' rights were subordinated to the claims of other creditors. But in my view this is because of the indirect nature of the investor's interest in the relevant asset. It is not because some form of limitation on what would otherwise be the Claimants' basic loss ought not to apply.

56. It follows, therefore, from the general principle established by *SAAMCo* that, where D owes a duty to provide information to enable C to decide on a course of action (as opposed to a duty to advise C as to whether or not he should take that course of action), D must take reasonable care to ensure that the information is correct, and, if negligent, will be responsible to C for all the foreseeable consequences of the information being wrong (*SAAMCo* at p.214F). However, and this most clearly appears from Lord Hoffmann's well-known example of the climber concerned about the fitness of his knee (*SAAMCo* at p.213D-F), there must be a sufficient connection between the subject matter of the duty and the consequences of undertaking a particular course of action. That is why the principle is all about the scope of the duty. D is not liable to the extent that the consequences are not properly attributable to the information being wrong.

57. What then are the consequences of the information being inaccurate or wrong? How is the loss which is attributable to the inaccuracy of the information to be identified? The answer which appears from the speech of Lord Hoffmann in *SAAMCo* (see the passages cited above) is that the negligent information-provider is not liable for losses which would have occurred even if the information which he gave had been correct. He reiterates this approach in his speech in *Nykredit plc v. Edward Erdman Ltd* [1997] 1 WLR 1627, 1638E/F:

> *"But in order to establish a cause of action in negligence he must show that his loss is attributable to the overvaluation, that is, that he is worse off than he would have been if it had been correct."*

58. In *Nykredit*, Lord Nicholls approaches the principle on a similar basis. Having explained that the basic measure of loss is the comparison between what C's position would have been if D had fulfilled his duty (i.e. he would not have entered into the relevant transaction) and C's actual position (i.e. having entered into the relevant transaction), he continues as follows:

> *"However, for the reasons spelled out by my noble and learned friend, Lord Hoffmann, in the substantive judgments in this case [1997] A.C. 191, a defendant valuer is not liable for all the consequences which flow from the lender entering into the transaction. He is not even liable for all the foreseeable consequences. He is not liable for consequences, which would have arisen even if the advice had been correct. He is not liable for these because they are the consequences of risks the lender would have taken upon himself if the valuation advice had been sound. As such they are not within the scope of the duty owed to the lender by the valuer."*
>
> *"For what, then, is the valuer liable? The valuer is liable for the adverse consequences, flowing from entering into the transaction, which are attributable to the deficiency in the valuation."*

59. Lord Nicholls then turned to the practical application of the test. He explains how, if the basic comparison throws up a loss (which it will do if a lender loses out through a deficiency in the negligently-valued security), an inquiry is then required to see what part of the loss is the consequence of that deficiency. He explains that "typically" the answer to this further inquiry will correspond to the amount of the loss as shown by the basic comparison "*but limited to the extent of the overvaluation*" (at p.1632A/B).

60. This reference to the extent of the overvaluation as a reflection of the loss attributable to the inaccuracy of the information in the case of a negligent valuer is then picked up and developed in the speeches in *Platform Home Loans Ltd v. Oyston Shipways Ltd* [2000] 2 AC 190 (per Lord Cooke at p.196H-197A, per Lord Hobhouse at p.201G and per Lord Millett at p.213H). Mr McQuater QC for ERIML urged me to be cautious about what was said in *Platform Home Loans*, because much of what was said about *SAAMCo* was *obiter*.

I accept that the case was actually about contributory negligence, but it does not seem to me that (anyway for the purposes of a summary judgment application) this factor detracts very much from the weight of what was said about *SAAMCo* more generally.

61. The relevant passage from the speech of Lord Millett is worth citing in full:

> *"It is necessary to recapitulate what this House has laid down in relation to the assessment of damages in cases of the present kind. Two calculations are required. The first is a calculation of the loss incurred by the lender as a result of having entered into the transaction. This is an exercise in causation. The main component in the calculation is the difference between the amount of the loan and the amount realised by enforcing the security."*
>
> *"The second calculation has nothing to do with questions of causation: see the Nykredit case, at p. 1638, per Lord Hoffmann. It is designed to ascertain the maximum amount of loss capable of falling within the valuer's duty of care. The resulting figure is the difference between the negligent valuation and the true value of the property at the date of valuation. The recoverable damages are limited to the lesser of the amounts produced by the two calculations."*
>
> *"It is to be observed that neither amount is an element or component of the other. Either may be the greater, for they are the results of completely different calculations. In mathematical terms, they bear the same relationship to each other as a-b does to c-d . The figure produced by the second calculation is simply the amount of the overvaluation. It is not the loss or any part of it, and cannot be equated with the amount of the loss sustained by the lender in consequence of the overvaluation. The two are the same only in a case where the lender has advanced 100 per cent. of valuation."*

62. The last part of this passage from Lord Millett's speech emphasises an important point in the context of the present case, reflecting as it does what Lord Hoffmann said in *SAAMCo* at p.218A that "*the question of whether the lender has suffered a loss is not the same as the question of how one defines the kind of loss which falls within the scope of the duty of care*". In my view, it confirms that there are two quite separate exercises being carried out. The first is a causation exercise and requires proof of actual "but for" loss, which involves looking forward from the date of the transaction to what has actually happened (anyway to the extent that this is foreseeable). In a lender's valuation case, where the transaction would not have been entered into but for the negligence, this will normally be the difference between the amount invested and the amount recovered by the lender when its security is realised.

63. The second exercise is not an element or component of the first, and (save possibly in a trivial sense) it has nothing to do with causation. Where the defendant is a negligent valuer, it requires an assessment of the difference between the valuation and the real value at the date of the transaction. In a straightforward lender's valuation case this will normally be the loss actually suffered from that moment, viz, the amount by which the value of the security available to the lender will in fact be less than the amount he thought

it would be. True it is that the amount of the recoverable loss may later change as a result of circumstances occurring between the time of the transaction and the time that the security is realised, but that affects the amount of the basic loss, and in my view is not part of the second exercise.

64. The significance attributed by Lord Millett to the difference between the valuation and the true value as a reflection of the maximum amount that can be recovered against a negligent valuer the scope of whose duty is limited in the sense considered in *SAAMCo*, was confirmed by Lord Hobhouse in *Platform Home Loans* (at p.210F):

> *"A result of this reasoning is that the damages which, in the present case, the plaintiffs can recover are confined to that part of the plaintiffs' basic loss caused by the defendants' negligence which can be equated in money terms to the amount of the defendants' overvaluation."*

65. The *SAAMCo* principle was considered again by the House of Lords in *Aneco Reinsurance Underwriting Ltd v. Johnson & Higgins Ltd* [2001] 2 All ER (Comm) 929. Lord Lloyd pointed out (at p.933f) that when Lord Hoffmann in *SAAMCo* (at p.222) came to apply the principles he had formulated earlier in his speech to an actual assessment of the damages in each of the three cases in issue, he sought to ascertain the maximum amount of loss capable of falling within the valuer's duty of care in an amount not exceeding the difference between the valuation and the correct value, both assessed as at the valuation date. This is also explained by Chadwick J when examining the *SAAMCo* facts in *Bristol and West Building Society v Fancy & Jackson (a firm)* [1997] 4 All ER 582, 620c-621j.

66. The actual decision in *Aneco* turned on whether the *SAAMCo* principle was applicable at all, and the House of Lords decided that it did not because the defendant brokers were under a duty to advise rather than simply to inform. However, Lord Lloyd summarised the nature of the principle in the following passage, where he contemplates that the difference between the negligent valuation and the correct value usually will (but might not always) reflect the proper measure of a limitation on the loss that is recoverable from a negligent valuer in these circumstances:

> *"Thus in the case of valuers, and their like, that is to say, those who undertake to provide specific information, the SAAMCo principle gave rise to a subrule, that valuers are not generally liable … for all the foreseeable consequences of their negligence, but only for the consequences of the valuation being wrong. It follows that the damages will usually, though not always, be limited to the difference between their valuation and the correct value; …"*

67. It is important to appreciate that the *SAAMCo* limitation on the damages that would otherwise be recoverable does not reflect a scientific approach to causation. The question of causation is central at the stage of ascertaining the basic loss but, as Lord Hobhouse

explained in *Platform Home Loans* (at p.207G), the *SAAMCo* principle "*is essentially a legal rule which is applied in a robust way without the need for fine tuning or a detailed investigation of causation*".

68. The same point about causation is made by Lord Millett in the passage from his speech that I have set out above, and is echoed by Lord Nicholls when alluding to the principle in *Kuwait Airways Corpn v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1091 at para 70:

> *"The second inquiry, although this is not always openly acknowledged by the courts, involves a value judgment ("ought to be held liable"). Written large, the second inquiry concerns the extent of the loss for which the defendant ought fairly or reasonably or justly to be held liable (the epithets are interchangeable). … the inquiry is whether the plaintiff's harm or loss should be within the scope of the defendant's liability, given the reasons why the law has recognised the cause of action in question. The law has to set a limit to the causally connected losses for which a defendant is to be held responsible. In the ordinary language of lawyers, losses outside the limit may bear one of several labels. They may be described as too remote because the wrongful conduct was not a substantial or proximate cause, or because the loss was the product of an intervening cause. The defendant's responsibility may be excluded because the plaintiff failed to mitigate his loss. Familiar principles, such as foreseeability, assist in promoting some consistency of general approach. These are guidelines, some more helpful than others, but they are never more than this."*

69. The final case which I should mention on this aspect is *Portman Building Society v Bevan Ashford* [2000] PNLR 344. In this case a firm of solicitors were sued for their negligent failure to disclose information relating to the ability of the borrower to service a loan to be made by the claimant lender. After considering *SAAMCo*, the Court of Appeal held that the lender was entitled to recover the whole of its loss because the scope of its duty extended to the disclosure of information that affected the viability of the transaction. They were therefore liable for all the consequences of it not being viable.

<u>Applying the *SAAMCo* principle to the present case</u>

70. Turning to the way in which the *SAAMCo* principle is to be applied in this context, the authorities demonstrate that the exercise which the court is required to carry out (anyway in a normal case) is a two-stage process. Stage one requires the court to ascertain the basic loss. In the present case, the basic loss is the loss sustained by the Claimants by reason of the fact that they made an investment which is worthless and which they would not have made if they had been informed as to the true value of the FCCs. As I have already explained, I must assume that there is a triable issue that the Claimants would not have made their investments if the Defendants had not acted in breach of duty, and it is not seriously in dispute that the Claimants will be able to prove that their investments are

now worthless, which (anyway arguably) is a foreseeable consequence of the breach. It follows that, for the purposes of this application, the Claimants must be treated as being able to prove a basic loss to the extent of the total value of their investment.

71. Stage two requires the court to assess the maximum amount of the loss capable of falling within the duty of care, which it does by identifying the consequences which are attributable to that which made the act wrongful. This exercise requires a careful analysis of the scope of the relevant duty of care.

72. On the issue of the scope of the duty, I assume for present purposes that both ERIML and CBRE were subject to duties to take reasonable care in their provision of information on the basis of which the Claimants decided whether or not to invest in the Trust. However, as I mentioned earlier in this judgment, there is a sharp divergence of view between ERIML and the Claimants as to whether it is arguable that ERIML's duty goes further, and accordingly as to whether it is right to apply the same *SAAMCo* principles as would be applicable to a mortgage lender claiming against the negligent valuer of their security.

73. The Claimants submit that there is no equivalence between the role of such a valuer and the role of ERIML in relation to the promotion of the Trust. They submit that the policy considerations that might regard it as unfair to expose the valuers of mortgage security to all the consequences of adverse movements in the markets should not apply to promoters in the position of ERIML. They submit that, although the duty to take reasonable care in presenting accurate information did not extend to giving advice on the merits of the transactions, the role of ERIML was very different from that of a valuer, because it was promoting an investment rather than providing dispassionate objective advice on a value. They also rely on the fact that ERIML in fact received a wide range of other benefits from the promotion far removed from a straightforward fee for the provision of a professional service.

74. This is not accepted by ERIML. It points out that the pleaded duty is to ensure that the facts stated in the IM were true and accurate in all material respects, which does not extend to the giving of advice. It also refers to the parts of the IM in which it was made clear that ERIML was not responsible for advising potential investors in relation to their investment and that each Investor warranted in his application form that he had relied on the advice of his own professional advisers. It does not accept that, by being labelled a "promoter", it is somehow placed in a position for which it has assumed legal responsibility. It contends that it was adviser to the Trust not the Claimants, and it points to the fact that (anyway so far as the Claimants are concerned) the true promoters were Bespoke.

75. ERIML accepts that it had an interest in the success of the Trust that was equivalent to the interest of the Claimants, because there were certain individuals associated with the Evans Randall Companies who were to receive up to 30% of the prospective profit on the investment, but it contends that this fact does not support a conclusion that it should be

regarded as having assumed a responsibility to the Claimants for all of the losses which they might suffer. It submits that the fact that it too had an interest, which was aligned with that of the Claimants and other Investors, has no bearing on the scope of its duty.

76. There is much force in ERIML's case on this issue, but in the end I am not persuaded that the Claimants have no real prospect of establishing that there are relevant differences between the scope of a duty owed by a valuer to a mortgage lender and the scope of such duty as ERIML owed to the Claimants. This is not because ERIML was under a duty to be careful in advising the Claimants as to whether or not they should invest in the Trust – no such case is made by the Claimants and to the extent that ERIML explained why that was not the case, it was attacking a straw man. Rather it is because the range of information contained in the IM that is said to be wrong is wider than the information contained in a valuation and is included for a wider purpose.

77. More specifically, it is claimed (and pleaded) by the Claimants that this information goes not just to black letter valuation, but also to more nuanced questions relevant to the commercial prospects for the investment more generally. It also seems to me that it is arguable that, where valuation information is provided to an investor for the purposes of making a decision on whether or not to invest, the scope of the promoter's duty is qualitatively different from the scope of the valuer's duty where valuation evidence is provided to a lender for security purposes. In the case of the latter, it is normally for the purpose of working out whether a loan to value ratio will be satisfied if the loan is made. This is largely an exercise which simply assesses whether the present value of the security is sufficient to pay off the loan if it needs to be realised and applies an appropriate loan to value ratio accordingly. In the case of the former, the information-provider knows that the person receiving the information will be using it as one element (which may or may not be of critical importance) in his decision making process. This is an investment rather than a lending decision and the duties at common law are supplemented by the statutory duties under FSMA, COB and COBS that I have referred to earlier in this judgment.

78. The Claimants say that they would not have invested if they had known that the information was wrong, but they say that in part because the Fire Control Centres would have been worth less than was required to cover their investment, and also because the information disclosed that a transaction they thought was viable was not in fact viable. In that sense it seems to me that it is arguable that, as against ERIML, the result reached in *Portman Building Society v Bevan Ashford* [2000] PNLR 344 (where there was held to be no limitation on the recoverable loss) may provide guidance on the approach to be taken where, even though there was no duty to advise, the information-provider knows that the information will be used by the recipient and his own advisers to decide on the viability of a transaction. In the present case it is arguable that the deficient information goes to both pure value and more generally to the viability of the transaction as a whole because of the quality of the counterparties and the characteristics of the assets.

79. ERIML has submitted that none of this affects the scope of the duty to inform, but it seems to me that it adds a layer of complexity to establishing the parameters of what is capable of falling within loss that is attributable to the incorrect information. Because it relates to commercial prospects over and above pure value, it makes it more difficult both to identify the true consequence of the information being wrong and to answer the question by trying to work out the extent to which the loss would still have been suffered even if the information had been correct. Chadwick J made a similar point in the *Fancy & Jackson* case at pp.621e-622j where the negligent information-provider was a solicitor.

80. In any event, I have reached the view that, even on the assumption that the *SAAMCo* principle applies so as to require the court to identify the direct consequences of the valuation being inaccurate (which is the situation in the claim against CBRE in any event), the Claimants have real prospects of establishing that the loss they have suffered on their investment is attributable, anyway in part, to the alleged inadequacies in the IM. It follows that I consider that the case should go to trial in any event, and it is therefore inappropriate for me to elaborate any further on the precise scope of the duties to which ERIML was subject.

81. In the case of the negligent valuer who owes a duty to a mortgage lender, it is fairly clear that the loss that will normally be attributable to the inadequate valuation can, on a straightforward application of the *SAAMCo* principle, be limited to the difference between the valuation and the true value. This approach is reiterated on a number of occasions in the authorities I have already referred to. It also seems that the authorities contemplate that, although in the normal case the true extent of the basic loss can only be finally assessed as at the date of realisation of the negligently valued security and is part of the causation exercise, the comparison for stage two of the *SAAMCo* test is to be carried out at the time of the valuation and has little to do with causation.

82. In my view, it is at least arguable that this comparison exercise is one which, in the normal case, is to be carried out at the date of the valuation, or possibly the time at which the valuation is relied on by the relevant Claimants entering into the relevant transaction. This is consistent with the way in which Lord Nicholls (in *Nykredit*), Lord Millett and Lord Hobhouse (in *Platform Home Loans*) and Lord Lloyd in *Aneco* all expressed themselves in the passages I have referred to above, and in the case of Lord Millett is quite explicit. I can see arguments that this is all the more appropriate where the valuation is produced for a purpose that relates to the viability of a wider transaction, even where the valuer or other information provider is not advising as to whether or not the relevant investor ought to enter into it. This seems to me to be arguable in the case of both ERIML and CBRE. Although the scope of their duties are different, and may not extend to losses which can only be attributed to the collapse in the property market or the failure of the Project, they must both have known that what is alleged to have been the inaccurate information would be used as part of a decision as to whether or not an investment was viable.

83. Both Mr McQuater QC for ERIML and Mr Kramer for CBRE referred me to a number of cases (*Scullion v Bank of Scotland Plc* [2011] 1 WLR 3212, *Bank of Ireland v Faithful & Gould* [2014] PNLR 28, *Europe Mortgage Co Ltd v GA Property Services Ltd* [1999] Lloyds Rep PN 709) in which the court considered how to apply the *SAAMCo* principle in the case of negligent overvaluations. In my view, none of them provide clear support for their submission that I can be satisfied that the exercise of asking what losses would have been suffered even if the valuation had been accurate, does not require a comparison between the valuation figure and the real value as at the date of the transaction.

84. Although the point is arguable both ways, I therefore disagree that it is clear that for this purpose it is necessary to ignore the discrepancy between valuation and true value as at the date of the transaction, and look only at the position that the recipient of information is ultimately in.

85. If this comparison were to be the only way of applying what Lord Hobhouse in *Platform Home Loans* called the legal rule, it is clear that summary judgment would be inappropriate. Despite CBRE's contention to the contrary, it seems to me that the evidence shows an arguable case (albeit one that is strongly contested by ERIML and CBRE) that the difference between the correct value and the valuation figure as at the date of the valuation was only just short of the amount of the Claimants' basic loss.

86. I accept that, on the basis of the evidence now available, it is quite likely that the Claimants will not be able to prove at trial that an overvaluation caused by any pleaded negligence committed by CBRE was anything like as much as £26.775 million, let alone the higher figure of £37.5 million said to be appropriate as the Claimants only constitute 71.4% of the total Investors. However, I do not consider that this is an issue that I can decide on a summary basis at this stage of the proceedings. In my view, the contrary remains sufficiently arguable for the case to go forward to trial.

87. However, it seems to me that ERIML and CBRE have a perfectly good case for contending that, in a case such as the present, the use of this formula for identifying the loss properly attributable to the inaccuracy of the information does not work very well. The reason for this is that, unlike the normal case of a mortgage lender suing the valuer of its security, the present case involves an action by loan note holders who have no direct security interest in the valued assets. As at the date of valuation they cannot make a direct link between the extent of the overvaluation and the extent to which they will be prejudiced by making an investment against the value of assets (the Fire Control Centres) that are worth less than the amount they thought, because they are subordinated in that respect to the rights of BoS and the Partnership's other unsecured creditors. To that extent there is force in CBRE's submission that the analogy is with a lender making an advance against a second charge.

88. However, the answer to these differences does not necessarily drive the court to a solution which requires it to carry out the hypothetical and speculative exercise of working out

what it can now be seen would have happened at some stage in the future if the Fire Control Centres were in fact worth what they were valued at. It is not obvious to me that the court is required to work out how much worse off the Claimants are than they would have been if the valuation in fact carried out had been correct by referring to what can now be seen to have occurred, without regard to the difference between valuation and true value as at the transaction date. This seems to me (anyway arguably) to be moving too far towards the scientific approach that was disapproved by Lord Hobhouse in *Platform Home Loans* (at p.207C-G). It is also arguable that it is inconsistent with statements to the effect that the principle is a legal rule, which is to be applied in a robust way, and that it has nothing to do with causation.

89. The approach suggested by ERIML and CBRE would necessarily require the court to examine the extent to which the Claimants would still have suffered the loss that they claim even if £126,350,000 had been an accurate statement of a reasonable value for the Fire Control Centres. As the basic loss only crystalised on the failure to refinance in 2011 when it became apparent that the Claimants had lost the full value of their investment, this exercise would involve a re-creation of what might have happened to the value of the Claimants' investment if the FCCs had been worth £126,350,000 rather than the £100,070,000 which they will on this basis have established that they were in fact worth.

90. I quite see that the fact that the Claimants are investors in an asset-holding issuer, with an interest in the underlying asset that is more remote than that of a standard mortgage lender, puts a different complexion on how the comparison between the valuation and the true value ought to be carried out. As CBRE submitted, it may be that they have more in common with a second chargee than the first mortgage lenders who were the subject of most of the authorities I have been asked to consider. It may, for example, be necessary to work out how much of the Fire Control Centre asset was actually available to the Claimants (through their interest in the Trust), taking into account the Partnership's obligations to those with priority under the intercreditor waterfall as at the date of valuation. However, it is not at all clear to me that, just because the valuation / true value comparison exercise might be inapplicable to the full value of the Fire Control Centres (because some part of them were never going to be available to satisfy the Claimants' claims), that means that the correct exercise is the hypothetical one suggested by ERIML and CBRE.

91. While I am far from saying that this will necessarily be the conclusion that the court would reach after a trial, I can also see some merit in an argument that, in the present case, an application of the *SAAMCo* principle should simply reflect the extent to which the Claimants were in a worse position as at the time of the wrongful act than they would have been in if the valuation had been correct. The Claimants would need to show that, taking into account the existing prior rights under the waterfall as they were then established to be, there would have been equity available to satisfy their interest if the valuation had been correct. To that extent they could then show that the consequence of the valuation being wrong was that they had an interest through the Trust, which was worth less than it was represented to be.

92. It would follow that, to the extent that less of the asset was available to discharge their claims as at the valuation date than they were entitled to believe would be the case, the Claimants' basic loss would be attributable to the wrongful overvaluation. I do not have clear evidence as to what that might be, and I am sure that this is an oversimplified description of the position, but on the figures that I have seen, the equity potentially available to discharge the BoS debt in so far as it related to the Fire Control Centres as at the valuation date was the difference between the £100 million lent by BoS (together with other then-existing prior ranking obligations of the Partnership) and £126,350,000.

93. In any event, I do not think that it is appropriate to reach a final determination as to what the approach should be in this case on an application for summary judgment. It raises the *SAAMCo* principle in a novel context. As was said by Lord Hoffmann in *Transfield* (at para 15) the question is ultimately one of whether the "*loss for which compensation is sought is of a kind or type for which the contract-breaker ought fairly to be taken to have accepted responsibility*". He had used similar language in *SAAMCo* itself (at p.214D/E) when he referred to what was "*fair and reasonable as between the parties*". These are warnings that there are real dangers in trying to decide what will inevitably be a fact sensitive issue as if it was a point of legal principle. A similar point was made by Lord Nicholls in *Kuwait Airways* (at para 70) where he said that the question was really whether the loss claimed is *"loss for which the defendant ought fairly or reasonably or justly to be held liable"*. These statements indicate how fact sensitive the exercise is likely to be.

94. While it is obviously incumbent on the court to reach a conclusion on the answer to such questions at the trial, it seems to me that it is difficult if not impossible to do the same thing on an application for summary judgment, where very many of the basic facts as to the relationship between the parties remain hotly contested. In the novel context of the present case, the question is not a short point of law of the type referred to by Lewison J in *Easyair*, nor am I satisfied that all of the necessary evidence is available, nor that such as there is can be set in its proper context without the sort of mini-trial referred to in that case.

95. Before leaving the application of the *SAAMCo* issue I should deal with a pleading point that was made by both ERIML and CBRE. They both contend that there was no proper pleading by the Claimants that the loss they claim is properly attributable to that which made the Defendants' acts wrongful. While it is true that the pleading on the point is brief, I disagree that it is insufficient. The basic loss is pleaded in paragraph 44 of the Re-Amended Particulars of Claim and their case on scope of duty and the application of the *SAAMCo* principle is elaborated in paragraph 11 of their Reply to ERIML's Defence and paragraphs 16 to 18 of their Reply to CBRE's Defence.

96. For these reasons I am not satisfied that issues relating to loss and the application of the *SAAMCo* principle can be determined on a summary basis. In my judgment, the applications by ERIML and CBRE on this aspect of the case should be dismissed.

The Loan Note Issue

97. The Re-Amended Particulars of Claim also make a quite separate claim against the Evans Randall Companies. This relates to the fact that it would seem that the Loan Notes do not constitute non-qualifying corporate bonds ("Non-QCBs") for UK tax purposes. The Claimants contend that they should have been drafted as Non-QCBs because, if they had been, they would not have been exempt from capital gains tax ("CGT") and so any losses made on them could have been treated as losses for CGT purposes and offset against any other gains that the Investors might have made.

98. It is said, therefore, that the UK tax treatment of the loans was a highly material consideration for prospective investors subject to UK tax. In that context, the Evans Randall Companies and BCTL (the latter in its capacity as trustee of the Trust) obtained a tax opinion from KPMG (the "KPMG Opinion") which contained the following statement (at section 4.6):

> *"We understand that the loan notes subscribed for will be non-qualifying corporate bonds ("non-QCBs") and it is assumed for the purposes of this Opinion that their value at the date of subscription is equal to their subscription price.*
>
> *"As the loan notes are non-QCBs any profits or loses in relation the redemption of the loan notes will be taxed as capital gains for UK resident individual note holders. It is not anticipated that any capital profits will be realised on the redemption of such loan notes since … it is assumed for the purposes of this Opinion that the subscription prices equals market value and there is no prospect of a premium on redemption. In the event that the loan notes are redeemed for less than full value a capital loss should be available to UK resident and domiciled note holders based on the actual loss incurred on the loan note (i.e. the difference between subscription value and redemption value, ignoring interest)."*

99. It is said that the Evans Randall Companies therefore knew that the Loan Notes should be Non-QCBs, which was an important commercial aspect of the investment for the Investors. There is also some e mail correspondence between Evans Randall and Bespoke, which is consistent with the Claimants' case that the Evans Randall Companies knew that the CGT status of the Loan Notes (and the units) was important to Bespoke, and that they intended that the Loan Notes would be subject to CGT. In the event, the Evans Randall Companies provided the KPMG Opinion to Bespoke who passed it on to potential investors, including the Claimants, together with the IM itself. In consequence, it is said by the Claimants that the Evans Randall Companies knew, or ought to have known, that

the Claimants' decision to invest would be made in reliance on an understanding that the Loan Notes would indeed by Non-QCBs.

100. The Claimants also contend that the Evans Randall Companies were familiar with the significance of the difference between QCBs and Non-QCBs and had structured other investments with that in mind. They say that in all these circumstances the Evans Randall Companies were under a duty of care to Investors, including the Claimants, "*to take reasonable care and exercise reasonable skill and diligence to ensure that the Loan Notes were correctly structured so as to be Non-QCBs*". It is then said that the Evans Randall Companies "*failed to exercise reasonable care and skill in relation to the drafting of the Loan Notes, which failed as a consequence to be structured so as to be Non-QCBs*". The loss said to have been sustained in consequence of this breach is said to amount to the lost CGT relief that each Claimant suffered as a result of the loan notes not being Non-QCBs, but is not otherwise particularised.

101. The Evans Randall Companies dispute every stage of this part of the Claimants' case. Unlike the duties pleaded against ERIML and CBRE, which I have described earlier in this judgment, it is not common ground for the purposes of the present applications that the Evans Randall Companies owed a duty of care to the Claimants in relation to the structuring of the Loan Notes. Indeed, it is the case of the Evans Randall Companies on these applications that the Claimants have no real prospect of establishing such a duty, and that the relevant parts of the particulars of claim should be struck out accordingly (or that summary judgment be entered for them on that issue).

102. In support of this submission they rely on the fact that the IM was silent on the Non-QCB issue. They point to the fact that potential investors were advised to seek their own professional advice both generally and specifically in relation to tax. This point is made in a number of different places in the IM, but the clearest statement is at the beginning of Appendix V to the IM as follows:

> *"Investors should seek their own advice on the taxation consequences of an investment in the Trust, especially those investors who are not resident for tax purposes in the United Kingdom or Jersey as they may be subject to tax in their respective jurisdiction. None of Evans Randall the Trustee the General Partner or any of their advisors can take responsibility in this regard."*

103. They also rely on the fact that the application form which was signed by each of the Claimants gave an express warranty that he "*has received the [IM] and is aware of the aims and objectives of the Trust and has relied on the advice of, or has consulted with, his own professional advisers with regard to tax, legal and other economic considerations related to this Investment in the Trust*".

104. As to the role and expertise of the Evans Randall Companies, there is no real issue that their primary role was as financial advisers to the Trust and the Partnership, and they were

not appointed by the Claimants. They had no knowledge of the personal circumstances of the Investors individually, nor did they know anything about their particular tax circumstances or objectives. The parties do not, however, agree as to the extent of the tax expertise which the Evans Randall Companies in fact had as compared to other advisers involved in the promotion of the Trust and the giving of financial advice to potential investors. Those advisers included the Trust's legal advisers S J Berwin LLP, Bespoke and Bespoke's legal advisers Beachcroft LLP. Bespoke was itself advised by its own lawyers and tax advisers, and this was something that was marketed by Bespoke in its own promotional material. The Evans Randall Companies deny that, even if they did have sufficient appropriate expertise, that of itself is sufficient to give rise to a duty of care to the Claimants.

105. As to the KPMG Opinion, the Evans Randall Companies submit that it is clear that the Claimants were not entitled to rely on any aspect of it. They say that it was provided to Bespoke in its capacity as promoter, not to the Claimants, and they point out that it contained clear exclusions of reliance on its contents. In particular the Introduction contained the following words:

> *"The Opinion is only provided for [ERIML] and the Trust. The Opinion cannot and should not be relied on by any third party who should seek their own independent tax advice as appropriate."*

106. They also rely on specific exclusions of responsibility in the IM itself and the Investors' application forms which made clear that the Evans Randall Companies were excluding responsibility or liability in relation to the sufficiency or completeness of any other written or oral information made available to prospective investors or their advisers. On the face of it this would extend to the information contained in the KPMG Opinion, and also to the other correspondence received by Bespoke during the period in which the IM was being prepared. The Evans Randall Companies submit that these factors all demonstrate that they did not owe a duty of care to the Claimants in relation to the structuring of the Loan Notes for tax purposes. They contend that this is sufficiently clear to enable the question to be dealt with on a summary basis.

107. The Claimants disagree. They submit that the question of whether the Evans Randall Companies owed a duty of care to the Claimants cannot be determined on a summary basis. They assert in particular that the question has to be assessed against the fact that one of the documents provided to potential investors was the KPMG Report, which assumed on its face that the Loan Notes were Non-QCBs for UK tax purposes. They also rely on the evidence adduced from Mr Rawicz-Szczerbo of Bespoke that Evans Randall were well aware of the significance for Investors of the distinction between QCBs and Non-QCBs and the correspondence that is consistent with that evidence.

108. The principles to be applied in determining whether or not a duty of care exists were not in any real dispute. Both parties cited the speech of Lord Bingham in *Commissioners for*

Excise & Customs v Barclays Bank plc [2007] 1 AC 181 in support of their case on the test to be applied when determining whether or not a tortious duty of care is owed to a claimant suing for pure economic loss. As is well-known, there are three tests:

108.1. The assumption of responsibility test: whether a defendant assumed responsibility to the claimant for what he said or did, or is to be treated in law as having done so.

108.2. The threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did, whether the relationship between the parties was sufficiently proximate and whether in all the circumstances it is fair just and reasonable to impose a duty of care.

108.3. The incremental test: that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care, restrained only by considerations which ought to negative, reduce or limit the scope of the duty or the class of person to whom it is owed.

109. I am, of course concerned with applications for summary judgment or strike out, and so the Claimants are entitled to submit that they only have to establish that they have a real prospect of establishing a duty. They rely on the fact that, whether or not a duty of the type pleaded in the present case is established is an essentially pragmatic question to be decided "*on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole*". This was the way that Lord Bingham described the correct approach in *Commissioners for Excise & Customs v Barclays Bank plc* at para 8, and this aspect of his decision has been considered and applied on many occasions since (to give but one example see Gloster J in *J P Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) at para 49).

110. In my judgment, the Claimants have established that the issue of whether the Evans Randall Companies owed the duty pleaded is not suitable for determination on a summary basis. The reasons I have reached that conclusion are as follows.

111. First, much evidence has been adduced of the extent to which on the one hand the Evans Randall Companies and on the other hand the Claimants, through Bespoke and their professional advisers, had access to appropriate tax expertise. It seems to me that the extent to which this was the case (on either side) is capable of informing the existence and extent of any duty. I have already summarised where the disagreements lie. In my view it is not appropriate to conduct what amounts to a mini-trial on this point and I have not done so.

112. Secondly, there is a clear distinction between a duty to take reasonable care that the information presented to Investors accurately reflects the true position as a matter of fact,

and a duty to advise Investors on the significance or consequences to them personally of that information. The way that the case is pleaded against the Evans Randall Companies is simply that they owed a duty to be careful in ensuring that the Loan Notes were what they were represented to be, or at the very least what the Claimants were entitled in all the circumstances to assume they would be, namely Non-QCBs. Given that it appears to be a simple matter to make an instrument qualify as a Non-QCB, it seems to me to be arguable that, taking the correspondence and the KPMG Opinion together, that material amounted to a simple statement of fact that the Loan Notes would be Non-QCBs.

113. Thirdly, it is arguable that a person in the position of the Evans Randall Companies with the expertise that they had, and fulfilling the role in relation to the transaction that they did, came under a duty of care to ensure that the information contained within that material was accurate if and to the extent that they knew (as they must have done) that the information might affect the interests of the persons to whom it was to be disseminated. At first blush, the persons to whom that duty would have been owed are the people to whom they disseminated it. That means the immediate recipients (Bespoke) and anyone else to whom the Evans Randall Companies knew that the information would be provided. There is a triable issue on the facts that this would include the Claimants as clients of Bespoke.

114. The next stage of the analysis is whether it was reasonable for the Claimants to rely on the Evans Randall Companies as to the accuracy of this information in the light of the various disclaimers given in the relevant documentation. Here again it is important to stress that the duty is said to be to take reasonable care to ensure that the Loan Notes qualified (in the relatively straightforward manner required) as the Non-QCBs which they arguably represented they would be. It is arguable that the Claimants were entitled to rely on what was said as to the non-qualifying status of the Loan Notes in the KPMG Opinion and surrounding correspondence. I do not think that it is obvious that they were obliged to call for the terms of the Loan Notes to check for themselves that this was the case.

115. On this point it is necessary to examine the terms of the KPMG Opinion and the terms of the IM.

116. As to the KPMG Opinion itself, it is my view that the Claimants have a real prospect of establishing that the exclusions of responsibility in the KPMG Report itself do not assist the Evans Randall Companies. In the light of the way they are expressed, I think it is arguable that they are only available to be relied on by KPMG and cannot without more be adopted by the Evans Randall Companies when the information is used and disseminated by them for a different purpose. Furthermore, I consider that it is arguable that they relate only to the advice given in the KPMG Opinion and not to any duty, which the disseminator of the factual information contained in it may have had, to be careful in presenting that factual information as accurate.

117. As to the question of whether the Evans Randall Companies can rely on the exclusion of liability in the IM and the warranty of non-reliance in the application form, it seems to me that it is arguable that they cannot, albeit for two separate reasons.

118. The opening words of Appendix V of the IM is the provision on which most reliance was placed by the Evans Randall Companies. In my view, it is arguable that the words relied on by the Evans Randall Companies (as cited earlier in this judgment) are not wide enough to have the effect for which they contend. I agree with the Claimants' submission that the duty to take reasonable care to ensure that the Loan Notes were Non-QCBs, arguably raises quite different questions from the "tax consequences" for individual investors of an investment in the Trust. In my view it is well arguable that the Appendix V disclaimer is concerned only with the latter, and has nothing to do with the care with which the Evans Randall Companies should have approached the task of ensuring that the Loan Notes were drafted so as to fulfil one of the characteristics (Non-QCB status) which the Evans Randall Companies represented (anyway arguably) that they did.

119. As to the application form, the warranty is expressly given "*to the Trust*" without mention of the Evans Randall Companies. In these circumstances, I consider that the Claimants have a reasonable prospect of establishing that the warranty was given only for the protection of the Trust, and not for the protection of anyone else. It follows that it is arguable that if the Evans Randall Companies supplied information to the Claimants other than that contained in the IM (e.g. the KPMG Report and the correspondence I have already referred to), this warranty of non-reliance on information other than that contained in the IM does not extend to protect any person other than the Trust itself.

120. At the end of the day, Bespoke and the Claimants seem to have made an assumption that the Loan Notes would be Non-QCBs, an assumption that was fortified by some of what they read in material supplied to them by the Evans Randall Companies. If that material had not been available, it is obvious that the Claimants would be in a weaker position because they would have to be able to say that they were entitled to assume that the Loan Notes would be Non-QCBs unless explicit provision was made to the contrary. However, as matters stand, and in the light of the information with which the Claimants were provided (albeit indirectly) by the Evans Randall Companies, I consider that there is sufficient evidence to give rise to a triable issue that the Evans Randall Companies were under a duty to take reasonable care to ensure that the Loan Notes were Non-QCBs, or to make clear that they did not know whether or not they would be Non-QCBs if that was the case.

121. In these circumstances, the Evans Randall Companies fail in their applications for summary judgment and/or to strike out the claims against them on the issue relating to the Non-QCB status of the Loan Notes.