Neutral Citation Number: [2021] EWHC 684 (Ch)

Case No: CR-2017-007339

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY DIVISION

IN THE MATTER OF ONE BLACKFRIARS LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Rolls Building
Fetter Lane, London EC4A 1NL

Dated: 23 March 2021

Before :

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

- -

Between :

(1) ADRIAN CHARLES HYDE
(2) KEVIN ANTHONY MURPHY
(AS JOINT LIQUIDATORS OF ONE BLACKFRIARS LIMITED) — **Applicants**

- and -

(1) ANTONY DAVID NYGATE
(IN HIS CAPACITY AS REPRESENTATIVE OF THE ESTATE OF JAMES JOSEPH BANNON, FORMER JOINT ADMINISTRATOR OF ONE BLACKFRIARS LIMITED APPOINTED UNDER CPR R 19.8(1))
(2) SARAH MEGAN RAYMENT
(AS FORMER JOINT ADMINISTRATORS OF ONE BLACKFRIARS LIMITED)

Respondents

Simon Davenport QC and Tom Poole (instructed by **Humphries Kerstetter LLP**) for the **Applicants**

Justin Fenwick QC and Ben Smiley (instructed by **Mayer Brown International LLP**) for the **Respondents**

Hearing dates: 8 – 12, 15 – 19, 24 – 26 & 30 June 2020 & 1, 2, 3, 6, 7, 8 July 2020

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APPROVED JUDGMENT

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 a.m. on 23 March 2021

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A. INTRODUCTION

1. The Applicants in these proceedings are Adrian Hyde and Kevin Murphy. They were appointed as the joint liquidators (the '**JLs**') of One Blackfriars Ltd ('**OBL**' or '**the Company**') on 30 March 2016.

2. The Second Respondent and Mr Shay Bannon are the former administrators (the '**FAs**') of the Company. They were appointed on 14 October 2010 by a syndicate of banks ('**the Syndicate**'). The Syndicate was led by the Royal Bank of Scotland ('**RBS**').

3. The Syndicate provided OBL with a facility (**'the Facility'**) to refinance a loan which OBL had used to purchase a plot of land at 1-16 Blackfriars Road, London SE1 9BP ('**the Site**').

4. Mr Bannon died on 12 May 2018. The First Respondent is the representative of the estate of Mr Bannon.

5. In September 2010, the Company defaulted on its obligations under the Facility and demand was made for immediate repayment of the then outstanding sum (£61.4 million). The sum was not repaid so the Syndicate appointed the FAs under a legal charge held by RBS as security for the Facility.

6. The Site was marketed on behalf of the FAs by the CB Richard Ellis Ltd. ('**CBRE**') and was ultimately sold to St. George Group PLC ('**St. George**') in December 2011. The purchase price paid by St. George for the Site was £77.4 million.

7. Having obtained permission from the relevant planning authority to vary the approved scheme previously obtained by OBL, St. George subsequently developed the Site in the form in which it exists today, namely, a 50-storey 170 m high tower containing 274 residential flats and two smaller buildings. One of the smaller buildings contains a 161 room hotel. The other contains retail units.

8. The JLs, represented by Simon Davenport QC and Tom Poole, allege that the administration of OBL was mishandled by the FAs from the outset. The JLs allege that the Site was sold at an undervalue and that, had the FAs complied with their statutory and common law obligations, OBL could have been saved as a going

concern. For the reasons given in an earlier[1] judgment, the JLs were not permitted to allege that the FAs had acted in breach of duty for failing to attempt a rescue of OBL as a going concern. Instead, the JLs allege that the chance of a funded rescue was lost because of other breaches of duty. This case was added by way of an amendment in August 2019.

9. The JLs' allegations against the FAs fall under three broad headings:

(1) Failure to act independently and in accordance with their legal duties

(2) Failure to properly assess the value of the Site, in particular its planning potential and

(3) Failure to market and sale at an undervalue.

The JLs were at pains to point out that these three categories of claim were all interlinked.

Alleged failure to act independently

10. The JLs allege that the FAs improperly pursued the interests of the Syndicate, who wanted in a quick disposal of the Site to clear OBL's debt, and that the FAs paid insufficient regard to the interests of other creditors. Linked to this is the allegation that the FAs failed to inform themselves sufficiently (or in some cases at all) prior to making crucial decisions including, in particular, the decision as to which of the statutory objectives of the administration to pursue.

Alleged failure to properly assess value of the Site

11. The JLs allege that the FAs: (a) failed to interrogate and understand the planning potential for the Site; (b) failed to consider or assess the valuations for the Site previously obtained by the Company before and during the administration; (c) failed to obtain their own independent valuation for the Site; and (d) failed to reconcile the disparity between the previous valuations and the strategic advice provided by CBRE to the Syndicate.

Alleged sale at an undervalue

[1] [2019] EWHC 1516 (Ch)

12. The JLs say that CBRE should never have been appointed to market the Site because they had previously advised the Syndicate and what marketing they did was in any event negligent. This failure, together with a deficient bidding process, they say, led to the Site being sold at an undervalue.

13. The JLs accordingly sought an examination of the FAs' conduct of the administration under paragraph 75(3) of Schedule B1 ('**SchedB1**') of the Insolvency Act 1986 ('**IA86**') and claim compensation. Permission to bring the claim was granted under paragraph 75(6) of SchedB1 by William Trower QC, sitting (as he then was) as a Deputy High Court Judge, on 24 April 2018.

The FAs' case

14. The FAs, represented by Justin Fenwick QC and Ben Smiley, deny any breach of duty on the part of the FAs. They say that by the time the Company fell into administration the scheme for which OBL had obtained consent was no longer financially viable and OBL was hopelessly insolvent. The FAs' case is that it was reasonable to decide to sell the Site in the interests of all the creditors. They further say that they took appropriate planning advice, from a leading planning consultant, DP9, and followed that advice by formally implementing the existing planning consent, that it was reasonable to use CBRE to market the Site and that the marketing and bidding process was properly carried out. The FAs say the Site was sold for its then market value.

The form of the trial

15. The hearing of the trial took place in unusual circumstances. Because of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 in response to the Covid-19 pandemic, a normal trial with the parties, their legal representatives, the witnesses and any interested member of the public all physically gathered together in a court in the Rolls Building for five weeks was impossible. Having refused an application to adjourn the trial for reasons set out in my judgment of 6 April 2020[2], I ordered the parties to co-operate to explore what options there might be to enable the trial to proceed as a fully remote trial.

[2] [2020] EWHC 845 (Ch)

16. The parties did co-operate. By the time of the second pre-trial review held on 21 April 2020 the parties had agreed a technological solution to enable the trial to proceed as a fully remote hearing. This involved the use of a hosted virtual court room accessed by Zoom, an electronic trial bundle and a live transcript. Any extra hardware needed to ensure a sufficiently stable audio-visual connection to facilitate a hearing conducted by Zoom was provided by Sparq. The electronic trial bundle and live transcript was provided by Opus2.

17. The technology worked well. The advocates, the witness giving evidence and I could all see and hear each other clearly in real time with very little interruption. From time to time the picture froze but for the most part when this occurred the sound (and the live transcript) continued so the impact on the progress of the trial was minimal.

18. A remote trial bundle operator displayed any document which the advocate wished to refer the court or witness to. The document displayed on the screen was visible not only to the witness but to everyone attending the hearing. It was also possible to display on screen more than one document side by side. Excel spreadsheets and other electronic documents could be displayed and zoomed in and out at the request of the advocate or witness. Electronic documents could be used in native format so it was possible for the expert evidence to be tested in real time against alternative factual scenarios. The result was not just that the documentary and expert evidence could be referred to in a very helpful, interactive and flexible manner but that all of those viewing the trial could follow the cross examination in a far more informed way than in a conventional hearing.

19. The court sitting hours each day were slightly curtailed to take account of the strain of conducting all communications via a screen but, otherwise, the trial proceeded entirely normally. A timetable for cross-examination of witnesses was agreed in advance and enforced. The factual and expert witnesses were able to give evidence either from their own homes or, as many of the experts preferred, from their office. The witnesses gave evidence from a variety of locations from the British Virgin Islands to Bromley.

20. I did not feel in any way disadvantaged in my ability to assess the reliability or credibility of the oral witness evidence. If anything, the opposite was the case. The engineer host provided by Sparq not only ensured that the internet connection was

sufficiently good and stable to enable remote cross-examination (well before the witness appeared) but also helped to ensure that the witness was generally positioned at a reasonable distance from the camera and in optimal light conditions. The result was in most cases as if I were sitting about 1.5 metres directly opposite both the witness and the cross-examining advocate with the trial bundle open in front of me. This permitted me to follow the ebb and flow of a cross-examination very well. If anything, I was in a better position to observe the witness's reaction to the questions and documents being put to them than if the trial had taken place in a traditional court room. In a typical Rolls Building court room, I would have been positioned behind a bench looking for the most part at the side of the witness's head from a distance of three or four metres while her or she either looked down into a paper trial bundle or at cross-examining counsel.

21. The Sparq engineer who tested the audio-visual connection and intervened when required to make any necessary adjustments also acted as virtual trial manager. There was no usher or associate present so it was the remote trial manager who transferred each of the advocates, the witnesses and me to and from our respective virtual waiting rooms into the virtual court room at the beginning of each day and at the end of any short adjournment. This process seemed to have the incidental benefit that the witnesses had a brief interaction with a neutral person who could reassure them that the connection to the remote court room was still functioning. My overall impression with all the witnesses, but in particular with the expert witnesses, was that giving evidence from their own offices or homes put them at their ease and assisted in getting the best evidence from them.

22. It is true, though, that for almost all of the witnesses the view I had of them was confined to their head and shoulders. I was not sharing the same physical space with them or the other trial participants. I was to that extent less able to view the full body language and demeanour of the witnesses. However, I did not consider this to be a significant disadvantage in terms of assessing the credibility or reliability of the witness evidence for the reasons given by Leggatt LJ (as then was) in R. on the application of SS (Sri Lanka) v Secretary of State for the Home Department 2018 EWCA Civ 1391.

"[36]. [I]t has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval:

"I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help."[3]

[39]…. empirical studies confirm that the distinguished judges from whom I have quoted were right to distrust inferences based on demeanour. The consistent findings of psychological research have been summarised in an American law journal as follows:

"Psychologists and other students of human communication have investigated many aspects of deceptive behavior and its detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanor as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments."[4]

[40] This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.

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[3] "Discretion" (1973) 9 Irish Jurist (New Series) 1, 10, quoted in Devlin, The Judge (1979) p63 and Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, The Business of Judging p9).

[4] OG Wellborn, "Demeanor" (1991) 76 Cornell LR 1075. See further Law Commission Report No 245 (1997) "Evidence in Criminal Proceedings", paras 3.9–3.12. While the studies mentioned involved ordinary people, there is no reason to suppose that judges have any extraordinary power of perception which other people lack in this respect.

> [41] No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts."

23. I also agree with the thrust of Lieven J's comments in A Local Authority v Mother & Ors [2020] EWHC 1086 (Fam) (5 May 2020) where she was considering whether to hold a fact finding hearing remotely or not in light of the Covid pandemic:

> "[27]. Having considered the matter closely, my own view is that it is not possible to say as a generality whether it is easier to tell whether a witness is telling the truth in court rather than remotely. It is clear from Re A that the Court of Appeal is not saying that all fact finding cases should be adjourned because fact finding is an exercise which it is not appropriate to undertake remotely. I agree with Leggatt LJ that demeanour will often not be a good guide to truthfulness. Some people are much better at lying than others and that will be no different whether they do so remotely or in court. Certainly, in court the demeanour of a witness, or anyone else in court, will often be more obvious to the judge, but that does not mean it will be more illuminating.
>
> [28]. I was concerned that a witness might be more likely to tell the truth if they are in the witness box and feel the pressure of the courtroom, but having heard Mr Goodwin and Mr Verdan I do now accept that this could work the other way round. Some witnesses may feel less defensive and be more inclined to tell the truth in a remote hearing than when feeling somewhat intimidated in the court room setting. In the absence of empirical evidence, which would in any event be very difficult to verify, I can reach no conclusion on what forum is most likely to elicit the most truthful and/or revealing evidence."

Enabling public access to the remote trial

24. A remote hearing is a private hearing by default unless the court makes an order to guarantee effective public access. In order to promote transparency and public access to justice, following the agreement to hold the trial as a remote hearing, I made an order on 3 June 2020 in the following form:

> "Pursuant to section 85A (1)(a) of the Courts Act 2003 (as amended by the Coronavirus Act 2020) the Trial shall be broadcast by Sparq by means of a passive live stream to a bespoke web page created by Sparq. The webpage shall

be accessible to the public without password or other restriction and the webpage address shall be published in the daily cause list and be available on request from the court office"

The trial was thus available to be seen by any interested member of the public with access to the internet. According to data supplied by Sparq, the livestream was in fact watched by an average of around sixty people a day (and a peak of 428). This level of public access is far higher than would be achieved by allowing people to physically attend a hearing in the Rolls Building.

25. In summary, the remote hearing proved to be more than a second-best work around in the face of the Covid 19 pandemic. The fully remote mode of trial certainly created real challenges for the parties and their representatives, not least because of the short period to make adjustments in the preparations for trial. However, my overall assessment is that not only were those challenges overcome by appropriate and mutually agreed adjustments on the part of counsel, the parties and court but that the trial was conducted more efficiently and far more conveniently as a fully remote trial. It was also more accessible to the public than it would have been had it taken place in a traditional court room in the Rolls Building.

B. FACTUAL BACKGROUND

26. The narrative of events set out below in Section B is based on an agreed chronology submitted by the parties.

The Beetham Group

27. The Beetham Group is a group of property development companies founded in Merseyside by Hugh Frost.

28. Mr Frost is now 70 years old and describes himself as semi-retired. Mr Frost has two sons: Stephen Frost and Simon Frost. He introduced them both into the family business. Stephen Frost, who subsequently changed his name to Stephen Beetham, began working for his father in 1991 at the age of 17.

29. The original corporate vehicle for his business was Beetham Organisation Limited. The company name is derived from that of an ancestor of Mr Frost.[5] The business

[5] Ralph de Beetham, who lived in the north west of England in the reign of Richard 1.

started with the refurbishing of terraced houses in and around Liverpool. It subsequently became a group of companies involved in residential flat developments in central Liverpool and then in larger scale mixed use tower developments in Liverpool, Manchester and Birmingham.

30. The success of the developments in Liverpool, Birmingham and Manchester ultimately led Stephen Beetham to set his sights on repeating the formula in London. The site identified as a potential for development was the Site in Blackfriars.

The Site

31. The Site is a rectangular block of land 96 m from north to south and 55 m from east to west. It is bounded by four roads: Upper Ground to the north, Stamford Street to the south, Blackfriars Road to the east and Rennie Street to the west. It lies approximately 50 m from the southern bank of the Thames and runs parallel to the west side of Blackfriars Road just before Blackfriars Bridge.

32. The Site once contained two buildings which were part of the head office of J Sainsburys PLC. The largest building, Drury House, was a twelve-storey office block. This faced onto Blackfriars Road. This was constructed in 1958 for Unilever and had a four-storey wing attached to its south side. The second office building was a five-storey Edwardian office block called Stamford House. This faced west onto Rennie Street. When Sainsburys moved its head office to Holborn Circus in 2001, both buildings were demolished to basement level. All that was left on the Site was a large hole in the ground surrounded by advertising hoardings.

33. In January 2002, Sainsburys obtained planning permission for construction on the Site of a nineteen-storey building designed by Foster & Partners. This comprised a cylindrical office building mounted on a tapered neck above a three-storey mixed office and retail base. This scheme was technically implemented (by carrying out piling works) on the Site in November 2006 but was never built.

34. The Beetham Group acquired the Site in November 2006 at a cost of £52 million. The purchase was funded by a facility from UBS.

The 2006 planning application

35. In October 2006, OBL (then called Beetham Landmark London Limited) submitted a planning application for the Site. The application sought permission for a scheme comprising: (1) a 52-storey tower, standing 165 m above ground level, containing 261 five-star hotel rooms (and associated facilities), 64 residential units and a 'Skydeck' observation platform open to the public; (2) a public plaza with shops and cafes; and (3) a six-storey residential and office block running parallel to Rennie Street containing 32 affordable residential units.

36. The distinctive feature of the tower, designed by Ian Simpson, is its unusual asymmetrical profile. The tower increases in girth from a small footprint at its base to its widest point at levels 32 and 33 before tapering again to the summit at level 52. The inspiration for this profile was a glass vase designed in 1952 by the Finnish designer Timo Sarpaneva.

37. In the 2006 scheme, the first three floors of the tower contain a foyer, lifts and plant rooms, floors 3 – 27 were to be occupied by a five-star plus hotel intended to be operated by Jumeirah, floors 28 to 49 were to contain 64 residential apartments and floors 50 – 51 contained the Skydeck, with a capacity for 220 people at a time. A four-storey basement would contain car parking space.

38. The 2006 application was approved by the planning committee of Southwark Borough Council ('**the Council**') in July 2007. Among the reasons given by the committee for approving the scheme were:

    (1) A study by the Greater London Authority which indicated that 2,500 additional hotel rooms were needed in Southwark between 2005-2027. The committee considered that there was a need for high-quality accommodation which the proposed '5-star plus' Jumeirah Hotel would meet.

    (2) The Skydeck would attract 800,000 visitors a year.

    (3) Its unique architectural form would become a London landmark ranking with the 'Shard' and the 'Gherkin'.

39. In December 2007, a slightly modified application was submitted and approved by the Council's planning committee.

40. On 10 March 2008, the Secretary of State for Communities and Local Government 'called in' the planning application under section 77 of the Town and Country Planning Act 1990. A public local enquiry was ordered to be held.

41. The enquiry opened on 9 September 2008 and concluded on 23 September 2008. On 12 September 2008, the Deputy Mayor of London submitted a letter containing a number of negative comments about the planning application.

42. Notwithstanding the negative assessment from the office of the Mayor of London, the planning inspector recommended permission be granted. In doing so, the inspector noted the following assessment by the architect James Eyre of Ian Simpson's design as: a "lovely, light, elegant form" which would augment the London skyline at the most obvious site for a landmark building". He went on to describe the proposed tower as an "instinctively understandable building" and a "building of sculptural elegance and beauty".

43. A material consideration for the inspector was the Section 106 agreement that had been agreed between the Council and OBL. This provided, amongst other things, a cash contribution of £15.6 million for off-site affordable housing (in addition to the on-site affordable housing) and public access to the Skydeck.

44. Among the successful team employed by the Beetham Group was a consultant from the planning consultancy DP9 ('**DP9**').

45. The Secretary of State accepted the inspector's recommendations and on 25 March 2009 planning permission on the conditions proposed by the inspector was granted ('**the Permitted Scheme**').

The Global Financial Crisis

46. Between the date on which the OBL's first planning application for the Site had been submitted (November 2006) and the date on which planning permission was finally granted (March 2009) the worldwide economic climate had changed dramatically for the worse. The bankruptcy of Lehman Brothers, which is commonly regarded as the climax of the global financial crisis, occurred on 15 September 2008 during the public enquiry into OBL's application.

47. The effect of the crisis was felt across all sectors of the UK economy but it had a particularly severe impact on the property market in London. One of the graphs produced by the JLs' development finance expert, Mr Griffiths, showed the negative effect of the downturn on both the national and prime central London property market in the period between September 2007 and March 2009 (referred to in the graph as 'the crunch'). The marked reaction in the prime central London property market to the collapse of Lehman Brothers was attributed to the importance of the financial sector to London's economy.

48. The global financial crisis impacted negatively not only on the feasibility of building the Permitted Scheme but also on the financial stability of the Beetham Group and its Russian partner Mirax.

Mirax

49. Two months before the commencement of the public enquiry, in June 2008, the Beetham Group entered into a joint venture agreement ('**the JVA'**) with a Russian company, Mirax Group LLC ('**Mirax**'). The purpose of the JVA was to develop the Site.

50. Mirax was beneficially owned by Sergei Polonsky, a 36 year-old businessman. Mirax was the company behind Moscow's Federation Tower, one of Europe's tallest buildings and a mixed development comprising a forty-four storey hotel, office space, shops and luxury apartments.

51. Mirax was initially introduced by a finance broker used by the Beetham Group. Following a meeting between Stephen Beetham and Sergei Polonsky in a London hotel Mirax agreed to become a joint venture partner of the Beetham Group to develop the Site.

Dryden

52. Mirax's vehicle for its investment in the project was Dryden Limited ('**Dryden**'), a company registered in Jersey. Dryden agreed pay £60 million for a 50% share in OBL pursuant to a sale and purchase agreement ('**the SPA'**). £40 million of this was to be paid up front, with £20 million paid if planning permission was granted following the public inquiry.

53. Dryden's liabilities under the SPA agreement were guaranteed by Mr Polonsky personally. Dryden's liabilities under the JVA were guaranteed by Mirax.

54. The Beetham Group's 50% share in OBL was held by Beetham Holdings Two Limited ('**BH2**'). BH2 was beneficially owned by Stephen Beetham (60%) and his brother Simon (40%).

The Facility

55. On the same day as the Beetham-Mirax JVA was agreed, 24 June 2008, OBL refinanced its indebtedness with UBS. It did so by borrowing £61.46 million from the Syndicate in the form of the Facility, together with an additional £1.6 million in "mezzanine lending" from RBS alone ('**the Mezzanine Facility**'). The repayment date of both the Facility and the Mezzanine Facility was 18 months from their commencement date of 22 June 2008. It was a condition of the Facility that the amount advanced did not exceed 55% of the market value of the Site.

56. On 2 October 2008, Savills provided a valuation of the Site with the benefit of the Permitted Scheme for the Syndicate. The Site was valued on this basis at £140 million. This was £100 million lower than Savills' valuation produced only six months earlier in April 2008. The October report took account of the turmoil in the financial and capital markets caused by the demise of Lehman Brothers and the global financial crisis.

57. The valuation noted a dearth of land sales evidence on which to base a valuation. The report stated: "Even for those sites where interest is still shown the bids made can vary significantly, sometimes by 100% probably being indicative of the fact that developers have widely differing views as to where the market will go over the next twelve months".

Two years of inactivity

58. For two years after the JVA and loan facility were agreed virtually nothing happened in relation to the Site.

59. When planning permission was granted in March 2009, Dryden did not pay the full £20 million it owed under the SPA. Between April 2009 and February 2010 only £4 million was paid.

60. The nature of the relationship between Mirax/Dryden and the Beetham Group during this period is not clear. No letters of demand or any other documents evidencing attempts by the Beetham Group to enforce any obligations under the SPA or JVA were in the hearing bundle. It would appear that Mr Polonsky's personal guarantee was never called upon. In his witness evidence, Mr Frost simply stated that he "did not know what Mirax/Dryden's problems were apart from the fact that they were unable to meet their obligations". His only evidence as to what the problems were was that Mirax found itself "under pressure from bondholders and banks in Russia and elsewhere".

61. During this period, the Site itself generated a very small amount of income (about £2,000 a week) because it was used as a storage site for construction materials. Professional advisers did some very limited work for OBL. In short, the project to develop the Site stagnated.

Amendment to the JVA and SPA

62. In June 2010, the JVA and SPA were both amended. Dryden's outstanding debt of £16 million was reduced to £10 million. The reduced amount ceased to be immediately payable. Instead, payment was postponed until the Site was either developed or sold. As a result of an inter-company loan, the reduced sum of £10 million became payable to Formby 2010 Limited ('**Formby**') rather than OBL.

63. Formby was owned beneficially by Mr Frost and Stephen Beetham 50:50.

Restatement of facilities

64. At the same time as the JVA and SPA were amended, the Syndicate's Facility and RBS's Mezzanine Facility were amended and restated. An agreed schedule of repayment of both secured and unsecured creditors was agreed.

65. Formby lent OBL £20 million and was granted a third ranking charge over the Site ('**the Formby Charge**').

66. Dryden was responsible for payment of interest, fees and expenses due to the Syndicate from OBL.

67. These arrangements reached in June 2010 had a somewhat paradoxical feature. The renegotiation of the Facility had become necessary because, according to Mr Frost, "Mirax had no immediately available funds" and yet the new arrangements made Dryden responsible for meeting future interest payments. A failure on Mirax's part to put Dryden in funds would put OBL into default under the Facility. OBL had thus put the fate of the development of the Site into Mirax/Dryden's hands.

Default

68. OBL defaulted immediately on the very first of the rescheduled interest payments. Of the £1.5 million due on 15 July 2010 only £150,000 was paid. Thirteen days later, one of OBL's unsecured creditors, Herbert Smith, issued a winding up petition in respect of £675,060 in unpaid legal fees.

The Syndicate's response to the default

69. On 3 August 2010, RBS wrote to the Company on behalf of the Syndicate to request urgent details of how the Company intended to rectify the default under the Facility and reserved all rights.

70. Mirax, acting through the managing director of Mirax UK Ltd, Dr Vladi, responded directly to RBS. Dr Vladi apologised for the delay in making the interest repayment and blamed the delay on extreme weather conditions in Moscow. He reassured RBS that "all measures have been taken to ensure that the funds are to be gathered on offshore Mirax accounts" and that the money "would become available at the beginning of September".

71. RBS was understandably unimpressed with the bad weather explanation for the failure to pay the interest instalment due. RBS asked for a detailed payment plan by 27 August 2010 and confirmation that the further sum of £1.475 million due on 15 October 2010 would be paid on time.

72. RBS sent a further chasing e-mail to Dr Vladi on 1 September 2010. The response to this email came not from Dr Vladi but from Stephen Beetham. He informed RBS that he was going to speak to Mr Polonsky and promised to get things "back on track". Mr Beetham's witness statement did not refer to his discussions with Mirax at this time but it is clear from a contemporaneous email that Mr Beetham had forwarded to Mr

Polonsky the Herbert Smith winding up petition on 2 September and asked to speak to him urgently.

73. Even if funds were being gathered in offshore accounts (as to which there is no evidence), no transfer of the outstanding sums was made to the Syndicate, no payment schedule was forthcoming and no confirmation was forthcoming that it was Mirax's intention to put OBL in funds to pay the sums due on 15 October 2010.

Events leading up to the administration

74. In light of the developments described above, RBS began to consider its security enforcement options both in respect of its own mezzanine lending and on behalf the Syndicate.

CBRE's advice to the Syndicate

75. RBS, on behalf of the Syndicate, asked CBRE for some advice. CBRE produced five documents in response:

    (1) A market and financial feasibility study focusing on the Jumeirah hotel dated August 2010;

    (2) A planning statement dated September 2010. This 37-page report focused on the potential issues and obligations associated with the implementation of the Permitted Scheme;

    (3) An Indicative Development Appraisal dated 9 September 2010;

    (4) A strategy report dated 9 September 2010 (**'the Strategy Report'**). The purpose of this 23-page report was "to assess the value of the planning consented scheme"; and

    (5) A draft strategic review ('**the Strategic Review**') dated 20 September 2010 to preserve value and maximise net realisation.

76. Neither the precise date nor the terms of CBRE's engagement by RBS are recorded in any of the reports themselves or in any document in the trial bundle but it is tolerably clear that RBS asked CBRE to carry out a 'strategic review' of the project to develop

the Site in light of default by OBL and the Syndicate's security. An internal CBRE email suggests that CBRE and RBS had agreed a fee of £50,000 for this review work.

77. The Strategy Report contained an assessment of the value of the Permitted Scheme. It stated as follows:

> *"The current residual site value of the proposed building, assuming an agreement in place with Jumeirah is estimated at £2.78 million, or vacant and available for sale to an owner occupier together with reconfigured residential units in the range of £43.15 to £48.50 million. Subject to further checks, it would appear likely that a redesigned scheme could generate similar values"*

78. CBRE recommended a three-stage approach:

- Pursue works necessary to preserve the extant planning consent;
- Investigate works to refine the existing consent; and
- A redesign to reduce the scale and address shortcomings to produce a more valuable scheme.

79. The Strategic Review contained an appraisal of the value of the Permitted Scheme, an estimate of the cost of implementing the Permitted Scheme and whether redesign of the Permitted Scheme was a viable option. CBRE's view was that any such redesign would trigger the need for a new full planning application and that "would be extremely challenging". It contained the following passage:

> "*Assuming a straight disposal of the property on an unconditional basis could be undertaken within a relatively short time frame, we consider that a sales price in the region of £40 million could be achieved. This is drawn from valuations in the range of £43.15 million to £48.5 million and envisages an element of top up on performance following sale. Whilst this is not supported by our appraisals of the current residual value of the consented scheme, it is supported by other comparable land sales that have occurred in London this year…."*

The first reference to putting OBL into administration

80. The first reference to the possibility of OBL being put into administration comes in an email of 9 September 2010 from Andrew Johnston of CBRE to two of his colleagues. Mr Johnston refers to a conversation he has had with Tom Brown of RBS. Mr Johnston tells his colleagues that he understands that the Syndicate is likely to put OBL into administration within a week to 10 days. The email also records Tom Brown as saying that:

> "*It will be a soft administration (meaning the Bank will be able to guide it).*"

The (w)hole in the ground

81. A week later, on 16 September 2010, Mr Bannon received an email from one of the Syndicate banks stating:

> *"Shay – you should get a call from RBS on a case involving a property (whole* [sic] *in the ground) in Blackfriars. Give us a call once you hear from them"*

As it happened, Mr Bannon was already in a telephone conversation with Sebastian Keuchel of RBS as this email arrived.

The BLP options paper of 17 September 2010

82. The day after the conversation between Mr Bannon and RBS, the Syndicate's solicitors, Berwin Leighton Paisner ('**BLP**'), finished an options paper ('**the Options Paper**'). The Options Paper recorded the views of the Syndicate as follows:

    (a) "*The Lenders have no faith or trust in management [of OBL] and would not want to continue a lending relationship with them;*

    (b) *The Lenders do not wish to fund a build-out of the Site;*

    (c) *The Lenders do not wish to introduce new money by way of increased facilities or third-party investment (e.g. through a joint venture);*

    (d) *The Lenders do not wish to bring the Property on to their balance sheets …"*

83. The Options Paper set out four possible strategies:

    (a) "*Short-term disposal of the Site;*

    (b) Medium-term disposal of the Site by a combination of one or more of (i) implementing the Permitted Scheme (ii) applying to amend the existing planning permission (iii) applying for a new planning permission;

    (c) Funding the build-out of the Site;

    (d) Mothballing the Site."

The conclusion reached by CBRE in light of the views of the Syndicate set out above was that only (a) or (b) were feasible.

84. The Options Paper also considered the pros and cons of administration on the one hand and receivership on the other. Among the pros of administration were the wide powers of administrators to take control of the affairs of the Company, to require directors to supply information and documents and the existence of a moratorium on creditors taking action to enforce their debts. On the cons side, the document noted the fact that administrators would owe duties to all creditors and that administration is generally considered to be more expensive. In relation to that the Options Paper qualified that as follows:

> *"However, administrators are becoming more used to deploying "light touch" administrations where day to day management is not needed or can be delegated."*

85. In relation to valuation of the Site, the Options Paper said:

> *"We understand that the indicative value that has been placed on the Property by CBRE in their valuation is significantly below the value that was given by Savills in the valuation that they provided to the Lenders, and upon which the Lenders relied…"*

BDO internal discussions

86. At the same time as BLP were finalising their Options Paper for the Syndicate, there was an in-house email exchange within BDO as to who would handle the administration if the appointment came BDO's way. On the morning of 17 September 2010, Ben Jones of BLP asked Mr Bannon whom he had in mind to run the administration within BDO. This led to a discussion between Mr Bannon and Mrs Rayment and to Mrs Rayment suggesting Lindsey Cook.

87. Mrs Rayment managed the BDO Real Estate Business Restructuring Team, which was itself part of the wider Business Restructuring Group led by Mr Bannon. Both Mrs Rayment and Mr Bannon were licensed insolvency practitioners with experience of handling real estate. Ms Cook was a senior manager.

88. Mr Bannon, Mrs Rayment and Ms Cook all worked on the same floor at BDO's office in Baker Street.[6] Mrs Rayment, Mr Bannon and Ms Cook worked in an open plan

[6] Compliance issues were dealt with by a separate office near Gatwick Airport.

office and sat at desks which were only a few metres apart. This permitted a high degree of informal information exchange between them.

89. When Ms Cook went on extended leave her place in the team was taken by James Baggley. There were others who assisted from time to time, in particular Warren Epstein and Matt Tang, but the core team was Mr Bannon, Mrs Rayment and Ms Cook.

BDO's understanding of the potential appointment

90. Mr Bannon provided a quick thumbnail sketch of the Site and the potential appointment to Ms Cook and Mrs Rayment in an email sent on 17 September 2010:

> *"It is a flat piece of ground with planning permission for hotel and mixed use. RBS [are] owed 30 m in syndicate with AIB – Paul Whitehead, and Santander [are] owed 15 m each. RBS then have a 5 m mezz strip. CBRE are advising. We are told it is light touch admin. Herbert Smith have petitioned in respect of unpaid fees and winder is due to be heard next Wed, hence urgency."*

91. Later that day Ms Cook made a note of a briefing by Mr Bannon. This note refers to "fundamental problems" with the size of apartments in the Permitted Scheme. It also refers to the potential administration as "light touch administration".

Telephone conference on 20 September 2010

92. There is a contemporaneous note of a telephone conference between the FAs, the Syndicate and CBRE on Monday 20 September 2010. The note (made by Ms Cook) records RBS's scepticism about the current management of OBL (with which Santander is recorded as agreeing). The note records a nervousness on the part of the Syndicate about the cost of implementing the Permitted Scheme.

93. BLP sent to Ms Cook a copy of the Options Paper and CBRE's Strategy Report.

Meeting on 27 September 2010

94. On 27 September 2010 a meeting took place between CBRE (Tim Perkin, Adrian Bunnis, Dan Higginson and Andrew Johnston) and the FAs. It is clear from a note produced by CBRE that the purpose of the meeting was to inform the FAs of the advice CBRE had already given to the Syndicate about their options in light of the default of OBL.

CBRE's meeting with Mr Beetham

95. CBRE had a meeting with Mr Beetham three days later to discuss his views on options for the Site. In a follow up email to Mr Beetham, CBRE made it clear that in addition to listening to Mr Beetham's ideas about the Site they were seeking information about OBL "which we will require in order for us to keep the Banks fully appraised of the potential of the site".

96. On the same day as this meeting, lawyers engaged by Mirax confirmed that unsecured creditors including Herbert Smith had been paid and that £610,000 was held on account for the Syndicate. By this point Mirax had instructed solicitors to act on its behalf and the directors of OBL had instructed Hill Dickinson ('**HD**').

Administration fee quote

97. On 29 September 2010 BLP wrote to HD to set a deadline of close of business on 1 October 2010 for a "substantive proposal". In the meantime, RBS asked Mr Bannon to provide a fee quote for an administration. Mr Bannon was asked to quote:

> *"based on a light touch admin but bearing in mind that we'll need administrators powers to get hold of documents from (probably) uncooperative professionals".*

98. Mr Bannon's reply to RBS's request was as follows:

> *"With regard to cost, we have estimated the fees for a light touch administration as follows:*
>
> *Statutory duties 15k; meetings with banks and CBRE to agree strategy and scope of agent's work 5-10k; communication with management to retrieve books and records 5k; communicating with professionals such as architects to secure ongoing co-operation 5 – 10k; liaising with the first wave of interested parties 10k; general contingency 10k.*
>
> *Total fees estimated at 50 – 60 k.*
>
> *This excludes any involvement in a detailed revised planning application, negotiations with potential purchasers or any litigation which may be required".*

99. This email would appear to indicate that Mr Bannon had not already closed his mind to the possibility of a detailed revised planning application being prepared and submitted but that if it did happen, the administration fees would be higher.

Offer to clear default rejected

100. On 1 October 2010 HD made an offer on behalf of the directors of the Company to clear the existing default. This offer was refused by the Syndicate. RBS then sent a formal letter declaring that the full loan was repayable on demand and default interest would now be applied. BLP told HD that the Syndicate would be prepared to consider continuing to finance the project but only if a £10 million capital injection was made by 8 October 2010.

Demand under the Facility

101. On 11 October 2010, RBS made a demand under the Facility for repayment of £61.4 million.

The meeting of 13 October 2010

102. On 13 October 2010, a two-hour meeting was held at the offices of BLP attended by RBS, Mr Bannon, Ms Cook, Stephen Beetham, Mirax and BLP. This was an important meeting because it involved everyone with an interest in the Site and it was clear that the Company was very likely to go into administration imminently.

103. According to the minutes prepared by BLP, Mirax opened the meeting by apologising for the repayment default under the Facility and saying that it had reached an agreement with its bank. The minutes then record Ben Larkin of BLP setting out the Syndicate's position as follows:

> *"In electing to appoint an administrator, the asset will not be immediately sold. Planning will be pursued in a different manner.*
>
> *The administrators will do whatever is appropriate in the circumstances to discharge his functions but he will always be available to hear proposals and suggestions from the stakeholders…*
>
> *"There are a number of solutions that could be put forward and Shay will consider them, For example, an investor could put in funds to pay off the bank debts, although I have no instructions. Alternatively, Mirax could buy the bank debt or Mirax could buy the property from the administrators."*

104. In response to a direct question from Mirax about the Syndicate's objectives, the minutes suggest that Mr Larkin stated that the Syndicate's aim was to have their debt repaid. The minutes also record that Mr Larkin distinguished the Syndicate's commercial aim from the objectives of the administrators under the Insolvency Act

1986. He is recorded as saying that: "The administrator's main role will be to return the company to its shareholders".

105. The minutes record that the parties had radically different views of the value of the Site. According to Mirax, the value of the Site "greatly exceeds the value of the debt". By contrast, Mr Larkin is reported to have said that "On the advice we have received there is a substantial risk the banks will not recover their debt". Mr Beetham appears to have referred to a Savills valuation of £135 million.

106. Most of the meeting was concerned with what difference an immediate £10 million capital injection would make. The Syndicate's answer was that if this happened the Syndicate would leave Beetham Group and Mirax in control of OBL.

OBL's view on selling the Site

107. On the day after the meeting, instead of proposing a £10 million injection of capital to retain control over OBL, HD sent a letter to BLP informing them that the directors of OBL were now of the opinion that "the most appropriate course of action is for [OBL] to accelerate the sale of the [Site]". The letter referred to two potential offers in excess of £150 million. The letter sought time for these offers to be pursued outside of an administration.

The appointment of the FAs

108. The proposal to delay the appointment of administrators was rejected by the Syndicate. Mr Bannon and Mrs Rayment were officially appointed as administrators with effect from 14 October 2010.

The first eight weeks of the administration

109. In the first eight weeks of the administration the FAs collected information from the directors of the Company, which was willingly provided.

110. On 18 October 2010, Mr Beetham and Mr Frost met with CBRE and the FAs. It was clear already that CBRE would be assisting the FAs. The administration was widely reported in the press, including the Financial Times and The Telegraph.

111. On 20 October 2010, Mr Bannon and Ms Cook attended a meeting with CBRE and DP9. BLP also attended. The implementation of the Permitted Scheme and the prospects of amending the planning permission were both discussed.

112. CBRE sent their proposed terms of appointment to the FAs on 22 October 2010. These were subsequently revised on 3 November 2010.

113. On 3 November 2010, CBRE sought documentation from DP9 with a view to pursuing (a) the implementation of the Permitted Scheme and (b) "the activity we discussed to comfort purchasers on the prospects for a variation to the consented scheme". On the same day, CBRE reported DP9's views on the prospects of obtaining letters of comfort from the Council to aid the marketing of the Site.

114. By 10 November 2010 CBRE had proposed an "action plan" to the FAs. This covered, amongst other things: (a) starting work on the implementation of the Permitted Scheme; (b) developing a marketing strategy to an international audience and; (c) a brief to two architectural firms to quote for proposing modifications to the Permitted Scheme.

115. DP9 sent CBRE its fee proposal on 15 November 2010.

116. On 23 November 2010, BLP wrote to the FAs to confirm they accepted the instruction to act for them.

117. On 24 November 2010, CBRE and DP9 attended a meeting with the Council planners. The purpose of the meeting was to discuss potential changes to the Permitted Scheme with the Council's planning officials.

Statement of Proposals

118. On 7 December 2010, Mrs Rayment wrote to all creditors. She informed them that, based on the current information held by the FAs, "there will be insufficient assets to enable us to make a distribution to the Company's unsecured creditors". The statutory proposals identified "objective 3" as the statutory purpose of the administration. The Company's statement of affairs attributed a value of £135 million to the Site.

119. On 12 January 2011, the FAs informed CBRE that their terms of engagement were agreed as well as their recommendations in respect of the marketing and architectural redesign work.

120. On 4 February 2011, CBRE informed the FAs that the Council had agreed in principle to vary the conditions for implementation of the Permitted Scheme. The application under section 96A of the Town and Country Planning Act ('**the s.96A application**') was issued later that month by DP9.

121. On 4 March 2011, CBRE advised the FAs about the importance of securing formal approval of the s.96A application before asking the Council for their views on potential modifications to the Permitted Scheme.

The marketing brochure

122. By the end of March 2011, the marketing brochure for the Site was in near final form. Mr Beetham's comment to the FAs on the brochure was that "Overall CBRE have done a fantastic job of presenting the scheme".

Commencement of formal marketing

123. The marketing of the Site by CBRE began on 9 April 2011 with a full-page advertisement in the Estates Gazette. The advert invites unconditional offers. Two days later the CBRE marketing brochure was emailed to potentially interested parties. Later, on 27 April 2011, a marketing website was launched.

124. On 3 May 2011, CBRE provided its first marketing report. This identified 107 parties who had been sent the brochure and proposed marketing continue for four weeks.

First progress report to creditors

125. On 9 May 2011, the FAs produced the first of the required six-month progress reports. The report confirmed that they were continuing to pursue the third statutory purpose and reported that the Site had been brought to market in early April 2011.

Request for bids

126. On 24 May 2011, CBRE updated the FAs on the marketing process. CBRE listed the parties who had expressed interest and categorised them in terms of seriousness. The following day, CBRE sent a message to all potential purchasers stating:

> *"Our instructions are to seek your best unconditional offer… Our client is seeking to conclude an unconditional sale, however, if any conditions are proposed these should be clearly stated".*

The deadline set for receipt of bids was 15 June 2011.

The first round bidders

127. Four bids were received:

(1) £110 million from the Sellar Property Group ("**Sellar**").

(2) £82.5 million from Essential Land LLP ("**Essential Land**").

(3) £51 million from GM Real Estate.

(4) £43 million from Stanhope PLC.

Engagement of Godfrey Bradman

128. On 20 June 2011, Mr Frost and Mr Beetham signed an agreement with Godfrey Bradman ('**Mr Bradman**'), the well-known property developer and businessman, best known for his involvement in the Broadgate development in London. The agreement was signed by them on behalf of Formby and BH2. The purpose of the agreement was to engage Mr Bradman's services to find an investor to buy the Site and thereby pay off the debts of OBL, including the sums owed to Formby and BH2. In return, Mr Bradman was to receive 5% of the sum recovered by Formby and 20% of the sum recovered by BH2. The commission figures were changed to a stepped commission payment.

Implementation works completed

129. On 23 June 2011, implementation of the planning consent for the Permitted Scheme was completed at the Site. On the same day, Mr Beetham met with Mirax. Mirax suggested they wanted to pay off all the Company's debts and "release the project" from administration. Mr Beetham was, however, sceptical about whether this would come to anything. Shortly after the meeting, Mr Frost told Mr Bradman not to "waste

much time" on a Mirax deal because "Stephen firmly believes that they do not have the money but their posturing might buy some time".

130. On 24 June 2011, DP9 and CBRE met the Council's planners to discuss their views on potential reconfigurations of the Site.

131. On 1 July 2011, Mr Beetham sent an email to his father in which he expressed concern regarding the way the bidding process was being conducted:

> *"Dad are you around as spoken to shay and he admitted to me that 70m is being given as a guide!!! We are being stitched up. GB [Mr Bradman] says we need to go to court".*

132. On 5 July 2011, CBRE updated the FAs as to the bid position. The offers from Sellar and Essential Land remained unchanged. The remaining offers were (a) £65 million from St. George, (b) £64.5 million from Downing, (c) £63 million from Mrs Shirinova and (d) £43 million from Stanhope.

133. On 7 July 2011, Mr Kerr reported to CBRE that he did not believe that the Council planners would be willing put their in principle support for a reconfiguration of the Site in writing. As a result, it was decided that the next best thing would be a letter from DP9 expressing their views on the chances of obtaining planning permission for a reconfiguration. This letter would then be made available to potential purchasers on the website.

134. On 12 July 2011, the Syndicate indicated to the FAs that they were not interested in a sale on deferred or contingent terms and the FAs met with Mirax to discuss their proposal to pay off the Company's debts. The notes of the meeting record that Mirax referred to the valuation of the Site by Montagu Evans (£125 million) and that Mrs Rayment's response was:

> *"Seen that. Role of administrator is to achieve the best price which is why we had the full and transparent marketing. We are happy that we explored the market…"*

The notes of the meeting also record that Mrs Rayment reassured Mirax that the FAs remained open to any proposals until they had entered into a sale contract for the Site or an exclusivity agreement.

135. On 15 July 2011, Mrs Rayment conveyed to Mirax the view of the Syndicate, which was that they would only consider full repayment without any deferred payment terms and would require proof of funding. This was subsequently confirmed in a letter sent by BLP to Mirax's solicitors.

DP9 letter of comfort

136. On 18 July 2011, Mr Kerr sent to CBRE the letter for the marketing website. The letter states that in DP9's view "with some negotiation we should have a reasonable chance of securing" permission for a reconfiguration. CBRE had understood that Mr Kerr's own view was that there was a strong chance of obtaining a revised consent and had put that formulation in an earlier draft, but Mr Kerr substituted "reasonable chance".

Review of bids

137. On 26 July 2011, the FAs reviewed the second round of bids with the assistance of a marketing report from CBRE. The remaining bids by this point were (a) £82.5 million from Essential Land, (b) £70 million from St. George and (c) £80 million from Sellar plus £10 million overage if a revised consent for more than 400,000 sq ft of residential accommodation was obtained. CBRE's recommendation to the FAs was to grant Essential Land "preferred bidder status".

138. In a telephone conference call on 26 July 2011, the Syndicate expressed a preference for the St. George bid because it had the smallest execution risk and would clear the debt owed to the Syndicate. However, the notes of the conference record that Mr Bannon explained that the FAs wanted to explore terms with Essential Land because the "Duty of Administrators is to creditors as a whole".

Assurance to Mr Beetham

139. In a letter sent to Dentons, the solicitors who were then acting for Formby, on 26 July 2011, BLP promised to meet Mr Beetham before granting exclusivity to any bidder.

A new view from DP9

140. On 27 July 2011, Mr Kerr sent CBRE a message reiterating his view that it was likely that the Council would give permission for a revised scheme but the message then continued with a new suggestion:

> *"I am not sure I understand why we do not get the consent for these changes and then secure a sale. I know that it would take longer but we could have been doing this over the last four or five months of the sale process".*

141. After CBRE forwarded the email to Mr Bannon, he asked CBRE how long the process would take, what it would cost and what the uplift in value might be. CBRE agreed to ask DP9 for this information.

Mirax say they intend to repay the entire debt

142. On 28 July 2011, Mirax's lawyers wrote to confirm Mirax's intention to repay OBL's outstanding debts in the sum of approximately £75 million. The lawyers confirmed that they were holding £5.5 million. BLP responded to this letter on 1 August 2011 by saying that the FAs would be happy to enter into discussions once it was clear that sufficient funding was available.

17 August 2011

143. On 17 August 2011, Mr Bannon met Mr Frost and Mr Beetham. The purpose of the meeting was for Mr Bannon to explain the current state of the marketing of the Site and to discuss any concerns either Mr Frost or Mr Beetham had. The notes record some hope that higher offers might yet be made for the Site and Mr Beetham's view that if the serious offers could not be flushed out then he would support accepting the offer of £82.5 million (i.e. the offer from Essential Land).

144. In the afternoon, Mr Bannon and BLP held a telephone conference call with Mirax. Mr Bannon agreed not to issue any contract to the preferred bidder until 1 September 2011 to give Mirax time to gather necessary funds to pay off the Company's debts.

DP9 note on planning application

145. On 19 August 2011, DP9 produced a note on the costs and timeframe that would be involved if the FAs were to pursue a planning application themselves.

Second progress report to creditors

146. On 23 August 2011, the FAs reported to all creditors on the progress of the administration. The report confirmed that the FAs were continuing to pursue the third statutory purpose and that discussions were continuing with a number of interested parties "with a view to completing a sale shortly".

Mirax offer

147. On 31 August 2011, the FAs held a meeting with Mirax. Mirax offered at this meeting to repay £7 million of indebtedness immediately, to pay a further £20 million within eight weeks and to repay the balance of the Company's indebtedness to the Syndicate within 12 months. The FAs rejected the offer the following day. This was an easy decision because the £7 million was insufficient to compensate for the loss of the Essential Land offer.

Exclusivity granted to Essential Land

148. On 2 September 2011, the FAs wrote to Essential Land to offer an exclusivity period of 28 days to finalise the terms of sale.

Application to extend the administration

149. On the same day, Mrs Rayment signed a witness statement in support of an application to extend the administration for one year until 13 October 2012.

Threat of proceedings

150. On 7 September 2011, the FAs received a letter before action from Lax & Co acting on behalf of Mirax and Dryden to challenge the FAs' decision to proceed with negotiating a sale to Essential Land. BLP advised the FAs that with only £7 million available there was only a 20% chance of the application succeeding but if Mirax were able to prove they had £27 million immediately available then the prospects of success would increase substantially.

151. The proceedings were not supported by Mr Beetham or Mr Frost. On 13 September 2011, a letter was sent to BLP stating that they agreed with the FAs progressing with the sale to Essential Land.

Expiry of exclusivity period

152. On 30 September 2011, the period of exclusivity granted to Essential Land expired without a contract of sale being entered into. It subsequently transpired that they had lost their source of funding.

Two offers from St. George

153. On 3 October 2011, the FAs received two offers from St. George: (a) an offer of £85 million on deferred payment terms; and (b) an upfront sale offer of £70 million.

154. At a meeting on 7 October 2011 attended by Mr Pidgley of St. George, CBRE and Mr Bannon, an increased upfront offer of £72.5 million was made. Mr Burns of CBRE emailed the proposed terms to the FAs later that day, which were £7,250,000 to be paid on exchange, £62.75 million on completion and £2.5 million on 16 December 2013.

CBRE's recommendation

155. On 10 October 2011, CBRE reviewed the bidding process and the further contacts made since the end of the exclusivity period granted to Essential Land. CBRE's recommendation was to accept St. George's offer.

The FAs' recommendation to the Syndicate

156. On 11 October 2011, the FAs recommended the acceptance of the St. George's offer to the Syndicate.

Intercreditor agreement

157. On 13 October 2011, Formby, RBS and the Syndicate agreed that the Site should be sold for not less than £77.4 million, with £7,450,000 to be paid on exchange, £72,450,000 on completion and £2.5 million on 16 December 2013.

158. The effect of the agreement was to increase the price of the Site so as to permit Formby to be repaid £4.9 million of the money it had lent to the Company. On the basis of this agreement, Formby confirmed its consent to release its charge.

The Dryden application

159. Having been given notice of the proposed terms of the sale of the Site, Dryden applied for an injunction to prevent the FAs from entering into the contract. The application

was supported by a witness statement from Dr Vladi of Mirax. The witness statement referred to Mirax's offer of 31 August 2011 as being still available for acceptance. The application was subsequently struck out because Dryden failed to provide £150,000 which the court ordered by way of security for costs.

Exchange of contracts

160. On 19 October 2011, contracts were exchanged for the sale of the Site at a total price of £77.4 million, with £7,450,000 to be paid on exchange, £72,450,000 on completion and £2.5 million on 16 December 2013.

Completion

161. The sale of the Site completed on 16 December 2011.

Final progress report

162. On 4 October 2012, the FAs filed their final report. This set out that the third statutory purpose had been achieved, with sums distributed to the secured creditors. The report proposed that the Company be dissolved. This happened in January 2013.

Revised planning permission

163. The Council granted a revised planning permission on 14 December 2012 allowing St. George to proceed to build the Site in the form that exists today. The accounts of St. George Blackfriars Ltd filed on 30 April 2013 valued the Site at £238 million.

Attempts to find an investor

164. In order to keep the above factual background section down to a reasonable length, I have not included any reference to the many attempts by Mr Frost, Mr Beetham and Mr Bradman to attract an investor to take the Company out of administration and/or complete the project. They worked tirelessly from before the FAs were appointed until the contract of sale for the Site was finally signed to identify possible investors. The trial bundle is full of what appeared to be promising contacts with potentially interested parties. Unfortunately, none of those initial signs of interest led to a funded offer for the Site.

C. THE PROCEEDINGS

165. An initial letter of claim was sent in May 2017, which is more than five years since the transfer of ownership of the Site to St. George and over four years since the Company was dissolved.

166. A response to the letter of claim refuting any claim was sent in September 2017.

167. The JLs issued their application for permission to bring the application. This was followed by a witness statement and draft Particulars of Claim in January 2018. Permission was granted in April 2018, as has already been mentioned.

168. The final version of the original Particulars of Claim was served on 1 May 2018. Mr Bannon, who had been very ill for some, time died 11 days later.

169. The FAs' Defence was served on 29 June 2018.

170. The JLs served a Reply on 10 August 2018.

171. On 9 November 2018, I heard the first case management conference and gave judgment on an application for further information under CPR Part 18.

172. In April 2019, the JLs applied to amend their Particulars of Claim. That application succeeded in part and an amended Particulars of Claim ('**APOC**') was filed and served on 7 August 2019. Consequential amendments to the Defence and Reply followed.

D. LIST OF ISSUES

173. A very full and detailed list of issues was agreed between the parties. This was a helpful document but many of the issues overlapped. Rather than mechanically address each and every one, I have instead addressed the main allegations of breach of duty in Section H of this judgment under ten headings.

E. WITNESSES

Factual witnesses

174. I heard from the following factual witnesses: Mr Frost, Mr Beetham, Mrs Rayment and Ms Cook.

175. Mr Frost gave evidence from his office in Liverpool. I formed a very favourable impression of him as a witness. He gave his evidence with care and was clearly doing his best to recall events as he remembered them. His witness statement contained a helpful chronological account of events as he recalled them. He answered all the questions put to him in cross-examination in a straightforward way.

176. Mr Beetham gave evidence from the BVI. He clearly had strong views as to how the sale of the Site could (and should) have been handled differently and how, as he perceived, damage had been done by the failure to take certain steps. His witness statement therefore contained rather more commentary than it ought to have done. Nevertheless, insofar as his witness statement contained an account of events (rather than his views on the events), my impression was that it accurately reflected his memory of events, albeit some 8 – 9 years after they occurred. He answered questions put in cross-examination in a clear and open fashion but was often keen to get his view of events across.

177. Mrs Rayment’s witness statement was very long at 87 pages. It struck me as being a somewhat over-lawyered document. I would estimate that around two-thirds of it comprised long excerpts from or her comments on documents. It did contain some of her own recollection but that was unfortunately to a significant extent buried under a super-structure of reconstructed narrative based on documents. Her witness statement was therefore far removed from what would have been adduced from her in examination in chief. What she actually remembered emerged in a more natural and convincing manner for the first time in cross-examination.

178. Mrs Rayment answered questions frankly and fully over the course of two days of cross-examination. I had no doubt that she was giving an honest account of her actions and thought processes as she remembered them. She was clearly not in any sense a subordinate to Mr Bannon. She had a good recollection both of the key events and how her and Mr Bannon’s view of the administration developed over time, including, in particular, the points on which she disagreed with him, e.g. in relation to the value of the Site.

179. Ms Cook’s witness statement at 49 pages was also far longer and far more document-based than it ought to have been. It also contained a lot of comment which was inadmissible. Ms Cook was not a decision-maker and therefore her witness statement,

which was almost entirely based on documents, did not really add anything of evidential value beyond what could be gleaned from the documents. There were no facts in issue in relation to which oral evidence from her was really required at all. However, she was able to assist with understanding some manuscript notes of meetings.

180. She nevertheless answered questions in a helpful and open way. She no longer works for BDO and had nothing to gain or lose by recalling events as she remembered them.

181. An unsigned witness statement from Mr Bannon was also relied upon by the FAs. This document reflected the content of a witness statement he signed in March 2018 but with certain passages removed and others restored. The FAs could have simply sought to rely on the signed witness statement (as admissible hearsay evidence) but they were concerned that some of the changes made to the signed version may not have been specifically approved by Mr Bannon. Mr Oulton of Mayer Brown explained how the document had been prepared in a witness statement dated 28 November 2019. That witness statement also exhibited a (redacted) note of a conference with Mr Bannon on 22 March 2018. It is evident from that note that Mr Bannon had read the then draft of his witness statement with great care and had some detailed points he wished to have corrected.

182. The JLs were of course right to point out that Mr Bannon's evidence was not tested in cross-examination and therefore the weight which can be attached to it is significantly reduced. However, I do not accept Mr Davenport's submission that no reliance at all can be placed on his evidence. Unlike the witness statements of Mrs Rayment and Ms Cook, my firm impression was that there was more of Mr Bannon in his statement than either of them in theirs. Although there were many references to documents in his witness statement, there was a higher proportion of material which clearly came directly from Mr Bannon and reflected how he saw things at the time. Furthermore, there were many informal e-mails in the trial bundle from which Mr Bannon's direct and concise style of self-expression emerged and that style of language was reflected in his witness statement. My overall impression was that Mr Bannon's witness statement was the result of detailed instructions from him and represented Mr Bannon's own clear recollection of events.

Missing witnesses

183. Mr Davenport invited me to draw an adverse inference from the fact that the FAs did not call a number of witnesses: Mr Bunnis of CBRE, any other representative of CBRE, Mr Baggley of BDO (and later RBS), Mr Keuchel of RBS and Mr Larkin of BLP. He submitted that the explanation for the FAs' failure to adduce evidence from the people identified above is that, if they had given honest evidence, they would have undermined the FAs' case. He referred me to Wisniewski v Central Manchester HA [1998] PIQR P324.

184. I decline to draw any such inference. In my judgement, it was perfectly reasonable for the FAs to adduce witness evidence from the three members of the BDO team with day to day responsibility for the administration and then leave the JLs to seek to prove their case that the FAs (or their agents) had acted in breach of duty. If the JLs wanted to put points to anyone from CBRE or RBS they could have approached them for a statement and, if necessary, served a witness summary and summonsed them to appear. This was particularly so with Mr Burns, the most senior of the CBRE people involved with the administration. He had provided a witness statement describing what CBRE had done in the course of administration. If the JLs wanted to challenge that account or ask questions about CBRE's conduct, it was open to them to issue and serve a witness summons on him. They did not.

185. The FAs were in my judgment also entitled to take the view that, having produced in disclosure a detailed e-mail trail of the progress of an administration which occurred nearly a decade ago, the value of calling further oral witnesses was in any event very limited indeed.

Expert witnesses

186. In relation to insolvency practice ('**IP**'), the JLs relied on evidence from Mr Laughton, a partner at Mercer & Hole. Mr Laughton is a chartered accountant and licensed insolvency practitioner. The FAs called evidence from Mr Sykes of RSM Restructuring Advisory, who is also a chartered accountant and licensed insolvency practitioner.

187. Both experts were very experienced and both held positions of responsibility within that profession. Mr Sykes had more experience that Mr Laughton of administrations involving development sites and their valuation. Mr Laughton had been involved in

this case since the outset and was clearly very familiar with every aspect of it. Their memorandum of points of agreement was helpful. Both answered questions in cross-examination in an open and co-operative way. Both made realistic concessions.

188. In relation to issues of sale and marketing of development land, the JLs called Mr Sharman of Levy Real Estate. Mr Sharman is a member of the RICS and a registered valuer. The FAs called Mr Gillington of Gerald Eve who is also a member of the RICS and also a registered valuer. Mr Sharman was an engaging and refreshing expert who expressed his views entirely independently of how they impacted on the JLs' case. Mr Gillington was rather more circumspect. However, in the substance of what both experts said, their evidence was helpful.

189. In relation to valuation, the JLs relied on the evidence of Mr Peter Clarke FRICS of Avison Young UK. The FAs relied on the evidence of Mr Rober Fourt FRICS of Gerald Eve LLP. Their evidence was relevant to both the issues of liability and quantum. Insofar as their evidence was relevant to liability, I deal with it in Section H(ix) below.

190. Both parties also called expert evidence in relation to planning, development feasibility, accountancy and tax. In light of my findings of fact and law set out below it was not necessary to decide any of the issues on which these experts gave evidence.

F. THE LEGAL FRAMEWORK

191. With effect from 15 September 2003, the Enterprise Act 2002 substituted a new Part II into the Insolvency Act 1986. Part II contains only one section, section 8. This provides that "Schedule B1 to this Act (which makes provision about the administration of companies) shall have effect" ('**SchedB1**').

192. Paragraph 3 of SchedB1 describes the purpose of an administration. It provides (with the words in [ ] added for the purposes of this judgment):

> "Purpose of administration
>
> 3. (1) The administrator of a company must perform his functions with the objective of –
>
> (a) rescuing the company as a going concern **[Objective 1]**, or

(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration) **[Objective 2]**, or

(c) realising property in order to make a distribution to one or more secured or preferential creditors **[Objective 3]**.

(2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.

(3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either – (a) that it is not reasonably practicable to achieve that objective, or (b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole.

(4) The administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if –

(a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph 1(a) and (b), and

(b) he does not unnecessarily harm the interests of the creditors of the company as a whole."

193. As noted by the editors of Sealy & Milman: *An Annotated Guide to the Insolvency Legislation* (23rd Ed. 2020), paragraph 3 of SchedB1 contains one of the major changes introduced by the Enterprise Act 2002. Under the former Part II of the Insolvency Act 1986, a court could make an administration order for one (or more) of four equal ranking purposes. They were: (i) the survival of the company, and the whole or any part of its undertaking, as a going concern; (ii) the approval of a company voluntary arrangement under Part I of the Insolvency Act 1986; (iii) the sanctioning of a scheme of arrangement; and (iv) a more advantageous realisation of the company's assets than would be effected on a winding up.

194. In short, as the JLs emphasised, and I accept, SchedB1 was intended to be a "new regime". The JLs referred me to the description of the change brought about by the Enterprise Act 2002 by David Richards J. in Exeter City Council v Bairstow [2007] Bus LR:

"**Administration: the new regime**

[40] The new regime for administrations was introduced by the Enterprise Act 2002. The main purpose, and the most significant effect, of the changes was, in effect, to replace administrative receiverships with administrations. The Cork

Report had seen great benefits in receivership as an alternative to liquidation and as a means of rescuing companies, and the original administration regime in Part II of the 1986 was based on the proposition that administration should be available where either there was no debenture holder with the power to appoint a receiver over the business and assets of the company or the debenture holder declined to do so. In the White Paper published in July 2001 (Insolvency – A Second Chance, Cm 5234), the Government's position was that administrative receivership should generally cease to be a major insolvency procedure and should be replaced by administration, which was described as:

"Collective insolvency proceedings – proceedings in which all creditors participate, under which a duty is owed to all creditors and in which all creditors may look to an office holder for an account of his dealings with a company's assets."

This major change is effected by section 72A, introduced into the 1986 Act, which precludes the holders of floating charges created on or after 15 September 2003, with certain exceptions, from appointing administrative receivers. They are instead given the right to appoint administrators: schedule B1 para 14."

195. Under the previous law, only a court could appoint an administrator. Paragraph 2 of SchedB1 changes this by providing as follows:

"A person may be appointed as administrator of a company—

(a) by administration order of the court under paragraph 10,

(b) by the holder of a floating charge under paragraph 14, or

(c) by the company or its directors under paragraph 22."

196. Sub-paragraph (3) of Paragraph 3 of SchedB1 makes it clear that the default purpose of an administration is Objective 1. Objective 2 may only be pursued if the administrator "thinks" either that Objective 1 is not reasonably practical or Objective 2 would achieve a better result for the company's creditors as a whole. Objective 3 may only be pursued if the administrator "thinks" that neither Objective 1 nor Objective 2 are reasonably practical. If Objective 3 is pursued, the actions taken must not "unnecessarily harm" the interests of the creditors of the company as a whole.

197. The waterfall of Objectives in paragraph 3, though more usually described from top to bottom, was succinctly summarised by Snowden J in Davey v Money [2018] Bus LR 1903 at [253] as follows:

> "The structure of this provision makes it clear that an administrator who is pursuing the objective under paragraph 3(1)(c) ("Objective 3") is focussing on achieving a return to the secured creditor (albeit whilst not unnecessarily harming the interests of the creditors as a whole); an administrator who is pursuing the objective under paragraph 3(1)(b) ("Objective 2") is focussing on achieving a better return to unsecured creditors as well as repaying the secured creditor; and an administrator pursuing the objective under paragraph 3(1)(a) ("Objective 1") is focussing on achieving a result in which all creditors are paid in full and the company is restored to financial health for the benefit of its shareholders."

198. The JLs emphasised in their submissions the difference between administration under the Insolvency Act 1986 as amended by the Enterprise Act 2002 on the one hand and administrative receivership on the other. The FAs accepted that there were differences between the two procedures and that the Enterprise Act 2002 introduced significant changes but submitted that the distinction should not be overstated.

199. For the purposes of deciding the issues in this case, in my judgment, it is not necessary to elaborate on what Snowden J said in Davey v Money [2018] Bus LR 1903 at [254], where he described the difference between the two procedures as follows:

> "Understood in this way, there is a significant difference between the role of the officeholder in an administration on the one hand and in a receivership or administrative receivership on the other. A receiver or administrative receiver owes his primary duties to his appointor and is generally free to determine when and how to realise assets to repay the secured debt without consideration for the interests of the unsecured creditors or the company itself. In contrast, in deciding how to run the administration, an administrator is required to have regard to the interests of all of the company's creditors, and he can only limit his ambition to seeking to realise assets to repay the secured creditor if he thinks that it is not reasonably practicable to achieve anything else. Even then, he must not unnecessarily harm the interests of the creditors as a whole".

G. THE DUTIES OWED

200. It is clear from the terms of Paragraph 3 of SchedB1 that one of the main duties of an administrator is to form a judgment as to which of the statutory objectives he or she is going to pursue. This is a dynamic and iterative process which involves the exercise of commercial judgment. It begins before appointment and continues after appointment. An initial view will almost always be formed and pursued in the early stages of any administration. This will then be followed by a firm decision. This

decision is required to be taken at the latest after the expiry of eight weeks from the day the company entered into administration and must be expressed in a formal statement to creditors as to which statutory objective is being pursued. This choice must, however, be kept under review because the appropriate objective may change in the course of the administration (as circumstances change or further information emerges).

201. I found the following paragraphs from the judgment of Rimer LJ in Key2Law (Surrey) LLP v Gaynor De'Antiquis [2011] EWCA Civ 1567 helpful in describing the practical realities of administration both before and after appointment (with emphasis added):

> "[33] It can therefore perhaps be said that the primary objective of an administration appointment is the rescuing of the company as a going concern, an objective which has in mind the saving of the company's undertaking, or a substantial part of it, and in due course the return of the company to its management. This might in some cases require the use of a company voluntary arrangement or a scheme of arrangement. **Accepting the existence of such objective, it must also be recognised that in practice a high proportion of appointments of administrators have been and will be made in cases in which it is apparent both before and after the appointment that a rescue of the company in this sense is not reasonably practicable** and that the alternative objective that is foreseen as being achievable is the paragraph 3(1)(b) objective. The achievement of that objective will usually involve the sale of the company's business and undertaking, either in whole or in parts. Moreover, this objective must be pursued even if a rescue of the company is perceived as practicable but the administrator nevertheless thinks that the paragraph 3(1)(b) objective would achieve a better result for the company's creditors as a whole. **Despite this hierarchical scheme, the distinction between the old regime and the new one is that appointments of an administrator (whether made in or out of court) do not specify the particular objective to be pursued and achieved. What objective the administrator sets out to achieve is a matter for his own judgment.**"
>
> [34] Accepting this last point as well, it is also the case that the particular way in which an administrator will or may set about achieving the purpose of administration is in practice not something that remains an unknown until after the administration appointment has been made. On the contrary, as paragraph 11 prescribes, the court may only make such an appointment if it is satisfied that the administration 'is reasonably likely to achieve the purpose of administration'; and in order to make an assessment as to that, the court requires evidence as to how the purpose is foreseen as likely to be achieved. That evidence must include an opinion from the proposed administrators that it is reasonably likely that the purpose will be achieved (rule 2.3(5) of the Insolvency Rules 1986).

> [97] … **I regard it as in principle anyway wrong to identify the purpose of an appointment of administrators by reference to pre-appointment considerations as to the particular objective or objectives that it is foreseen that an appointment is reasonably likely to achieve.** The present case shows that an appointment that is made with the intention, hope or expectation of – or, perhaps, 'with a view to' - the achieving of a particular objective may not in fact achieve it. The fallacy of the 'fact based' approach is that it proceeds on the erroneous basis that the factual considerations that induce the making of a particular administration appointment are considerations that conclusively identify the objective 'with a view' to which the appointment is made. That involves a misinterpretation of the scheme of Schedule B1.
>
> [98]. Paragraph 11 of Schedule B1 provides that a court may make an administration order in relation to a company only if it is satisfied (a) that the company is, or likely to become, unable to pay its debts, and (b) 'that the administration order is reasonably likely to achieve the purpose of administration'. Paragraph 3 explains what that purpose is and sets out the hierarchy of objectives that I have explained. An application to the court for the making of an administration order will of course require evidence as to how it is said the purpose is likely to be achieved and such evidence will commonly be directed at the achieving of a particular objective in the hierarchical scheme. If the court is thereby satisfied that an administration order is 'reasonably likely' to achieve such objective, the paragraph 11(b) condition of the making of an administration order will be satisfied. But it is fallacious to proceed from that to the conclusion that the purpose of the administration order that is then made is to enable the achieving of that particular objective and that alone. It is not. The order is made for the purpose of administration explained in paragraph 3, which keeps all the administrator's options open; and the present case provides a good working example of how an administrator who assumes his office with the thought that he might be able to achieve the purpose of administration in one particular way may quickly find that circumstances compel him to change tack and seek to achieve it in another way"

202. The points I take from the above passages are:

(1) An administrator will usually take an initial view before being formally appointed as to which objective (or objectives) might be practical to pursue.

(2) In many cases, it will be obvious even before appointment that Objective 1 is not reasonably practicable.

(3) The decision as to which objective is reasonably and practicably achievable is a matter for the judgement of the administrator.

(4) Whether a court order is made at the outset or not, all the options remain open and the administrator may have to change tack.

The overarching duty

203. It is not in dispute that the general and overarching duty of the administrator is to act in the interests of the company's creditors as a whole – see BLV Realty Organization Ltd v Batten [2010] BPIR 277 per Norris J at [20] and para 3(2) of SchedB1 (subject to sub-paragraph (4)).

204. As to what this means in practice, I agree with the comment made in Lightman & Moss On the Law of Administrators and Receivers of Companies (6th edition, 2017) (hereafter '**Lightman & Moss'**) at para 12-025:

> "The focus of the duty is on aggregate outcomes and overall consequences. The upshot is that the administrator may act in ways that promote general creditor welfare at the expense of the welfare of individual creditors".

The common ground on particular duties owed by the FAs

205. That following duties were common ground:

(1) Pursuant to paragraph 5 of SchedB1, the FAs, as officers of the court, were under a duty to act fairly and honourably. This reflects the rule in Ex p James (1873-74) L.R. 9 Ch App 609.

(2) Pursuant to paragraph 68 of SchedB1, the FAs owed a duty to manage the Company's affairs, business and property in accordance with the published proposals and any subsequent revisions (approved where necessary by the creditors) and any directions given by the court.

(3) Under paragraph 4 of SchedB1, the FAs owed a duty to the Company to perform their functions as quickly and efficiently as was reasonably practicable.

(4) The FAs owed the Company a duty to exercise reasonable care and skill in the performance of their functions to the standard of an ordinary, reasonably skilled and careful insolvency practitioner.

(5) If they made a valid decision to cause the Company to sell the Site, the FAs were under a duty to obtain the best reasonably obtainable price for the Site which the circumstances permitted.

(6) The FAs owed a duty to take account of relevant matters and not irrelevant matters when exercising their powers and functions.

(7) The FAs owed a duty to exercise their powers in good faith and for a proper purpose and rationally.

(8) The FAs owed a duty of loyalty to protect the creditors of the Company.

The core duties

206. Duties (1) – (3) in the above list might be described as core statutory duties. In addition to these there are a number of further specific duties which derive from the Insolvency Act 1986 or the rules under it. These are listed in paragraphs 12-033 and 12-034 of Lightman & Moss. None of these are in issue in this case.

The duty to take care

207. Duty (4) above is, or is the equivalent of, the common law duty to take care. This was how it was described by Snowden J in Davey v Money [2018] Bus LR 1903 at [622].

208. I accept the FAs' submission that they were not to be judged by the standard of "the most meticulous and conscientious member of the profession" – per Millett J in Re Charnley Davies Ltd (No. 2) [1990] B.C.C. 605. To succeed with their claim for breach of this duty, the JLs must establish that the FAs "made an error which a reasonably skilled and careful insolvency practitioner would not have made" – see Re Charnley Davies Ltd (No. 2) [1990] B.C.C. 605 at p.618D-E. Many of the particular allegations of breach in this case, such as the failure to obtain a valuation, failure to appoint an independent marketing agent, and failure to investigate planning potential properly, fall into this category of duty.

The relevance of particular expertise in planning matters

209. The JLs' case as set out in paragraph 8A of the APOC was that, through Mr Bannon, the FAs held themselves out as having particular experience in planning matters. No particulars were given of the alleged holding out but on 1 October 2010 in an e-mail to RBS Mr Bannon said that he had "experience of making planning applications".

The evidence in Mr Bannon's witness statement that he had "significant experience" in acting as an administrator in the real estate sector and dealing with large scale high value development sites was not challenged. I am not persuaded that any more onerous duty should be imposed on the FAs by way of a modification of Duty (4) simply because Mr Bannon could point to having experience of administrations with planning aspects. In my judgment, both Mrs Rayment and Mr Bannon owed a duty to act as ordinary, reasonably skilled and careful insolvency practitioners, albeit practitioners with experience of planning matters and dealing with development sites.

Duty (5): the duty to obtain the best reasonably obtainable price.

210. There was a subtle difference between the parties in their description of this duty which is owed both in equity and at common law. The JLs referred to it simply as "a duty to obtain the best price reasonably obtainable at the time of sale". The FAs submitted that the obligation was to "take reasonable care to obtain the best price which the circumstances of the case, as the administrator reasonably perceives them to be, permits".

211. In my judgment, the FAs' formulation is more accurate and is consistent with the formulation of the duty used in Re Charnley Davies Ltd at 618B-C, which was approved by Snowden J in Davey v Money [2018] Bus LR 1903 at [388]:

> "It is to be observed that it is not an absolute duty to obtain the best price that circumstances permit but only to take reasonable care to do so; and that in my judgment means the best price that circumstances as he reasonably perceives them to be permit".

Described in this way it is clear that Duty (5) is nothing more than an aspect of the overall duty of care on the part of the administrators to act with reasonable care and skill. This is how it was treated by Snowden J in Davey v Money [2018] Bus LR 1903 at [622] and CICCJ Briggs in Brewer v Iqbal [2019] EWHC 182 at [52] – [56].

Is Duty (5) a non-delegable duty?

212. It is common ground that the duty to obtain the best reasonably obtainable price is non-delegable for mortgagees and receivers. The Court of Appeal in Raja v Austin Gray [2002] EWCA Civ 1965 held at [29] – [35] that a mortgagee accused of allowing a sale at an undervalue cannot avoid liability by saying that it had retained

an apparently competent professional and followed his/her advice. The Court approved the following passage from the third edition of Lightman & Moss, which appears in virtually identical form in the current sixth edition at paragraph 13-046:

> "The approach adopted by Cross LJ [in Cuckmere Brick Co. Ltd. V Mutual Finance Ltd. [1971] 949 at p. 973 creates a form of strict liability on the mortgagee. His duty of care to sell at the best price reasonably obtainable is not delegable in the sense that he can avoid or perform his duty merely by appointing a reputable agent to conduct the sale, but extends to ensuring that reasonable care is taken by any agent or professional adviser employed by him in the sale. The extension of his duty may be an accident of history, but it promotes justice for the mortgagor who is thereby saved from the invidious, and often difficult, task of apportioning blame between the mortgagee and his agents and can also claim credit for any loss when settling accounts with the mortgagee. Moreover, the mortgagee can be assumed to be better placed to know the facts relating to a claim against the agent and is frequently in a better financial position to pursue the claim and ultimately it must be remembered that it was the mortgagee who chose the agent who was later negligent. Once the special rule applicable to mortgagees is accepted, there is no sufficient reason to distinguish the position of the mortgagee and that of the receiver, and it would therefore appear that a receiver is subject to a like strict liability in respect of disposals"

213. The issue between the parties in this case is whether this form of strict liability which was originally held to apply to mortgagees but was then extended to receivers also applies to administrators. In short, the JLs submit that it does; the FAs say it does not.

214. The FAs rely on the decision of Snowden J in Davey v Money [2018] Bus LR 1903. That was a claim for compensation from two administrators under paragraph 75 of SchedB1 to the Insolvency Act 1986. Part of the case advanced by Ms Davey in that case was that the main asset of the company, of which she was the sole shareholder, was sold at an undervalue. Ms Davey said that the marketing and sale of the property had been negligently handled by Alliance Property Asset Management Ltd ('**APAM**'), who had been appointed by the administrators.

215. Snowden J held at [443] that the administrators in that case had acted reasonably in choosing to instruct APAM. Counsel for Ms Davey submitted that the administrators could still be liable even if APAM had been reasonably chosen, if the decision by the administrators taken on the basis of their advice, judged objectively, was unreasonable. Mr Fenwick QC, acting for the administrators, submitted in that case that "following incorrect professional advice should not lead to liability for

administrators if the advice was apparently competent and the decision was within the scope of their statutory powers".

216. Snowden J accepted Mr Fenwick's submission and held that the administrators could not be liable if they "reasonably relied upon advice from APAM that appeared to be competent". He refused to extend the form of strict liability rule which applies to mortgagees and receivers to administrators. The critical paragraphs in his judgment are paragraphs [449] – [451]:

> "[449] In reaching that conclusion[7], the Court of Appeal referred to and relied on an obiter dictum to that effect of Cross LJ in Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949 at p. 973. Cross LJ had indicated that the underlying rationale for the view that a mortgagee should be liable to the mortgagor for the negligence of the mortgagee's agent was that the mortgagor would not necessarily have any direct cause of action against the mortgagee's agent himself. Earlier in the same passage, Cross LJ explained the distinction between such a case and the law applicable to a trustee,
>
> > "[Counsel for the mortgagee] further submitted that even if we should be of opinion that a mortgagee was liable to account to the mortgagor for loss occasioned by his own negligence in the exercise of his power of sale, it was not right that he should be liable for the negligence of an agent reasonably employed by him. … counsel pointed out that a trustee is not liable for the default of an agent whom it is reasonable for him to employ. But the position of a mortgagee is quite different from that of a trustee. A trustee has not, qua trustee, any interest in the trust property, and if an agent employed by him is negligent his right of action against the agent is an asset of the trust. A mortgagee, on the other hand, is not a trustee and if he sues the agent for negligence any damages which he can recover belong to him…."
>
> [450]. Applying that rationale, since an administrator does not, qua administrator, have any interest in the property in question; and since the agent will invariably be engaged by an administrator on behalf of the company so that any cause of action would be an asset of the company, the correct analogy for this purpose is indeed between an administrator and a trustee rather than between an administrator and a mortgagee or receiver.
>
> [451]. Accordingly, I would accept the proposition that the Administrators cannot be liable in negligence to AHDL if they reasonably relied upon advice from APAM that appeared to be competent."

217. In these proceedings, Mr Fenwick submits that, applying the well-established rules of precedent, which are not in dispute, I am bound by Snowden J's conclusion in

[7] I.e. that the same strict non-delegable duty applied to both mortgagees and receivers.

paragraph 451 of Davey v Money [2018] Bus LR 1903, unless I am persuaded that he was plainly wrong to distinguish as he did between the position of administrators on the one hand and receivers and mortgagees on the other.

218. Mr Davenport submitted that Snowden J's decision in paragraph 451 was plainly wrong and that I should not follow it. He made three points:

(1) The analogy drawn with trustees is inaccurate because administrators and trustees are subject to entirely different statutory regimes. In particular, Mr Davenport submits that there are special considerations which militate against imposing "intolerable burdens on trustees", such as the fact they "often undertake heavy responsibilities for no financial reward" and that doing so "may also lead to damaging uncertainty as to what has and has not been validly decided" (per Robert Walker J, as he was then, in Scott v National Trust for Places of Historic Interest or Natural Beauty [1998] 2 All ER 705).

(2) The fact that an administrator does not have any interest in the property in question, and so is unable to claim against the agent, cannot be determinative. That reasoning, he submitted, was doubted by Kitchen LJ (with whom Ward and Lloyd LJJ agreed) in Glatt v Sinclair [2011] EWCA Civ 1317 (a decision not referred to in Snowden J's judgment).

(3) The effect of Snowden J's judgment is that administrators are subject to a less stringent duty than that which applies to mortgagees, receivers and liquidators. Mr Davenport submitted that this is a paradoxical result which runs entirely contrary to the legislative objective of the Enterprise Act 2002.

219. I am not persuaded that these arguments demonstrate that Snowden J was plainly wrong to decide the issue as he did. Taking each point in turn:

(1) Whilst it is true that the rules which apply to trustees and administrators are different, what Snowden J was relying on was one particular similarity, which distinguished both from the position of receivers and mortgagors, namely that trustees and administrators have no interest in the property in question. That seems to me to be a perfectly valid point of similarity between the position of administrators and trustees, which distinguishes both from receivers and

mortgagees. It is a similarity which was recognised and accepted by the Court of Appeal in Glatt v Sinclair (see below).

(2) Snowden J did not, it seems to me, treat the trustee/administrator's lack of an interest in property as determinative. He simply treated it in the same way as Cross LJ in Cuckmere Brick Co Ltd v Mutual Finance Ltd did, namely as a factor which militated against imposing liability for acts of a negligent agent.

(3) As to Glatt v Sinclair, what was being addressed in that case was whether the non-delegable rule did not apply to court-appointed receivers who, like trustees, have no interest in the property being sold. The respondent relied on Cross LJ's observations in Cuckmere Brick Co Ltd v Mutual Finance Ltd. At [55], Kitchen LJ said:

> "55. I do not believe the matter is as clear as the respondent contends. I accept that a court appointed receiver has no interest in the property and is, in this sense, similar to a trustee. However, in general he is under the same fiduciary duties and owes the same duties of care as a receiver appointed out of court. Moreover, the receiver may well be in the best position to ascertain the merits of any potential claim against any agent he has appointed. In all the circumstances I have reached the conclusion that this is an issue which would benefit from further argument and since it is not necessary for me to express a final conclusion upon it, I prefer not to do so."

The fact that the Court of Appeal considers that the rule of non-delegability for court-appointed receivers is one which would benefit from further argument falls a long way short of demonstrating that Snowden J's decision in relation to administrators was plainly wrong.

(4) Finally, I do not accept that the result of the decision in Davey v Money [2018] Bus LR 1903 is paradoxical or inconsistent with the Enterprise Act 2002. The main purpose of the Enterprise Act 2002 was to shift the emphasis of administration in the direction of corporate rescue. That aim does not assist in determining whether it is appropriate or not to extend the rule of non-delegability to administrators when it is alleged that things have gone wrong in an administration.

220. Despite an invitation to do so, the JLs did not draw my attention to any academic or textbook commentary criticising Snowden J's decision on this point.

221. In my judgement, the key point is that the administrators act at all times as the agents of the company in administration and any sales or marketing agent engaged by the administrator acts at all times as agent of the company. Thus, while it makes obvious good sense to make the administrators liable for any negligence in the choice of agent, if an apparently competent sales or marketing agent causes loss to the company in the course of acting on its behalf, that is a cause of action which vests in the company. It would thus give rise to a claim which could be pursued by the company at any time. In the present case, immediately upon appointment the JLs were entitled to call upon CBRE to provide copies of all the documents produced by them in the course of the marketing and sale of the Site and to decide whether to bring a claim in negligence or breach of contract. The JLs were therefore not in any worse position than the FAs to judge whether CBRE had done anything wrong. It might even be said that they were in a better position. Nevertheless, they chose not to bring a claim against CBRE.

222. For all of those reasons, I am satisfied that I should follow Snowden J's decision in Davey v Money [2018] Bus LR 1903 in declining to extend the rule of non-delegability to administrators.

Reasonable reliance

223. I do, however, accept Mr Davenport's submission that it is not sufficient for the FAs to demonstrate that any agent appointed appeared to be competent and that the agent's advice was in fact followed. The FAs must go one step further and show that they reasonably relied upon the advice of the agent. This requirement follows directly from what is said by Snowden J in Davey v Money [2018] Bus LR 1903 at [451] (with emphasis added): "the Administrators cannot be liable in negligence … if they reasonably relied upon advice from APAM that appeared to be competent".

Which of the duties are fiduciary in nature?

224. The nature of Duties (1) – (3) as described in paragraph 205 above was not in dispute.

225. Neither Duty (4) nor (5) is a fiduciary duty for the reasons set out in Davey v Money [2018] Bus LR 1903 at [621] citing and applying Millett LJ's analysis in Bristol and West Building Society v Mothew [1998] Ch 1 and I did not understand the JLs to contend otherwise.

226. Duties (6) and (7) are established fiduciary duties and were accepted as such in a very similar formulation in Davey v Money [2018] Bus LR 1903 [623]. Like Snowden J, I understand Duty (7) to be another way of expressing the duty not to act capriciously.

227. The duty of loyalty, Duty (8), is also clearly a fiduciary duty. It derives from the combination of the general rules which relate to agents as described by Millett LJ in Bristol & West Building Society v Mothew [1998] Ch 1 (CA) and paragraph 69 of SchedB1. As to the former, Millett LJ at [18] says this:

> "The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary". Paragraph 69 makes the administrator the agent of the company in administration. The only dispute between the parties concerned the precise nature of the fiduciary duty of loyalty in the context of Objective 3."

The scope of the duty of loyalty in an Objective 3 case

228. The only dispute between the parties related to the scope of the fiduciary duty of loyalty in an Objective 3 case. The FAs relied on the following two passages from Lightman & Moss (the second passage is a footnote to the first):

> "We saw in para 12-025 above that the Insolvency Act 1986 directs the administrator as a general rule, to perform his functions in the interests of the company's creditors as a whole. Thus, in exercising his powers as agent, the administrator must act with "single minded loyalty" so as to promote the interests of creditors collectively (they being the ones who hold the economic interest in the company) over his own interests."
>
> "This gives way where the administrator chooses to perform his functions with the objective of realising property in order to make a distribution to one or more secured or preferential creditors (the third objective). In these circumstances, the secured or preferential creditors (as appropriate) in effect become the principal, subject to the duty to avoid unnecessary harm to the interests of the company's creditors as a whole: 1986 Act Sch B1 para 3(2), (4)"

229. The JLs submitted that the second passage set out above is "plainly incompatible with the authorities" and referred in particular to Davey v Money [2018] Bus LR 1903 at [622] – [624].

230. I reject that submission. In my judgment, the editors of Lightman & Moss are right to say that fiduciary obligations when applied to administrators must be "flexed and moulded" to reflect the statutory and regulatory framework in which they operate. In relation to an Objective 3 case, Parliament has deemed the principal to be the secured

creditors rather than the creditors as a whole. It has therefore chosen to permit an administrator to put the secured creditors' interests above those of other creditors. The scope of fiduciary duty must, in my judgement, respect and reflect this.

231. That is of course not to say that the administrators in an Objective 3 case owe no fiduciary duty of loyalty to the unsecured creditors. The administrator remains an agent for them but an agent whose duty is qualified by the fact the statute requires him or her only to "avoid unnecessary harm". It is a modified duty of loyalty. It follows that a wholesale surrender of discretion by an administrator to the interests of a secured creditor in an Objective 3 case might still potentially give rise to a claim for breach of fiduciary duty, not least because such a wholesale surrender may well lead to unnecessary harm being suffered by the unsecured creditors.

232. In short, there is, in my judgment, no contradiction between Davey v Money [2018] Bus LR 1903 at [624] and the passage from Lightman & Moss relied upon by the FAs set out above.

The standard of review

233. In Davey v Money [2018] Bus LR 1903, Snowden J also considered what standard of review ought to be applied to decisions taken by administrators in proceedings brought under paragraph 3 of SchedB1 to the Insolvency Act 1986. His conclusion at [255] was that the appropriate standard to apply was that of good faith and rationality. The relevant passage (with emphasis added) is as follows:

> "Given the range of interests to be addressed under paragraph 3 of Schedule B1, the use of the expression that the administrator "thinks" rather than, for example, "reasonably believes" is a clear indication that Parliament intended a degree of latitude to be given to an administrator in deciding upon the objective to be pursued, and that he is not lightly to be second-guessed by the court with the benefit of hindsight. In Lightman & Moss, The Law of Administrators and Receivers of Companies (6th ed.) at paragraph 12-022 it is suggested, by reference to case-law and the legislative debate upon this provision, that the appropriate standard of review by the court should be one of good faith and rationality. **This would mean, for example, that an administrator's decision not to pursue the first objective will only be open to challenge if it was made in bad faith or was clearly perverse in the sense that no reasonable administrator could have thought that it was not reasonably practicable to rescue the company as a going concern. I agree with that approach.** Though obviously important for creditors and shareholders, the assessment of the practicality of following one or other objective (e.g. whether a company which is insolvent or on the brink of insolvency can be rescued) will most likely require

> the exercise of a substantial amount of commercial judgment, often under significant time pressures. I see no good reason to adopt any more interventionist standard of review of an administrator's opinion in this regard than is applied more generally by the courts to the question of whether to interfere with specific business decisions taken by administrators: see e.g. Re Edennote Ltd [1996] BCC 718."

234. The FAs submit that (a) I am bound to follow Snowden J's decision on this point unless I consider that it is clearly wrong, and (b) it is right in any event. The JLs submitted that Snowden J's decision was wrong and that I should not follow it.

235. Snowden J. gives four reasons for reaching his conclusion:

(1) The use of the work "thinks" in paragraph 3 of SchedB1 suggests that Parliament intended administrators to have a degree of latitude and ought not to be lightly second guessed with the benefit of hindsight.

(2) The practical decision as to which objective to pursue will in most cases involve a substantial amount of commercial judgment, often under time pressure.

(3) There is no good reason to adopt a more interventionist standard of review than applies in other areas of insolvency, e.g. to liquidators, citing In re Edennote Ltd [1996] 2 BCLC 389.

(4) It accords with the views expressed in Lightman & Moss.

236. In the next paragraph of his judgment, Snowden J. describes a proviso to the deferential good faith and irrationality standard of review. Snowden J. approved the view expressed in Lightman & Moss, (at paragraph 12-023) that the requirement in paragraph 3(4) of SchedB1 that the administrators may only pursue Objective 3 if this does not "unnecessarily harm" the interests of the creditors as a whole. As Snowden J observed, that requirement is not qualified by the words "if he thinks" and therefore invites a more objective standard of review.

237. The relevant text from Lightman & Moss which was approved of but not quoted by Snowden J. reads as follows:

> "Paragraph 3(4) is not altogether happily drafted. The words "only if" and the word "and" linking the requirements in sub-paras 3(4)(a) and (b) suggest that the

administrator may only select the third objective if the selection itself does not (objectively viewed) inflict "unnecessary harm". This unhelpfully elides the commercial judgment which the administrator has to make as regards what can be practically be achieved and the course he chooses to follow in order to implement that commercial judgment. It is therefore preferable to read para. 3(4) as meaning that once the administrator has made the commercial decision to pursue the third objective (to which the court will generally defer), he has a wider duty in relation to realising security than would an administrative receiver."

238. The JLs submit first that Davey v Money [2018] Bus LR 1903 has been wrongly interpreted to be authority for the proposition that the decision of an administrator as to which objective to pursue is only capable of challenge on grounds of good faith or irrationality. I do not accept this. The judgment is perfectly clear. In the latest edition of Kerr & Hunter on Receivers and Administrators (21st edition, 2020), Davey v Money [2018] Bus LR 1903 is cited at para. 25-20 fn. 85. as an authority for precisely this proposition. In my judgment, there cannot be any real scope for what Snowden J held in relation to the standard of review.

239. The JLs say that paragraph [255] of the judgment in Davey v Money [2018] Bus LR 1903 is nevertheless not binding on me and should not be followed for six reasons:

(1) First, the point was not the subject of argument in Davey v Money [2018] Bus LR 1903. Snowden J did not, therefore, have the benefit of the arguments being considered in the present case.

(2) Second, although the word "*thinks*" is used in sub-paras 3 and 4(a), it is not used in relation to sub-para 4(b). The fact that sub-para 3(4)(b), SchedB1 is not couched in terms of what the administrator "*thinks*" means that the question of "*unnecessary harm*" is to be assessed objectively. This is supported by Snowden J's statement at [254] "he can only limit his ambition to seeking to realise assets to repay the secured creditor if he thinks that it is not reasonably practicable to achieve anything else. Even then, he must not unnecessarily harm the interests of the creditors as a whole." (emphasis added)

(3) Third, there was no need for the judge to have recourse to the legislative history: the fact that Parliament chose to include the word "*thinks*" in relation to both conditions in sub-para 3 but only in respect of the first condition in sub-para 4 makes plain its intention that the question of "*unnecessary harm*"

be subject to a more interventionist standard of review by the courts. In any event, the extracts of *Hansard* referred to are directed solely at the issue of what was meant by "*thinks*", and so do not assist in interpreting sub-para 3(4)(b).

(4) Fourth, the suggestion that the courts generally defer to the specific business decisions taken by administrators is inconsistent with Snowden J's later conclusion at [256] that the more deferential standard of review does not apply to the methods adopted by the administrator to pursue his chosen course. This creates an artificial distinction between the selection of the statutory objective and the methods adopted in its pursuit, particularly given that administrators must keep their choice of objective under review. It is also particularly dangerous in this case where the FAs and their insolvency expert suggest that administrators need not focus on objectives, but instead can simply focus on what needs to be done.

(5) Fifth, that suggestion is inconsistent with the authorities that emphasise that a more interventionist standard of review is appropriate where there are competing inter-creditor interests.

(6) Sixth, the authorities referred to by the editors of Lightman & Moss, including In re Edennote Ltd, were not concerned with administrators or paragraph 3 of SchedB1 and were therefore of limited relevance to the question of construction that Snowden J was concerned with.

240. Taking each point in turn, I am in no position to form a view as to the extent to which the point was argued before Snowden J. What is clear is that the conclusion reached in paragraph [255] was a necessary part of the judge's reasoning on what Snowden J. described as "Issue 1", namely whether the administrators went wrong in failing to choose the correct objective. That is, in my judgment, sufficient to engage the rule as to precedent on which the FAs rely and to which I have already referred.

241. The second point seems to be correct as it stands. It accurately reflects paragraph [256] in the judgment. However, this does not assist me in deciding the issue of whether the conclusion reached in paragraph [255] was plainly wrong or not.

242. As to the third point, the only reason why the legislative history is referred to at all is because it is cited in a footnote in Lightman & Moss. It is not an important part of the reasoning. Insofar as the passages are relevant to the issue of the standard of review for choices between objectives, the passages support the conclusion the judge has reached in any event based on the use of the word "thinks" in the statute.

243. As to the fourth point, I don't accept that there is any inconsistency between the conclusions reached in paragraphs [255] and [256]. The conclusion reached in paragraph [255] is the general one, in relation to which there is a gloss or an exception in relation to objective (3).

244. I am not sure I really understand the fifth point. The authorities being relied upon are not identified. There will very often be inter-creditor tensions in an administration.

245. As to the final point, Snowden J would have been well aware that the authorities referred to in Lightman & Moss (Re Trident Fashions [2004] EWHC 293 (Ch) [2004] 2 BCLC 35 and In Re Edennote Ltd [1995] BCC 389) were not directly concerned with administrators choosing between objectives or indeed administrators at all.

246. Re Trident Fashions [2004] EWHC 293 (Ch) [2004] 2 BCLC 35 was concerned with a challenge to a company voluntary arrangement proposed by the joint administrators of Trident Fashions PLC. The administrators had concluded that the sale of the company as a going concern was not possible and that a company voluntary arrangement would achieve a greater return to creditors. The statutory basis for the challenge was that there had been a material irregularity by one of the administrators, Mr Pepper, within the meaning of section 6(1) of the Insolvency Act 1986 At paragraph [39] of the judgment, Lewison J (as he then was) said:

> "The rules clearly give him a measure of judgment about what to place before the creditors or, as we have now learned to call it, a margin of appreciation. I do not think, therefore, that the question I should ask myself is whether I would have come to the same conclusion as Mr Pepper. It seems to me that the court should only interfere if a judgment made by the administrator about the material to be placed before the creditors was a judgment to which no reasonable insolvency practitioner could come. That judgment should I think be made on the basis of the material available to the administrator at the time and not with the benefit of hindsight"

247. In Re Edennote Ltd [1995] BCC 389, an assignment made by a liquidator was set aside and the liquidator removed. The judge had found that the liquidator had acted in a way that no reasonable liquidator would have acted. The assignee appealed. The main complaint in the Court of Appeal was that the judge had applied the wrong test by referring to the public law test of Wednesbury unreasonableness. The appeal was dismissed [1996] BCC 718. Whilst deprecating the judge's reference to Wednesbury unreasonableness, the Court of Appeal held that the correct test had been applied, namely:

> "(fraud and bad faith apart) the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it".

248. In my judgment, there is nothing objectionable, still less anything plainly wrong, with considering what standard of review is applied to decisions by administrators or liquidators in other insolvency contexts. Indeed, it is noteworthy that the editors of Kerr & Hunter on Receivers and Administrators (21st edition, 2020) criticise Snowden J.'s qualification in paragraph [256] of his judgment because it is not in line with the general rule that the appropriate standard of review is that of bad faith and irrationality.

249. The JLs also failed to produce any articles or commentary which is critical of the conclusion reached in paragraph [255]. Both the leading insolvency textbooks support the conclusion he reached on the standard of review to apply and it has recently been followed and applied at High Court level in Moulds Fencing (Torksey) Ltd. and Others v John William Butler and Another [2020] EWHC 2933 (Ch) at [18].

250. For all the reasons given above, the JLs have not persuaded me that Snowden J.'s decision in on the standard of review in Davey v Money [2018] Bus LR 1903 was wrong, let alone plainly wrong.

Insolvency Code of Ethics

251. A number of passages from the Insolvency Practitioners Association Code of Ethics (2008) ('**the Code of Ethics**') were referred to by the JLs' IP expert, Mr Laughton, in his reports and were put to Mrs Rayment in cross-examination. The IP experts agreed (perhaps not surprisingly) that a skilful and careful administrator would be expected to comply with the Code of Ethics. Equally unsurprisingly, Mrs Rayment accepted

this in cross-examination without hesitation. However, as the JLs observed, no breach of the Code of Ethics was pleaded by the JLs.

252. Notwithstanding the lack of a pleaded case of breach, in my view, it was open to the JLs to rely on the Code of Ethics to assist the Court on whether the FAs had acted in breach of their duties. A breach of the Code of Ethics may well be an indicator or even a strong indicator of a failure to act with due care and skill for the reasons given by CICCJ Briggs in Brewer v Iqbal [2019] EWHC 182 (Ch) at [80]. Behaviour constituting a breach, for example, of Fundamental Principle (a) (Integrity) or (b) (Objectivity) as described in the Code of Ethics may well be strong or very strong evidence of a breach of duty of care or a fiduciary duty.

Record keeping duties

253. The JLs relied on the following two paragraphs in particular from the Code of Ethics as giving rise to duties on the part of the administrators.

> "[74]. It will always be for the Insolvency Practitioner to justify his actions. An Insolvency Practitioner will be expected to be able to demonstrate the steps that he took and the conclusions that he reached in identifying, evaluating and responding to any threats, both leading up to and during an insolvency appointment, by reference to written contemporaneous records.
>
> [75]. The records an Insolvency Practitioner maintains, in relation to the steps that he took and the conclusions that he reached, should be sufficient to enable a reasonable and informed third party to reach a view on the appropriateness of his actions."

254. The JLs relied upon the view of the FAs' IP expert that paragraphs 74 and 75 were "fundamental ethical requirements" and the following passage from Lightman & Moss on the duty to explain in paragraph 49 of SchedB1:

> "12-024.. The duty to explain is part of the legislative rebalancing that was effected by the Enterprise Act 2002. In shifting the emphasis away from administrative receivership (which was significantly downgraded) and towards a streamlined collective administration regime designed to serve the interests of creditors as a whole, the Enterprise Act 2002 sought to enhance transparency and accountability from the perspective of unsecured creditors. This rebalancing has prompted one commentator to suggest that the effect of the duty to explain his selection of objective is to transfer the onus onto the administrator to demonstrate that his selection was rational. Whilst it is not clear that the duty to explain per se gives rise to such a shift in the burden of proof, nonetheless in the spirit of collectivity and transparency, it does oblige the administrator to provide creditors

with "sufficient information to allow them to participate in the proceedings in a meaningful way".

255. The FAs submitted that:

(1) The JLs have not pleaded any breach of any record-keeping requirements, nor any breach of any provision of the Code of Ethics, so the Court should refrain from making any decision on their scope and nature or how they interact with duties owed by the FAs;

(2) The absence of records is not alleged to give rise to loss – it is not an actionable breach of duty on any view;

(3) The only relevance of any absence of records, therefore, is that the Court must rely on such material as does exist (including the emails and witness statements) in order to determine whether the JLs have discharged their burden of proof;

(4) It should not be suggested that paragraph 74 of the Code of Ethics seeks to or does shift the burden of proof onto the FAs in a civil claim – rather it constitutes regulatory guidance; and

(5) The obligation to keep records should not be overstated – see Birdi v Price & Pettit [2018] EWHC 2843 (Ch), in which the judge rejected criticism of a trustee in bankruptcy who was alleged to have breached the record-keeping requirements in the Code of Ethics, observing that [77]:

> "He was obliged to keep a record of his actions and dealings and of the information which he had obtained but that did not, in my judgement, require him to record the reasoning which had led him to take each action. Mr. Macpherson's argument was in effect that the First Defendant should have made a file note setting out the process of reasoning leading to each step he took in carrying out his duties as trustee in bankruptcy. Such a requirement would be unrealistic and is not required by the obligation to keep proper records. In that regard the First Defendant was correct to say that his obligation was to keep records which were such that his actions could be justified by reference to them but that he was not required to set out the chain of reasoning which caused him to take a particular action."

256. I accept the FAs' submissions. In the absence of any pleaded allegation of breach of a duty to keep proper records it is not necessary or appropriate for me to express any

conclusions as to the scope and nature of these record keeping duties or how they interact with the other duties which were pleaded.

257. I was not persuaded that the passage cited by the JLs from Lightman & Moss was relevant in any event. It seems to me to be more concerned with a specific duty to explain as the administration progresses. The remedy for a failure to explain is for those who feel deprived of information to request it and if the explanation is not forthcoming to apply for relief under paragraph 74 if dissatisfied. In proceedings such as this, which are concerned with an administration which concluded ten years ago, the absence of certain contemporaneous records might well make the court's work harder but it has to decide the issues according to what evidence remains. There is, in my judgement, no question of the duty to explain in paragraph 69 leading to a shift in the burden of proof.

258. The JLs submitted that there was a legal duty on administrators to consult with directors as to the value of the Company or the Site and more generally. The FAs submitted that there was no such duty. I agree with the submission of the FAs. As Snowden J. pointed out in Davey v Money [2018] Bus LR 1903 at [287], in many cases an administrator will be appointed because the directors of a company, appointed by shareholders, have presided over the decline of a company into insolvency. The administrator is put into office to bring independent judgment to bear and to manage the company in the interests of the creditors of the company in accordance with the statutory framework of the Insolvency Act 1986. A duty to consult with directors or shareholders would cut across and interfere with that legislative framework of duties. If there were such a duty it would not in any event extend to a duty on administrators to share all the information they had received from third parties or other creditors with the directors or shareholders.

H. THE ALLEGED BREACHES

(i) Was there an improper agreement to a "light touch" administration?

259. The duties and responsibilities of the administrators described above take effect from the moment of appointment and not before. It is the JLs' pleaded case that the FAs "acquiesced in and agreed with RBS's desire for a "soft administration" in which "RBS would guide the administration".

260. In response to a Part 18 request, the JLs added the following:

> "Accepting an instruction from the Syndicate to conduct a "light touch" administration impaired the Former Administrators' ability to decide upon the correct objective for the administration and their willingness to obtain a valuation. 'Light touch' was an impermissible approach to the administration…."

261. The FAs deny the allegation.

262. In their opening submissions, the alleged agreement was placed by the JLs firmly in the pre-appointment phase. Paragraph 2 (d) of their written opening said (with my emphasis):

> "Without making any independent inquiry, the FAs improperly agreed with the Syndicate <u>pre-appointment</u> to conduct a "light touch" administration, which the FAs understood to mean that they would work with CBRE and BLP … to effect the strategy of an LPA receivership under the guise of an administration".

263. The opening submissions continued: "The FAs' acquiescence in this strategy necessarily involved the FAs impermissibly determining their statutory objective prior to appointment."

264. The JLs repeated the same submission in paragraphs 270 and 271 of their closing submissions.

265. The allegation it seems to me needs to be broken down into the following component parts:

(1) Did the FAs and the Syndicate agree a "light touch" administration?

(2) If so:

(a) What did the FAs understand it to mean? In particular, did it involve an agreement to allow RBS to guide the administration?

(b) Was the agreement improper or did it otherwise involve breach of duty?

(c) Did the agreement impair the FAs' ability to decide upon the correct objective or necessarily lead them to impermissibly pre-determine their statutory objective prior to appointment?

266. Mrs Rayment was adamant in cross-examination that the administration of OBL was not carried out as a "light touch" administration. Whilst I accept her evidence that the

memorandum she wrote in 2009 about "light touch" administrations applied only to low value cases, it is clear to me based on the contemporaneous exchanges between the Syndicate and BDO in September 2010 that the Syndicate wanted a "light touch" administration and Shay Bannon was prepared to go along with this.

267. In reporting the possible appointment to the rest of the BDO team on 17 September 2010, Mr Bannon said "We are told it is light touch admin". He did not challenge or query whether the potential administration met this description. When two weeks later, on 30 September, RBS asked BDO for a budget for the administration, Mr Keuchel of RBS specifically said that the fee quote should be "based on a light touch administration". Mr Bannon had no hesitation in providing an estimate expressly "for a light touch administration".

268. At no point in the two weeks between the submission of this fee estimate and their appointment did the FAs query the aptness of the label "light touch" to describe the administration, either internally within the BDO team or externally with the Syndicate.

269. In light of this clear contemporaneous evidence, I have no hesitation in finding that the Syndicate and BDO agreed that the administration was intended to be a "light touch" administration.

270. The more difficult issue is determining what the FAs, BDO and the Syndicate meant by a "light touch" administration in 2010.

271. Today the term has a settled meaning. It describes an administration where the administrators have made use of the powers in paragraph 64 of Schedule B1 to the Insolvency Act 1986 to authorise directors to continue to exercise management powers. As recently as 2017, the Editors of Lightman & Moss have described the granting of this permission as a "rare occurrence". However, the Covid 19 pandemic has seen a number of well-known companies enter "light touch" administrations. In Re Debenhams[8], Trower J referred to the administration as "light-touch" because the proposals currently included the exercise of certain operational powers by the current management and working with them to stabilise the business during the Covid 19-related uncertainty.

[8] [2020] EWHC 921 (Ch).

272. I was referred by the JLs to an article by Chloe Shuffrey which described the increasing use of these powers in response to the Covid 19 pandemic. [9] The article also referred to a protocol produced in April 2020 by the Insolvency Lawyers Association. For the protocol to apply, the administrator must be satisfied that the company can be rescued as a going concern and, in particular, that the company has sufficient working capital to pay key post-administration costs and expenses (including, for example, rent, salaries, utilities and suppliers) on an ongoing basis.

273. Although I found the materials I was referred to by the parties interesting, I am concerned with what was understood by the term "light touch administration" in 2010 rather than what it was understood to mean in 2020.

274. There is some evidence to suggest that RBS believed that a "light touch administration" meant an administration which they could "guide". That is certainly a view which was expressed informally by RBS to CBRE, and Mrs Rayment accepted in cross-examination that RBS did want to guide the administration.

275. Mrs Rayment's evidence in chief was as follows:

> ""Light touch administration" was a phrase with which I was very familiar at that time. I understood it to mean a situation where we would be appointed by a secured lender (often a bank), which effectively had the sole economic interest in a company because the amount of its lending significantly exceeded the value of its security, to act as administrators of the company and to unlock as much value as we could from the secured asset(s). The reference to 'light touch' was to the idea that at least in theory, there would be limited or no day-to-day management work for us to perform. We would not be expected to incur significant administration fees while trading or running a business: rather, third party property experts, agents and/or managers would undertake the requisite specialist work in relation to the asset on which we, as the administrators, would rely".

276. I accept this evidence for the following reasons:

    (1) The second of the two aspects referred to by Mrs Rayment is consistent with the contemporaneous e-mail from Mr Bannon of 1 October 2010. In this e-mail, in which he quoted £50-60k for a light touch administration "as follows", the limited anticipated work is listed.

[9] 'Crisis Management and Insolvency' NLJ 15 May 2020.

(2) There is no evidence of any attempt by the Syndicate to exert any improper influence on the FAs or impose conditions on the FAs by labelling the administration "light touch".

(3) At the meeting on 13 October, BLP speaking for the Syndicate was clear and open that the Syndicate wanted its lending repaid but was equally clear that the FAs would be left to discharge their functions as they saw fit. The note records the following comments which I accept accurately represented both BLP's understanding of what the FAs intended approach would be and the FA's own view of their role (if appointed):

> "The administrators will do whatever is appropriate in the circumstances to discharge his functions but he will always be available to hear proposals and suggestions from the stakeholders"; and
>
> "The administrators' main role will be to return the company to its shareholders, then to get a better return for its creditors, and then to get a better realization for secured creditors than on a liquidation".

(4) The fact that the FAs quoted on the basis that the administration was likely to be "light touch" would not in any way bind the FAs once they were in office. Although the fee quoted was £50,000, the FAs in fact incurred £250,000 in respect of their own fees.

277. It seems to me that the key question is whether the FAs fettered their own discretion in advance in some improper way. I do not accept that they did. I accept Mrs Rayment's evidence that it is not unusual to agree an outline strategy as to what would be done when the administrators got into office. "We wouldn't necessarily stick with the strategy once we got into office but there would be an outline strategy at the outset". It seems to me to be wholly unrealistic for administrators to do anything else, as is recognised in the judgment of Rimer LJ in Key2Law (Surrey) LLP v Gaynor De'Antiquis [2011] EWCA Civ 1567 cited above.

278. I also accept Mrs Rayment's evidence that by quoting for a "light touch" administration the FAs were not accepting that "the Syndicate would in some way be controlling the administration". There was evidence that the Syndicate wanted to gain some control over the overall situation by appointing the FAs but that is not the same as wanting to control the FAs. I find that the following comment attributed to Mr

Brown of RBS accurately represents the Syndicate's position just before the FAs were appointed:

> "The banks have lost confidence in the borrower [OBL] and the sponsor [meaning Mirax]. We have gone through two processes for credit approval of restructurings in the last 12 months. The most recent restructuring went into payment default almost immediately. Two winding up petitions have been presented against the borrower. The banks are seeking either a substantial pay down of their facilities or to control the planning process through the appointment of an administrator."

279. That comment came in response to Mirax suggesting that they wished to start implementing the planning permission of the Permitted Scheme. The suggestion was not that the Syndicate was going to control the FAs but that at least they could be sure that the planning would be implemented by an administrator. Mr Larkin of BLP is then reported to have said at the same meeting that "The banks' view is that there is too much risk to leave implementation in the hands of the company". There is in my judgement nothing improper in the Syndicate seeking to gain control over the situation in this sense.

280. I therefore find there was no breach of duty on the FAs' part in agreeing a budget based on the assumption that the administration was to be "light touch" as that was understood by Mrs Rayment.

<u>(ii) Was the appointment of CBRE appropriate?</u>

281. There are five sub-issues identified in the List of Issues:

(1) When were CBRE appointed?

(2) What were the terms of CBRE's instructions?

(3) What advice was provided by CBRE?

(4) Were CBRE sufficiently independent, and was their appointment appropriate?

(5) To what extent was it reasonable for the FAs to rely on the actions and advice of CBRE, and did their advice appear to be competent?

Date of appointment

282. I accept Mrs Rayment's evidence that CBRE were appointed by the FAs shortly after the FAs were themselves appointed. This oral evidence was supported by an entry in BDO's internal "New Case Set Up Form" checklist of 29 October 2010. It is also consistent with what Peter Burns, a senior director at CBRE, said in a witness statement served in 2012. Mr Burns was the most senior individual in the CBRE group responsible for this assignment.

283. Mr Bannon in his witness statement said that the retention of CBRE was "one of the first steps" he took. CBRE attended the meeting with Mr Frost and Mr Beetham on 18 October 2010 at which the role of the FAs and CBRE was discussed. Four days later, on 22 October 2010, Mr Bunnis of CBRE, sent a letter with his estimate of fees for CBRE's work (other than acting as sales agent).

284. I therefore find that CBRE were appointed by no later than 18 October 2010, subject to agreement being reached on fees.

Terms of appointment

285. As to the terms on which CBRE were retained by the FAs, I find that this was a two-stage process. I accept what Mr Bannon says in his witness statement about CBRE being retained initially to assist the FAs to formulate their strategy and how to prepare the Site for marketing and how to ensure that the Permitted Scheme was implemented. This was the pre-marketing phase. The scope of this work is set out in CBRE's letter dated 22 October 2010. As part of this work DP9 were retained by CBRE on behalf of the FAs to provide planning advice. The scope of DP9's work was set out in a letter dated 15 November 2010 addressed to CBRE.

286. The second stage involved CBRE being formally retained as sole selling agents. A letter dated 3 November 2010 addressed to Mr Bannon as "client" set out CBRE's understanding of the scope of the services to be provided over an initial period of 12 months as follows:

(1) Preparation of an architect's brief.

(2) Monitoring of the planning implementation works.

(3) Selection of marketing brochure designer and preparation of sales particulars.

(4) Collation of technical reports and information and uploading onto data room.

(5) Preparation of periodic strategy and marketing reports.

(6) Agency role in the disposal of the Property.

287. The first five of the points listed above were referred to as "stage one" of the engagement. For these, fixed fees were proposed. The final point was referred to as "stage two", for which two alternative fee structures were proposed. A copy of CBRE's standard terms and conditions was also enclosed.

288. Correspondence then followed between the FAs and the Syndicate about the level and structure of CBRE's fees as well as how the work was to be funded. This culminated in terms being agreed and set out in a letter from CBRE addressed to Mr Bannon dated 13 January 2011. Both Mr Bannon and Mr Burns exhibited the 13 January 2011 letter to their 2012 witness statements and referred to it as CBRE's "engagement letter".

289. In light of the foregoing, I have no hesitation in holding that the 13 January 2011 letter represented the terms of CBRE's engagement. I reject the JLs' submission that there is no evidence that the terms of the 11 January 2011 letter were accepted. They were self-evidently accepted by conduct. The type and extent of the services which CBRE were offering to perform remained unchanged between the 3 November 2010 proposal letter and the 13 January 2011 letter. The terms of the instructions were clear.

What advice was provided?

290. Paragraph 7 of Mr Burns' witness statement says: "CBRE was instructed to act in a property advisory role to 'ensure the [Site] is sold at best value given the current market conditions'." I accept that evidence. I also accept what is said in paragraphs 51, 58, 65 and 71 of Mr Bannon's witness statement and paragraph 70 of Mrs Rayment's witness statement as to what advice was provided by CBRE. I find that CBRE provided the FAs with the following advice:

(1) That the type and size of the hotel component in the Permitted Scheme was inappropriate and unviable, as summarised in the FAs' report to the Syndicate of 2 November 2010.

(2) That it was crucial to implement the Permitted Scheme in order to obtain a certificate of lawfulness by March 2011, as recorded in the note of the meeting held on 20 October 2010.

(3) That Stephen Beetham and Mr Frost's programme for the implementation of the Permitted Scheme was achievable. This is recorded in the FAs' letter to the Syndicate dated 2 November 2010.

(4) That it was desirable to apply to vary the conditions for implementation of the Permitted Scheme.

(5) That implementation of the Permitted Scheme would "not be a problem" for the Council, as recorded in the note of the meeting of 20 October 2010.

(6) That the value of the Site was not anything like the £135 million attributed to the Site by the directors in their statement of affairs and was instead something more like £43.15 to £48.5 million.

(7) That architects ought to be instructed to provide alternative configuration options on a "blue-skies" thinking basis which could then be used as part of the marketing of the Site.

(8) That an approach ought to be made to the Council to seek to ascertain their attitude to a revised planning application with reconfigured use of space and, if possible, to obtain comfort letters as an aid to marketing – as recorded in the email of 3 November 2010 sent by Adrian Bunnis of CBRE to the FAs.

(9) To commence international marketing in early 2011 with a website and data room of documents and brochure, as reported in the 2 November 2010 letter to the Syndicate.

(10) A creative marketing company should be consulted to ensure that the brochure is of the appropriate standard.

(11) How best to structure the marketing process, including bid deadlines, submission of questions to bidders, interviews and an exclusivity period for the preferred bidder.

The above points are merely a set of headings for the many individual pieces of advice supplied by CBRE to the FAs. The advice was not generally recorded in formal reports or memos to the FAs (prior to the provision of regular marketing reports). Instead, the advice was more often provided on an informal basis in the course of discussion in meetings and by email. The stream of advice was provided by CBRE continuously between the first point meeting on 18 October 2010 and the completion of the sale of the Site the following year.

291. In light of the foregoing, I have no hesitation in rejecting the JLs' submission that the FAs did not request or receive any strategic, planning or sales and marketing advice themselves. The submission that the FAs did not request advice to be supplied is contradicted by the letters of engagement dated 22 October 2010 and 3 November 2010. Both of these documents clearly set out what services the FAs required CBRE to provide.

292. I also reject the JLs' submission that "CBRE's role once the Company was in administration was simply to implement the pre-agreed security realisation strategy". This submission flies in the face of the terms of the letters of engagement and is completely inconsistent with the advice which was as I have found in fact supplied to the FAs, in particular, in relation to the implementation of planning and the advice to obtain architect input on potential reconfigurations to which I will return to below.

293. The burden of the JLs' submission above lies in the word "themselves". Their submission as I understood it was that CBRE's advice all stemmed from a strategy decided by the Syndicate. This then naturally leads into the allegation of lack of independence.

Were CBRE independent?

294. The first issue is whether it was appropriate for the FAs to have appointed CBRE given that they had previously advised the Syndicate. The JLs submitted that this previous role gave rise to an obvious conflict of interest.

295. When this point was put to Mrs Rayment in cross-examination, she rejected it:

> *"Q…CBRE were conflicted and they were conflicted because they had been advising the banks and the banks had a discrete position, which did not mesh or overlap, or might not, with the whole body of the creditors.*

A. That is the [JL]'s position yes as I understand it.

Q. OK. And your answer to that is?

A. I disagree. When we engaged CBRE, they were acting for the administrators with a duty of care to us"

296. Mr Laughton's view on whether CBRE ought to have been appointed in his report was as follows:

"In my opinion, CBRE had a conflict of interests as a result of acting for both the Syndicate and the joint administrators, whose interests were not entirely coincident. The agent's conflict of interest gave rise to a clear conflict of interests for the joint administrators themselves. A reasonably skilled insolvency practitioner would introduce safeguards to reduce the threats to objectivity created by such a conflict. Such safeguards would in the circumstances of the Company include different agents."

297. In cross-examination, Mr Laughton explained that the source of the potential conflict depended on whether in the concrete circumstances the interests of the Syndicate and those of the creditors as a whole actually diverged or not: "It's all about whether the interests of the bank align with the interests of the creditors as a whole". This led to the following exchange:

"Q. Well, if the property is to be sold, you agree that it is in the common interest of all creditors that the best price should be obtained?

A. Yes

Q. And you would, therefore, expect the interests of all creditors to be aligned: yes?

A. Yes."

298. I accept Mr Laughton's evidence in this respect. It seems to me that whether there is a conflict in an administrator appointing an adviser who had previously advised one creditor depends on whether there is a conflict between the interest of that creditor and the other creditors. If this is right, the question as to whether it was inappropriate for the FAs to appoint CBRE depends on how matters appeared to the FAs when they were appointed.

299. In my judgement, there was nothing at all on 14 October 2010 or in the weeks immediately following which ought to have suggested to the FAs that it was inappropriate for CBRE to be appointed to act for them for the following reasons:

(1) There was nothing said at the 13 October 2010 meeting which suggested a conflict of interest between the Syndicate and other creditors. There was no opposition to preparations being made for the sale of the Site. This was presented as a far from immediate prospect because of the need to implement planning permission. BLP's meeting note stated: "The eventual aim will be to sell the property to settle the claims of the creditors. However, there would be a relatively significant window of time before that happens during which proposals could be put to the administrators which may allow for a stakeholders-solution."

(2) The day after that meeting the solicitors acting for the Company's directors sent a letter in which the view was expressed that the most appropriate course of action was for the Site to be sold.

(3) There is nothing in CBRE's Strategy Report itself which suggests a conflict between the secured creditors and the other creditors existed or might develop. No reader of the Strategy Report would gain the impression that CBRE had closed their mind to any particular option for the future. The report was drafted in neutral and balanced terms.

(4) There was nothing to suggest to the FAs that CBRE's views on the value of the Site were unreliable. Mr Laughton accepted in cross-examination that there was nothing to suggest that CBRE was doing anything other than seeking to give the Syndicate an accurate "steer" about the value of the Site. He also realistically accepted that if CBRE in fact believed that the Site was worth significantly more than £43-48 million, then they had every incentive to say so given the Syndicate's own exposure exceeded that sum.

(5) There was no opposition from Mirax or Mr Frost or Mr Beetham to CBRE advising on planning implementation either at the meeting on 13 October 2010 or at the meeting on 18 October 2010. Quite the opposite, Mr Beetham's response was to offer to assist them in that process.

(6) The Syndicate had been open with Mirax, Mr Beetham and Mr Frost at the meeting held on 13 October 2010 that CBRE had been advising the Syndicate. It was also made clear that their assessment of the value was such that there

was a substantial risk that the Site, if sold, would not repay the Company's debt.

(7) Mr Frost did suggest another agent to act alongside CBRE but did not object to CBRE as such. Mr Beetham was content for there to be one agent and for the marketing process to bring out offers.

(8) There was no opposition during the early stages of the administration to a strategy of implementing the existing planning and preparing the Site for marketing and sale. The interests of all the creditors were aligned on both the idea of implementing planning and on preparing the Site for sale in the medium term so as to give time for other potential solutions. In those circumstances, even based on Mr Laughton's own evidence there was no conflict which precluded the appointment of CBRE as the FAs' adviser on planning implementation, marketing and sale.

300. Furthermore, in my judgement, it was reasonable for the FAs to take account of the practical realities, including:

(1) That CBRE had already been involved and had useful knowledge about the Site, in particular is planning history.

(2) That CBRE had the skills to effect a sale and bring it to market for the best price.

(3) That CBRE would owe the FAs a duty of care to provide competent advice on the topics agreed in their instructions.

301. I also find that there was nothing which ought to have set any conflict alarm bells ringing for the FAs during the negotiation of CBRE's terms of engagement. Quite the opposite, it was clear from the way CBRE approached the draft terms that they were focussing on what they could offer the FAs, including further strategy reports if required.

302. It is true that another administrator might have taken a different approach, such as appointing a different agent in place of CBRE to bring fresh eyes to an assessment of the project. However, I am nowhere near being persuaded that the appointment of CBRE in the circumstances described above was something that no reasonable

insolvency practitioner would have agreed to, which is the threshold I have held the JLs must meet to succeed.

Alleged post-appointment conflict

303. The JLs put a number of alleged post-appointment instances of conflict of interest to Mr Sykes in cross-examination. The first was based on the loan facility document, which defined the strategic adviser to the Syndicate as "CBRE or such other person who is appointed as strategic advisor". The point Mr Davenport sought to make was that there was no evidence that CBRE's role as strategic adviser had ever been terminated. However, this alleged basis for conflict had never been pleaded. Nor had it been alleged that the FAs knew about this continuing role.

304. In any event, the point was in my judgement a bad one. It is inherently unlikely that the Syndicate would have had any interest in spending money on CBRE as a strategic adviser when it was funding the administration of the Company and was aware that the FAs had appointed CBRE. Mr Sykes' reaction to the suggestion that CBRE had continued to advise the Syndicate was that he would have expected that role to have come to an end when the Facility was called in. The JLs were unable to point to any concrete evidence of CBRE providing any strategic advice to the Syndicate after 14 October 2010. There was no evidence, for example, of CBRE invoicing the Syndicate for any further work.

305. The second (unpleaded) allegation of subsequent conflict of interest was that CBRE appeared to be acting in some capacity in relation to the Essential Land bid and the St. George bid. Mr Sykes' response to both points, which I accept, was that the FAs were entitled to assume that CBRE had made internal arrangements to manage any conflict, whether by internal information barriers or other means. In any event, the point had not been pleaded as a conflict of interest and so the FAs had not been given a proper opportunity to deal with it.

Reasonable reliance

306. If, as I have found, there was no conflict of interest in appointing CBRE, there was no reason why the FAs should be precluded from relying on the advice they received from CBRE on the basis that it was not independent.

(iii) Alleged failure to gather and analyse information on valuation

307. Issues 10 and 11 in the List of Issues summarised allegations that the FAs failed to gather sufficient information, in particular about the potential value of the Site.

308. There is very little, if any, dispute about the information on value which the FAs had or when they received it:

(1) On 20 September 2010, the FAs were provided with the Strategy Report. This valued the Site at between £43-48 million subject to a reconfiguration of the residential units and said that "on the basis of a sale today, a price of £40 m should be achievable".

(2) On 13 October 2010, the FAs were informed that the Company had a valuation from Savills which valued the Site at £135 million.

(3) On 15 October 2010, the FAs were provided with two Savills valuations. The first, dated 2 October 2008, valued the Site at £140 million based on planning consent being obtained for the Permitted Scheme. The second, dated 12 January 2010, valued the Site at £135 million.

(4) On 7 December 2010, the FAs received the Statement of Affairs from the Company's directors. This stated that, in the directors' view, the realisable value of the Site was £135 million.

(5) On 28 March 2011, the FAs were provided with a valuation by Montagu Evans from December 2010. This valued the Site at £125 million.

309. There is also no real dispute about what the FAs did with the valuation information they received. By the time of the first meeting between the FAs and Mr Frost and Mr Beetham on 18 October 2010, it was clear to all concerned that there was a significant discrepancy between the value that Mr Beetham and Mr Frost believed the Site had (around £135 million), which was based on two valuations from Savills, and the view expressed by CBRE that it was worth between £43 and £48 million. Mr Bannon's response to this discrepancy was that the true realisable value of the Site would and should be revealed by a marketing and bidding process. He explained his view at the beginning of the meeting, as the contemporaneous note of that meeting shows.

310. Mrs Rayment also attended that meeting. Her evidence, which I accept, was that she too believed that the true value of the Site would be revealed through a competitive marketing process.

311. The JLs' submission was that the significant difference between the CBRE estimate of value and the other valuations should have prompted the FAs to question the CBRE estimate, obtain a second opinion or obtain their own independent valuation. To fail to do so and to instead simply accept the CBRE estimate was, the JLs submitted, irrational and a breach of the FAs' duty to act with reasonable care and skill.

312. I do not accept that the FAs simply assumed that the CBRE estimate was right. Mr Bannon's evidence in his witness statement was that he thought it was "probably low". Mrs Rayment's evidence was that she thought it was a "ball park" indication of what might be achieved on a sale. In cross-examination she explained that this was the subject of further discussion:

> *"Everybody recognised that we were in a very unstable market condition in our view and that the market would determine the value of the site, which could well be within the security of the banks or maybe within the security of the Beethams, but the advice that we had from the conversations we had with CBRE, it was not at the level of Savills."*

313. This evidence was supported by the contemporaneous note Mrs Rayment made in which she queried the suggestion that £135 million might be realised which had been incorporated in an internal case review document. On seeing this figure, Mrs Rayment queried it by inserting a manuscript "Really?".

314. The reason given by Mr Bannon in his witness statement for not obtaining further valuation evidence was that valuations are "nothing more than estimates of what that price might be based on theoretical assumptions." Mrs Rayment's evidence was to the same effect.

315. Mr Laughton's view as expressed in his report was that a reasonably skilled insolvency practitioner would have commissioned an independent valuation of the Site and that no reasonably skilled insolvency practitioner would, in the circumstances of the Company, rely solely on the market to provide a value.

316. In cross-examination, Mr Laughton accepted that, in the hypothetical case of a residential property being offered for sale by a reasonably competent insolvency practitioner which had been recently valued at £450,000 and £1.35 million and for which the only bid which was received was £500,000, the property would be sold at that price regardless of whether a third valuation of say £700,000 had been obtained or not.

317. When Mr Laughton was challenged about his view that no reasonable insolvency practitioner would adopt a strategy of allowing the market to determine the true value, his answer failed to identify any way in which a further valuation would have made any difference to the outcome of the administration – even if that valuation had in fact supported the higher Savills valuation:

> "*Q. What do you mean that a reasonably skilled insolvency practitioner would not adopt a strategy of allowing the market to determine the price? What should he do instead?*
>
> *A. He should identify the value on the basis of professional advice and independent valuation.*
>
> *Q. Right. Let's just take that one stage further, before we break. Assume that the administrators in this case had obtained a valuation of - whether it's 115 million, 120 million or 125 million, it matters not for these purposes, and assuming that, because they concluded that a funded rescue was not possible, they determined that the site should be sold; yes?*
>
> *A. Yes.*
>
> *Q. And they marketed it fully and openly and it reached highest offers of £80 million. What do you suggest that the reasonably competent administrator should do in those circumstances?*
>
> *A. Review the marketing process to ensure that they had achieved the best price that was reasonably obtainable.*
>
> *Q. And if, on reviewing the marketing process, they concluded they had achieved the best price reasonably obtainable, should they sell or should they not?*
>
> *A. They should."*

318. In other words, far from it being critical to the outcome of the administration that the administrators obtained a further valuation, Mr Laughton's answer set out above demonstrates that when it comes to the point of sale what is critical in determining whether the market price has been achieved is whether or not the marketing process

was sound. In my judgement, the position Mr Laughton took in his report that a further valuation in this case was essential did not therefore withstand cross-examination.

319. It also did not do much to encourage me to set much store by Mr Laughton's views on this point because he admitted that he had never in fact been involved in a case as an administrator where the valuation of a property asset had been in substantial dispute and had never acted as an administrator of a company which owned a single real property asset.

320. Mr Sykes' evidence was that the FAs' approach was reasonable. His view was that the FAs had no reason to obtain another valuation because this would have added nothing to the determination of the strategy for the Site or the sale process.

321. When it was put to him that a reasonable insolvency practitioner would have obtained another valuation, Mr Sykes responded as follows:

> *"A. Well, they had a decent valuation from CBRE and they had an indication of value from Savills. So they had - they knew there was real value in the site and they also knew that if they went out to get another valuation, a formal valuation, it wasn't really going to add anything to the argument because it would entirely depend on the - the inputs. And the strategy here was that the property should be sold, so taking it to the market and making sure that it was properly marketed, as widely as appropriate, was the way to go forward.*
>
> *Q. And that would determine whether it was worth £2 million or £240 million?*
>
> *A. Well, it would do, wouldn't it?*
>
> *Q. And you think that is a sensible way forward?*
>
> *A. That seems to me to be a reasonable way forward for the administration, yes, in the context of the administration."*

322. Whilst I can accept as a general proposition that a reasonably competent administrator faced with divergent views as to the value of an asset of the company might decide to obtain a further independent valuation, it was not, in my judgement, either irrational or an act of bad faith or a failure to act with reasonable care and skill for the FAs to decide not to do so for the following reasons:

(1) I accept Mr Sykes' evidence (described above) that the path chosen by the FAs was "a" reasonable way forward, even if it wasn't the only possible

approach. On the other hand, for the reasons set out above, Mr Laughton's original view to the contrary did not survive cross-examination.

(2) I accept the FAs' submission that any valuation is necessarily hypothetical and extremely sensitive to a large number of potential inputs and assumptions. By contrast, exposing an asset to market is a more direct and definitive way to ascertain its actual value. This submission derives support from In Re Coniston Hotel (Kent) LLP [2014] EWHC 1100 (Ch), in which at [44] Morgan J noted: "a valuation is a prediction of what will happen in a particular market. Comparing a prediction of what will happen in a market with what actually has happened in a market will show that the events in the market are superior to anyone's prediction as to what they might be."

(3) The Permitted Scheme was a particularly complex development site with multiple variables, in relation to which a wide range of legitimate views of potential development value might be held.

(4) The state of the property market was uncertain and there was likely to be a significant time lag before sale. The utility of a valuation of the Site as at November 2010 for a sale unlikely to take place until May 2011 is far from obvious.

(5) The rival views as to value (Savills and CBRE) came from highly reputable professional sources and were relatively recent. It was not a case, therefore, of an administrator putting an asset on the market without any or any up to date information on value.

(6) As Mr Beetham himself accepted in paragraph 28 of his witness statement, anyone interested in bidding for the Site would necessarily have made his or her own assessment of the value of the Site. That assessment would inevitably be based on calculations as to the cost and value impact of whatever revisions to the Permitted Scheme they might seek (based on their own requirements) and the prospects of obtaining and implementing any such revisions.

(7) Mr Frost's evidence was that a red book valuation would cost around £75,000. Having paid CBRE for its report, the Syndicate would be highly unlikely to

have been willing to fund this and there was no other obvious source of funds for this.

(8) If a further valuation would have assisted with either the marketing or sale of the Site or was in any event an advisable step, this is something that the FAs were entitled to expect CBRE to raise with them and/or recommend. CBRE did not do so.

323. As to the Montagu Evans valuation dated December 2010 which was sent to the FAs on 28 March 2011, it was not put to Mr Sykes that this ought to have in any way changed the approach of the FAs. Indeed, the report was submitted to the FAs and CBRE by Mr Beetham solely for the purpose of asking CBRE to reconsider the price per square foot sale values for the residential units. It was not submitted in December 2010 or at any other time to the FAs in support of an argument that the entire approach to the administration was misconceived or misinformed.

(iv) Alleged failure to gather and analyse sufficient information in order to determine the appropriate administration strategy

324. The JLs submitted that:

(1) The FAs failed to gather and analyse sufficient information in order to determine whether it was reasonably practicable to rescue the Company as a going concern (Objective 1).

(2) At no stage did the FAs genuinely *think* about Objective 1.

(3) The FAs did not request the following information that they would have been aware of had they read the documents received from BLP on 20 September 2010: (a) the Beetham 2009 Business Plan; (b) the appendices to the first CBRE Strategy Report; (c) the final version and/or further drafts of the first CBRE Strategy Report; (d) the prior valuation of the Site carried out by Savills; and (e) the valuation of the Site carried out by CBRE in 2009.

325. The insolvency experts were agreed what was necessary for Objective 1 to be a reasonably practicable aim. Paragraph 5.3 of the joint memo recorded the following agreement:

> "The insolvency experts agree that in the circumstances of the Company it would not be reasonably practicable to achieve objective 1 unless (without selling the Site) the Site could be refinanced, the unsecured creditors paid or otherwise satisfied and the administration costs paid (and subject to provision for future costs and liabilities as required in order to be a going concern)."

326. Objective 1 was considered to be unrealistic at a very early stage. I accept Mrs Rayment's evidence that:

> "Within a short period of time after our appointment [Mr Bannon] and I formed the view that the appropriate strategy for the administration, and indeed the only way to achieve any return for the Company's creditors, would be to market and sell the Site for the best price we could achieve in the circumstances".

327. When Mr Laughton was then asked to identify information which the FAs missed and which might have suggested to a reasonable insolvency practitioner that Objective 1 could have been achieved, he did not refer to any of the five categories of document referred to by the JLs. Nor were the contents of these documents put to Mr Sykes as containing information which was capable of leading a reasonable administrator to conclude that Objective 1 was a viable option.

328. Mr Laughton accepted in cross-examination that the key point for the pursuit of Objective 1 was whether there was a potential source of funding to carry out the development:

> *"...It would be a matter of refinancing, but that's what the going concern would be all about, obtaining that refinancing.*
>
> *Q. So by going concern, you would also recognise the need for there to be a probable source of 200 or 300 million of funding?*
>
> *A. A potential source, yes"*

329. He later accepted that the administrators might have quickly been able to identify that refinancing was unlikely.

> *"Q. So for refinancing on the basis of the consented scheme, then you would have to have some indication that there might be somebody who was prepared to fund the rescue on the basis of the consented scheme; yes?*
>
> *A. You start from no knowledge and you go down the course of exploring what might be available. If you quickly identify that there is nobody who can participate in refinancing because you know not only the existing stakeholders but the external market or you've taken advice on it or you've put feelers out into that market, then you will - you will stop that exploration"*

330. Mr Laughton and Mr Sykes also agreed that it was not for the FAs themselves to either raise or pursue potential sources of refinance. I accept in this respect the evidence of Mr Sykes:

> *"The point I'm making is that the powers here are the powers of the administrator, which he is granted, he or she is granted, and they are powers to manage the company. Raising finance is a different task, which is not to do with the day-to-day management of the company, and from where I sit you can't actually restructure and refloat and refinance a business as administrator on your own, and that's where I think* ***Mr Laughton and I both agreed, that it's not for the administrators to go out and just raise large sums of money to refinance a company."***

331. Mr Laughton also accepted that:

(1) If the directors and shareholders express the view that the best way forward is for the property of a single asset company to be sold, that would indicate to a reasonably competent administrator that they "had effectively abandoned at least for the moment any prospect of being able to rescue the company themselves".

(2) It was relevant for the FAs to consider the success or otherwise of the directors and shareholders in obtaining funding to meet the liabilities of the bank.

(3) It was relevant for the FAs to take account of the fact the Company had entered administration because it had consistently failed to meet its banking covenants.

332. In light of the foregoing, I have no hesitation in rejecting the JLs' submissions that the FAs failed to gather sufficient evidence to form a view as to whether Objective 1 was feasible and that they failed to think about it at all for the following reasons:

(1) Whether Objective 1 was feasible was a question of whether the project could be refinanced. It was not for the FAs to go out and personally seek a refinance of the Company. The FAs were entitled to see how matters developed in the course of the eight weeks before their proposals needed to be published.

(2) I accept Mrs Rayment's evidence that both she and Mr Bannon kept an open mind as to any proposals from the Company's stakeholders or third parties which would achieve a rescue of the Company.

(3) The FAs were entitled to take account (and did take account) of the fact that the Company had repeatedly defaulted on its obligations and had gone into administration in difficult economic and market conditions.

(4) The FAs were entitled to conclude from the letter sent to BLP by the directors on 14 October 2010 that the directors themselves considered that the rescue of the Company as a going concern was not an immediate prospect.

(5) It was not unreasonable for the FAs to conclude provisionally that Objective 1 was not a realistic prospect.

(6) Even if the FAs had actively pursued further enquiries, the failure on the part of Mirax, Mr Beetham and Mr Frost despite significant efforts to find a purchaser or investor at any time between 14 October 2010 and the sale of the Site shows that the pursuit of Objective 1 was doomed in any event.

(7) None of the five categories of documents which the JLs said the FAs ought to have obtained in any event contained anything which materially altered the prospects of a funded rescue. That turned exclusively on the interest of third-party funders, which it was for the directors and shareholders to pursue.

333. I reject the submission that the FAs disregarded and/or placed no weight on the valuations and opinions on value provided to them by Mr Frost on 15 October 2010 and Mr Beetham on 26 January 2011 and 28 March 2011. All valuation information was shared with CBRE. The FAs were entitled to rely on CBRE to advise if any further information was so significant as to change any part of the agreed marketing or sale strategy. In any event, I have concluded that it was reasonable for the FAs to pursue a strategy of allowing the market to determine what the true value of the Site was.

334. Finally, I also reject the suggestion that there was a failure to investigate the causes of the Company entering administration. The FAs were well aware of the Company's defaults. It was not suggested to Mr Sykes that, had the FAs pursued the reasons for the defaults in greater detail, anything of relevance to their choice of Objective would have emerged.

Was there a failure to "think" about the statutory objectives?

335. I also reject the JLs' submission that there was a failure by the FAs to think about the statutory objectives or that there was a confusion about objectives and strategy.

336. I find that it is clear that the provisional strategy which the FAs decided to pursue on appointment was basically a three-track strategy of: (a) taking steps to implement the existing planning consent; (b) preparing to market and sell the Site; and (c) investigating reconfiguration options. That this was the approach was clear from the notes of the meeting of 18 October 2010.

337. This is also clear from the contents of progress reports sent from time to time to the Syndicate, which typically have as their two headings "planning" and "marketing" – see e.g. BDO's report dated 12 November 2010 to the Syndicate. This provisional strategy was in my judgment consistent with both Objective 2 and 3 in SchedB1. There was, in my judgement, nothing unlawful about taking such steps during the eight-week period before they were obliged to publish their proposal for the administration. Whether their provisional strategy being pursued ultimately fell under Objective 2 or 3 depended on whether the FAs considered the proceeds of sale would exceed the level of the secured debt or not.

338. I accept Mrs Rayment's evidence that in the run up to the publication of the statutory proposals on 7 December 2010 there was a lively discussion between her and Mr Bannon about how much the Site would generate and, as they put it, "where the value was likely to break". I accept her evidence and that while she was initially more optimistic than Mr Bannon, in the end she came round to his view that the value was most likely to break below the level of the secured debt, which is why it is Objective 3 which is identified in the final published version of the proposals.

339. It is perhaps somewhat surprising that Mrs Rayment did not refer to this debate in her witness statement but that there was such a debate is consistent with the contemporaneous evidence of how the report to creditors progressed through its four main drafts. The earlier drafts were ambiguous as to whether Objective 2 or Objective 3 was being pursued. This is not surprising because (a) spending significant sums on seeking to vary the conditions for implementing planning consent is a classic example of doing something which leads to a better result for the Company's creditors as a whole (including secured creditors) than if the Company had been immediately wound up and its prime asset sold as is and (b) the spectrum of value indications the

FAs had received (£43/£48 million – £135 million) was wide and straddled the secured lending.

340. Given the wide range of indicated value, the FAs had to form a view. Mrs Rayment's evidence that there was such a discussion in the immediate run up to the 7 December 2010 deadline is therefore inherently plausible given the information the FAs had on value. It is also supported by the terms of the e-mail sent by Mrs Rayment to Mr Baggley on 3 December 2010.

341. What is beyond any doubt is that in the final form of the proposals it is Objective 3 that is the statutory objective referred to in the Statement of Proposals. The covering letter to all creditors states in clear terms that "Based on current information there will be insufficient assets to enable us to make a distribution to the Company's unsecured creditors". However, even the final statement still referred to the implementation of the planning consent as being something which furthered Objective 2.

342. Entirely appropriately in terms of keeping an open mind, the FAs decided not to commit themselves to saying precisely what value they attributed to the Site. Paragraph 3.2 states simply "Although the Directors have attributed a value of £135 m to the site, we would advise that the true value of the site will only be determined when the site is marketed". They had also clearly not given up all hope of making a distribution to unsecured creditors. Paragraph 6.5.3 states that "any distribution to unsecured creditors is dependent on asset realisations."

343. In my judgement, the documents and evidence I have referred to above show that, far from not thinking at all about the statutory objectives, as the JLs alleged, the FAs gave proper consideration to all the statutory objectives. The best evidence of what the FAs thought is contained in the Statement of Proposals and the six month reports thereafter. In the initial statement, they did not dismiss Objective 1 out of hand but merely noted that it seemed unlikely. This again seems to me to be a strong indication of keeping an open mind whilst at the same time necessarily forming a judgment on the information available to them.

344. Although they realised they had to come off the fence and decide whether the administration was an Objective 2 or an Objective 3 administration by reference to whether the sum realised by the Site was likely to be enough to pay off the secured

creditors, I find that they clearly felt that what they were doing about implementing planning might yet be of benefit to the unsecured creditors.

345. Viewed in this light, the fact that both Mr Bannon and Mrs Rayment signed witness statements in 2012 stating that they had pursued Objective 2 is rather less surprising than it first appeared. I accept Mrs Rayment's evidence that in identifying Objective 2 as the statutory objective of the administration, those statements were mistaken. At a formal level, that is obviously so. It is incorrect because (a) the structure of the legislation as described in Section F of this judgment makes it impossible to pursue more than one of the three objectives and (b) the Statement of Proposals makes it very clear that it was Objective 3 which was being pursued.

346. There is, however, nothing in the legislation which prevents administrators from taking actions which are consistent with Objectives 2 and 3. This case provides a good example of such a situation. The decision to implement planning consent was of potential benefit to all creditors and was something which I find the FAs reasonably considered to be a step which was potentially in accordance with Objective 2. It was quite rightly not suggested to Mrs Rayment that she or Mr Bannon had been seeking to mislead the court in 2012 when they both said that the administration was an Objective 2 administration, given that the actual statutory purpose was stated in a formal document itself lodged at Court. It was, in my judgement, obviously an innocent mistake.

The nature of Objective 3

347. In the course of their closing submissions the JLs submitted that Objective 3 prescribes a "liquidation type" process. They contended that "If administrators are pursuing Objective 3 then they are selling as liquidators, namely disposing of assets without seeking to add value i.e. quick unconditional cash sales." I disagree. It is wrong to describe a disposal of assets by an administrator pursuant to Objective 3 as a liquidation, for three reasons. First, as an office holder an administrator must always conduct him or herself in accordance with the legal duties of an administrator and not any other type of insolvency practitioner. Secondly, when pursuing an Objective 3 administration, the administrator has at his or her disposal the full range of powers available to the administrator, which are greater than those available to liquidators. Thirdly, and most importantly, the pursuit of Objective 3 must be carried out in such a

way as not to cause unnecessary harm to the unsecured creditors. This is a proviso which does not apply to liquidations. An administrator pursuing Objective 3 who thought of him or herself as carrying out a liquidation type exercise may well fall into error and a breach of duty. In short, Objective 3 administrations are administrations, not liquidations.

Alleged failure to consult directors

348. In Section G above, I rejected the JLs' submission that the FAs were under a duty to consult the directors of the Company. If I am wrong on that and there was such a duty, I am not persuaded that the FAs failed to engage reasonably with Mr Frost and Mr Beetham for the following reasons:

(1) I accept what Mrs Rayment and Mr Bannon said in their witness statements about the frequency of their contact with Mr Frost and Mr Beetham, which is in any event clear from the many emails between them.

(2) The FAs requested information including asset valuations from Mr Frost by email on 15 October 2010, which were provided.

(3) The meetings between the FAs and Messrs Frost and Beetham appear to have been co-operative and productive and the tone of communication respectful and professional. In particular, when the FAs met Mr Beetham and Mr Frost on 18 October 2010 and on 11 November 2010, Mr Bannon was in my judgement open and clear about his views on how he saw the administration proceeding.

(4) The FAs took proper account of the Statement of Affairs from the Company's directors dated 7 December 2010.

(5) CBRE (acting on behalf of the FAs) engaged with Mr Frost, seeking relevant information, particularly in respect of planning.

(6) The FAs provided Mr Beetham with the draft marketing brochure. His comments were taken into account in revising and finalising the draft.

(7) Mr Laughton did not suggest any information or comment which the FAs could have obtained from Mr Frost or Mr Beetham but which they failed to

obtain which would have made any material difference to the outcome of the administration.

Alleged avoidance of creditors' meeting

349. Although it seems to me nothing ultimately turns on this point, I do not accept the submission made by the JLs that Mrs Rayment chose Objective 3 or in any other way worded the Statement of Proposals in order to avoid a creditors' meeting. I accept that this is what Mr Frost appears to have understood her to have said but, in my judgement, this was a misunderstanding on his part for the following reasons:

(1) I believe Mrs Rayment when she says the desire to avoid a creditors' meeting played no role in her decision making.

(2) I consider it far more likely that what Mrs Rayment explained to Mr Frost was that, as a result of the FAs' decision to pursue Objective 3, there was no requirement to hold a creditors' meeting.

(3) I cannot see any reason why Mrs Rayment should have wanted so desperately to avoid a meeting in any event. Such meetings are part and parcel of administrations.

(4) The imputed motive makes no sense in any event. If 10% of creditors demand a meeting, one would have to be held in any event. This would have allowed any grievance or criticism of the FAs to be aired, which is what it is said the FAs wanted to avoid.

(v) Was there a failure by the FAs to exercise their own independent judgement?

350. The allegation that the FAs failed to exercise their own judgement had a number of aspects. I have already dealt with the allegation that the FAs surrendered their discretion by agreeing to a "light touch" administration. Another aspect of the allegation was based on the uncontroversial fact that CBRE had already recommended to the Syndicate a twin-track strategy of implementing planning consent for the Permitted Scheme and marketing the Site for sale as a means of realising its value.

351. There are a number of strands to this point but taken at its most general level, I reject it. In my judgment, it was open to the FAs to either adopt that advice or not (regardless of whether it formed part of a strategy report to the Syndicate or not). I accept Mrs Rayment's evidence in cross-examination when the point was put to her that if the FAs had disagreed with CBRE's suggested approach, they would not have followed it and they followed it because they agreed with it. The fact that it had been suggested to the Syndicate before the administration does not, in my judgement, make it unreasonable for the FAs to adopt it if they saw fit, at least in the first eight weeks of the administration pending the publication of their own proposals, whilst keeping their minds open to other possibilities such as a refinancing, which is what I have held they did.

(vi) Was there a failure to investigate, pursue and obtain a varied planning consent?

352. In both the JLs' opening and closing submissions, it was submitted that the FAs' approach to planning was the "paradigm example" of their failure to exercise independent judgment and to act in the interests of the Company's creditors as a whole. In light of the fact that this allegation is selected by the JLs as the centrepiece of their challenge to the independence of the FAs, it is appropriate to consider the allegation in detail.

The JLs' four submissions

353. The JLs' case was that the FAs acted in breach of duty by failing to investigate, pursue and/or obtain a varied planning consent. The JLs summarised their case on this in four propositions:

(1) First, the FAs agreed to implement the existing planning consent to lock-in the value of the Site, as part of the pre-agreed security realisation exercise.

(2) Second, as soon as the Syndicate realised that in all likelihood they would recover their money, as a result of Crescent Heights' offer to purchase the debt at £60 million and bids coming in at over the secured debt, they had no incentive to investigate and consider what further consent could be achieved.

(3) Third, rather than look at the position from the point of view of the Company and its creditors as a whole, the FAs "kowtowed" to the Syndicate and did not

even seek to understand the planning uplift / value of the Site with revised planning.

(4) Fourth, when the FAs were told that they should pursue a revised consent, they appear to have accepted at face value Mr Chowdhury's throwaway comment that some of the value of planning uplift was likely to already be factored into bids and did not explore the matter further.

354. The FAs' case, in summary, is that their approach to planning was entirely reasonable. The FAs submitted that they reasonably relied on the advice they took from DP9 and CBRE in the course of the administration.

355. The insolvency experts agreed that it was appropriate for the FAs to take advice from appropriate professional advisers. It was common ground that DP9 was an appropriate professional adviser on planning matters.

356. Mr Laughton's view was that the FAs ought to have obtained advice early in the administration about the cost and potential benefit of seeking revised planning consent. This, he said, ought to have included advice on the effect on the value of the Site. In the conclusion to his report, he expressed the view that "a reasonably skilled insolvency practitioner would not have failed to investigate, pursue and/or obtain a varied planning consent."

357. Mr Sykes' view was that the FAs reasonably obtained CBRE and DP9's advice on planning matters and reasonably took account of it at all stages. He was also of the view that there was nothing to indicate that their advice at any stage was anything other than reasonable and competent. In respect of the substance of that advice received, he distinguished between two periods:

(1) Up to 28 July 2011. During this period, Mr Sykes' evidence was that a reasonably skilled and careful administrator would not have understood either CBRE or DP9 to be advising that an application for revised planning consent should be made by the FAs themselves.

(2) After 28 July 2011. During this period DP9's advice changed. From 28 July 2011 DP9 positively recommended an application for a revised consent. It was Mr Sykes' view that there were a number of factors which weighed against the

pursuit of a revised planning by the FAs at that stage and that it was not unreasonable for the FAs to decide not to pursue the application themselves.

358. The factors which Mr Sykes identified as weighing against the FAs pursuing an application for planning consent themselves were:

(1) The application might not succeed, which in turn might taint the value of the Site in the eyes of the market.

(2) Even if successful, whatever consent was ultimately obtained might not necessarily be suitable or well received in the market by the time of the new sale date (which might be as much as two years after the date of the application).

(3) The potential purchasers for the Site would by definition be sophisticated developers / investors who would have their own ideas for the Site which might not accord with those advising the FAs. They and their advisers would be capable of factoring in the chances of obtaining their own amended consent.

(4) The application would require funding and take time. The delay would be for up to two years and the Company had no funds available to fund the costs.

359. I prefer Mr Sykes' evidence to that of Mr Laughton for the following reasons:

(1) Mr Laughton had no experience of conducting an administration of a company with substantial property assets or of a company whose only asset was land with planning permission; Mr Sykes did.

(2) Both Mr Laughton's report and answers in cross-examination in relation to planning were expressed in rather vague terms and couched in generalities, whereas Mr Sykes' evidence was more grounded in practicalities. For example, when Mr Laughton was asked the simple question of whether, in his view, a reasonably skilled insolvency practitioner would have pursued planning consent for the Site, his response (with emphasis added) fell short of a clear 'Yes':

> "*Q……..At paragraph 6.18 you say: "I conclude that a reasonably skilled insolvency practitioner would not have failed to investigate, pursue and/or obtain a varied planning consent."* ***Do I understand by that that you assert in your opinion the reasonably skilled insolvency practitioner would in fact have pursued a varied planning consent in this case?***
>
> *A.* ***No, my conclusion is investigate or pursue or obtain*** *- and you only pursue if you've investigated and you only obtain if you've pursued. But if it only went as far as investigation and the conclusion from the investigation was further pursuit was not the right thing to do, then that's what I meant, that's what I think I've said.*
>
> *Q. And, therefore, there is nothing on the facts of this case, as you understand them to be - and you set out your understanding of the facts - where you say you would expect the reasonably skilful insolvency practitioner in fact to have gone for - that is to say applied for and pursued - a revised planning consent, or is there?*
>
> *A. I think that's part of what a reasonably skilled insolvency practitioner would have been exploring during the course of the case, and* ***I'm not saying that they would definitely have pursued a varied planning consent, but I'm saying they would have looked at whether it was the appropriate thing to do****."*

(3) Mr Sykes was not effectively challenged on the specifics of his evidence in relation to planning. In particular, he was not challenged on any of the four factors (set out above) which he said would have weighed heavily against the FAs pursuing planning permission themselves.

360. The submission that the FAs agreed to implement the existing planning consent "as part of the pre-agreed security realisation exercise" is in my judgement not supported on the evidence for the following reasons:

(1) It was not just the Syndicate but all the stakeholders who supported and encouraged the implementation of the Permitted Scheme. Mr Frost accepted this in cross-examination.

(2) The idea of implementing consent was clearly discussed at the meeting between Mr Bannon, Ms Cook, CBRE and DP9 on 20 October 2010; as the notes record, the advice was "Protecting value = with implementation." It was thus clearly something which CBRE / DP9 felt needed to be discussed with the FAs rather than it being just taken as a pre-agreed.

(3) Implementation was identified as one of the three work streams in the subsequent call between the FAs, CBRE and the Syndicate which took place on 20 October 2010.

(4) Mr Frost himself emailed Mr Bannon on 1 November 2010 saying, amongst other things, "Clearly I expect that you would want the property marketed with the benefit of an implemented planning consent to ensure that maximum value is achieved."

(5) CBRE emailed Mr Bannon on 3 November 2010, following a meeting with DP9, and advised *inter alia* "it is vital that we proceed with the process of implementation. Please can you confirm if you are in a position to issue instructions…".

(6) Finally, there was a meeting between CBRE and the FAs (recorded in CBRE's letter of 10 November 2010) at which an action plan was agreed, including for CBRE to "Approach WSP to start implementation of the scheme to secure planning".

361. These emails, in my judgement, demonstrate that there was a genuine discussion between 14 October and 10 November 2010 involving the FAs, CBRE, DP9 and Mr Frost about whether planning ought to be implemented and, if so, how. That discussion culminated in an instruction from the FAs to CBRE to approach WSP.

362. I cannot make any sense of the JLs' second submission. It is quite clear from the contemporaneous correspondence on the issue of planning that it was the FAs who were in charge of seeking advice from CBRE and DP9 and issuing instructions to them. From time to time they reported back to the Syndicate or requested comments but I am satisfied that it was the FAs who decided what planning steps were taken or not taken.

363. The submission that the FAs "kowtowed" to the Syndicate by not even seeking to understand the potential planning uplift was in my judgment not an appropriate submission. There was not the slightest evidence that the Syndicate sought to impose its will on the FAs in relation to planning matters or that the FAs surrendered their authority as decision-makers in relation to planning.

364. If one removes the unsupportable allegation of kowtowing, the JLs' core submission is that it was a breach of duty by the FAs to fail to investigate the potential uplift in value of a revised planning consent. It is common ground that no detailed investigation was made by the FAs (or CBRE on their behalf) of the potential value uplift of any potential reconfiguration of the Site. The issue is why this was so and whether this failure was a breach of duty.

365. It is appropriate to consider the issue as Mr Sykes did in two time periods: (i) 14 October 2010 – 18 July 2011 and (ii) 27 July 2011 onwards.

(i) 14 October 2010 – 18 July 2011

366. The reason why no detailed investigation of potential planning uplift in a varied consent occurred in this period was that the strategy recommended by CBRE and DP9 (and accepted by the FAs) was a more conservative one. It comprised: (i) implementing the existing consent, albeit under revised less onerous conditions; (ii) investigating a number of alternative configurations which potential purchasers might consider; and (iii) engaging with the planning authority to obtain a positive response to a range of possible changes. That this was what CBRE and DP9 thought was appropriate is clearly evidenced in the contemporaneous documents:

(1) CBRE had considered the question of applying for a "a more valuable consent" on the Site in September 2010. In their draft Strategy Paper, they expressed their view that this would be the "preferred route" in "an ideal world". However, their view was that "at this stage it is difficult to envisage this being a viable route" because "the modifications required are likely to trigger a new planning application".

(2) CBRE's view on the prospects of a new planning application to secure permission for a revised scheme of the same scale was that it would be "extremely challenging". This was said to be due to a change to planning policy and a change in the strategic views on the part of the planning authority.

(3) CBRE's recommendation (at that stage to the Syndicate only) was that an application to modify the existing consent was "not a viable option". This document was not passed to the FAs but it clearly expresses CBRE's own

professional opinion and it is clear that CBRE's view on this did not change on this point after 14 October 2010.

(4) On 3 November 2010, Mr Bunnis sent to Mr Bannon an account of a discussion he had had with Mr Kerr of DP9. The e-mail summarised DP9's views and presented them as their "recommendations" but it is clear that CBRE agreed with them and they were therefore in effect joint recommendations to the FAs. They included (with emphasis added):

> *"2. In parallel with the implementation process, <u>we have explained the need to explore alternative internal configurations for the tower</u> and Malcolm is of the clear view that changes in the number of units by way of a reduction in size to both the hotel and the residential components will necessitate a new planning application. His view however is that Southwark will be broadly supportive and that the potential problem lies with the Mayor who previously objected to the scheme. Malcolm's view however is that it should be possible to persuade the Mayor not to frustrate the process of securing a new planning consent provided that appropriate payments are offered for Crossrail.*
>
> *3. <u>The strategy therefore will be to seek to secure a satisfactory letter from Southwark Council supporting the changes which we proposed</u> together with appropriate changes to the Affordable Housing provisions which will also be necessary. Following receipt of the letter, Malcolm would then approach the Mayor and endeavour to secure similar assurances that he would not object to a planning application along the lines we have suggested. <u>We have assumed that the Banks will not wish to fund a new planning application and await the outcome but that these comfort letters if capable of being secured will aid the marketing process considerably.</u> The process of securing the letters will be carried out contemporaneously with the implementation process*
>
> *4. So far as the identification of variations to the current design, we remain of the view this should be procured from an appropriate architect in line with the strategy which we outlined in our previous correspondence".*

(5) On 12 November 2010, Mr Baggley of BDO wrote to the Syndicate to provide an update on planning matters (with emphasis added).

> *"CBRE have met with Malcolm Kerr of DP9 (the planning consultants) who clearly has significant knowledge of the site and will need to be retained to assist going forward. He has provided clarity on aspects of the planning and believes Southwark are*

> *supportive of the scheme and any relatively minor amendments to planning. It is suggested that a letter of comfort is sought from Southwark as to any changes before going to market to circumvent their offices being inundated with queries from potential purchasers."*

(6) On 15 November 2010, DP9 advised the FAs that it would "be crucial to gain the support of LB Southwark at political and officer level" and that "the issues involved will need to be dealt with sensitively given the additional level of decision making by the Mayor". They warned that "Boris Johnson and his Deputy, Sir Simon Milton, has expressed views about tall buildings including those proposed for North Southwark in the past, which have not been favourable".

(7) On 24 November 2010, Mr Bunnis wrote to update Mr Bannon following a meeting with the Council and DP9 (with emphasis added):

> *"1. Southwark appear very helpful in their approach to implementation which is generally in line with that which was outlined by Hugh Frost and are clearly very keen to assist with implementation...*
>
> *2. On repeated occasions, Malcolm Kerr of DP9 stressed our wish to re-engage with Southwark as soon as these conditions are cleared in order to discuss the potential for a variation to the current planning consent. He talked about the need to reduce the scale of the individual residential rooms and also to reduce the rating of the hotel slightly. This was generally well received on the basis there will be negligible variations to the appearance of the building, but there was push back on our wish to change the quality of the hotel materially. It is clear that a five star rating is a big selling point with Southwark and we will need to restrict the reduction in the quality of the hotel so that it can still qualify in their eyes as a five star product."*

(8) When DP9 wrote to CBRE on 2 March 2011, they noted that the timetable had slipped somewhat but emphasised the importance of not doing anything which might endanger the application to change the conditions for the implementation (the section 96 process):

> *"As discussed previously, we want to handle any crossover between the S96A and longer-term scheme amendments very carefully. Adrian Dennis can be difficult, and if he senses that something more significant is coming forward he may seek to delay or frustrate the S96A process. Technically they should be seen separately, but that won't necessarily stop him! The risk is that by putting the two together you will unravel the implementation and potentially see the extant consent expire, along with its value".*

(9) DP9's advice about the importance of completing the s96A process before opening discussions about any potential scheme amendments was passed on by CBRE to the FAs on 4 March 2011. CBRE also informed the FAs that the marketing brochure was now in its fifth draft.

(10) After the s96A application had been granted and the Permitted Scheme implemented in June 2011, a "scheme reconfiguration pre-application meeting" with the Council's planners was held on 24 June 2011 (12 days after the deadline for bids). It was attended by DP9 and CBRE. The notes of the meeting record two major reservations on the part of the council about any reconfiguration:

> "*The [Site] is an employment site and the Council has always viewed it as such. Members did not envisage the area being residential, and officers were also keen to avoid losing further employment sites to residential."*
>
> "*Members did have aspirations for a prestigious hotel on the site…."* and the officer *"was not convinced about the justification for 150 rather than 261 rooms, and queried why no other 5-star operator could service 261 rooms if Jumeirah could have done."*

(11) On 7 July 2011, Mr Kerr informed CBRE in a telephone call that he believed strongly that the successful bidder would secure the Council's consent to lower the star rating of the hotel and reduce the residential room size. However, Mr Kerr advised that he did not think that the planners would put this into writing.

(12) On 18 July 2011, Mr Kerr of DP9 signed a letter referring to the meeting with the planners of 24 June 2011 stating that "with some negotiation" there was "a reasonable chance of securing the altered mix and uses to the building that

most of the potential purchasers seem to want". CBRE's draft had originally referred to the prospects of approval as being "strong" (reflecting the tone of Mr Kerr's views as expressed on 7 July). This letter was placed in the data room.

367. The above chronology of events in my judgment shows the FAs entirely appropriately listening too and following the advice of DP9 and CBRE at every stage between 14 October 2010 and 18 July 2011. Put simply, the FAs did not apply for revised planning consent themselves or produce a full revised scheme to put to planners or seek to interrogate the planning uplift of such a scheme because they were not advised to do so. They instead followed a strategy developed by CBRE and DP9 and recommended to the FAs which was to concentrate on obtaining revised conditions for the implementation of the current scheme before approaching the planning authority for an informal comfort letter as an indication of likely support for one or more potential reconfigurations thought most likely to appeal to potential purchasers.

368. The JLs did not suggest that there was anything which ought to have put the FAs on notice that it was unreasonable to follow the substance of this advice. They could not do so because their planning expert Mr Gibney did not suggest that any advice of DP9 set out above fell below the standard of the reasonably competent town planning consultant. Indeed, he confirmed in cross-examination that he largely agreed with the advice they gave.

369. The strategy recommended by CBRE and DP9 was followed from 14 October 2010 to 18 July 2011 by the FAs subject to two modifications. The FAs were in my judgment left with no choice but to accept DP9's advice that the planners would not produce a comfort letter themselves. The second best thing to do in these circumstances was to produce a letter from DP9 expressing their views on how likely it was that an application for modified consent would succeed. This was done. The second respect in which the original plan was not followed was that the marketing got under way before CBRE and DP9 had their meeting with the Council to discuss potential changes to the configuration of the Site. A significant part of the delay was caused by illness on the part of the chief Council planning officer.

370. I therefore accept the submissions made by the FAs that in circumstances where neither CBRE nor DP9 advised that a planning application be made by the FAs before

27 July 2011, and the advice appeared to be competent and reasonable, there can be no valid criticism of the FAs and no breach of duty.

(ii) 27 July 2011 onwards

371. The JLs' submission for this period is that "when the FAs were told that they should pursue a revised consent, they appear to have accepted at face value [CBRE's] throwaway comment that some of the value of planning uplift was likely to already be factored into bids and did not explore the matter further". This is not supported by the contemporaneous evidence.

372. In his e-mail of 27 July 2011, on which the JLs rely heavily, Mr Kerr said (emphasis added):

> *"My point is that from conversations with officers at Southwark, it appears likely that we can revise the planning consent by reducing the size and number of hotel rooms to a level that we are told most of the bidders would prefer, and in addition that we can change the layout of the existing flats to produce a greater number of smaller units. There also appears to be a very good chance that a new affordable housing deal can be agreed as an off-site payment, particularly when you consider the recent agreements on NEO Bankside and King's Reach.* ***Obviously, none of this can be guaranteed and there is some risk, but I am not sure I understand why we do not get the consent for these changes and then secure a sale.*** *I know that it would take longer but we could have been doing this over the last four or five months of the sale process.*
>
> *I want to make it clear that this is not me trying to get fees for DP9 – as you can imagine they are relatively insignificant in terms of our overall business -* ***I just want to make sure that this has been considered properly before any decision has been made. It is entirely possible that I may have missed something and if so I apologise but I thought I should make my views clear****"*

373. The email is curious in at least three respects. First, it came out of the blue only 11 days after DP9's previous views on the prospects of planning consent being obtained were lodged in the data room for the marketing of the Site for consideration by intending purchasers. It was implicit in the strategy followed up to that point that it was for intending purchasers to take their own view on what reconfiguration it made sense to seek by way of an application for amended consent. Secondly, it is on its face rather ambiguous. It is not a recommendation that an application for planning consent be made. At most it is a recommendation to give that possibility some consideration. Thirdly, to the extent that the "I am not sure I understand why we don't" formulation

is to be understood as an implicit recommendation that the FAs now seek planning consent, there is little or no explanation at all for his change of mind. Mr Kerr does not say "I have gone through my files again and changed my mind" or "I have had a further conversation with the planners and they have made new and very positive noises about an application for consent to ….".

374. The FAs submit that Mr Kerr was prompted to write this email by Mr Bradman acting on behalf of Messrs Frost and Beetham. There are grounds for thinking that this was the case but I do not consider it necessary to make any findings about Mr Kerr's motives. I prefer instead to take it at face value as a recommendation to the FAs to consider the idea of making an application for planning consent themselves. CBRE for their part treated it that way. When Mr Chowdhury forwarded the message to Mr Bannon he referred to it as a "note of advice". Mr Chowdhury is clearly somewhat surprised by its contents. His comment is "This note is quite a departure from the rather conservative approach they gave us on the 18th of July". Mr Chowdhury also made clear that he did not think much of the idea. He ends his email by saying that CBRE would not be altering their recommendations as per their most recent note of advice. In my judgment, there is nothing objectionable in that assessment. The FAs would be expected to have to deal with differences between advisers.

375. Importantly, in my judgment, Mr Bannon did not dismiss Mr Kerr's suggestion as impractical or too late. He was clearly somewhat irritated to receive this suggestion so late in the day but his response was to ask CBRE to ascertain how long it would take to obtain a revised consent, what the cost would be and what the uplift in value would be. He also asked for CBRE's view on whether some of the benefit was already factored into the existing offers.

376. Mr Chowdhury's response was: "I will revert to DP9 on timing and likely costs. In value terms, it is difficult to say, but I would agree with your assessment that some of the benefit of re-configuration would have already been factored into the bids received. I would expect there to be an enhanced value of the site above, say £80 m, as this would be reward for the investment in a new planning permission and the risks attached."

377. Mr Burns, the senior director at CBRE, agreed with Mr Chowdhury's assessment. His response was:

> *"I agree with you that they have most likely already priced this risk in – none of the bidders throughout the process queried our initial advice that you could alter the planning …."*

378. When, on 19 August 2011, DP9 produced the note requested by Mr Bannon it described what would be involved in terms of the necessary work streams, costs and timescales for such an application. The note did not say that DP9 recommended that the application be made or that there had been any further contact with Southwark planners which altered their previous advice as to the chances of the application succeeding. CBRE forwarded the note to Mr Bannon the same day. In summary, the advice was that it would take 6-8 months and would cost £400,000 – £600,000.

379. Both Mrs Rayment and Mr Bannon set out their reasons why they chose not to pursue the idea of applying for a revised consent themselves. Mrs Rayment's reasons in summary were:

    (1) She believed the bidders would have already factored into their bids any value uplift from a revised consent.

    (2) She had noted from the interviews with the then top four bidders how different each of their own plans were for the Site and how each had already been in discussion with the Council about planning and social housing issues. Had the FAs made an application it would have been different to each of the bidders.

    (3) She was uncertain how receptive the Council would be to an application from the FAs, given they were not going to be the ultimate developer.

    (4) The application would cause considerable delay and there was a real risk that the application may not succeed anyway.

    (5) The FAs had no funds to pay for the application themselves and the Syndicate would not have provided funds.

380. Mr Bannon's evidence was to the same effect.

381. I accept Mrs Rayment's evidence. I have no reason to doubt that these were the reasons why the FAs decided not to pursue an application themselves. In short, the FAs did exactly what DP9 suggested on 28 July 2011. They considered the suggestion

that they apply for planning permission (as subsequently costed in the 19 August 2011 note). Having done so, they rejected it.

382. The JLs' own expert on sales and marketing, Mr Sharman, accepted that a decision by the FAs to apply themselves for an amended application would have created a number of risks and potential future obstacles, including:

(1) That the then current bidders might well no longer be interested by the time the Site was back on the market and might have committed their funds elsewhere.

(2) That, by the time the planning process had been completed, the market might have moved downwards.

(3) The Company's debt would accumulate during the period.

(4) That the FAs would have to pay between half a million and a million pounds for the planning application.

(5) That the planning application might be called in.

I accept the FAs' submission that each of these risks militates against the FAs deciding to make an application themselves in August 2011.

383. In light of the foregoing, I accept the FAs' submission that it was reasonable for the FAs to conclude that it was not in the interests of the Company and its creditors to change course in August 2011 to pursue an application for planning themselves and I reject the JLs' submission that in doing so the FAs acted unreasonably or irrationally for the following reasons:

(1) The suggestion to consider making an application for amended consent had been made at a very late stage in the administration. Bids had already been assessed. The JLs' own sales and marketing expert conceded in cross-examination that: "by the end of July 2011 it would have been a late stage to switch sale bases given that the marketing process was almost complete (akin to shutting the stable door after the horse has bolted)".

(2) The suggestion in the note of 28 July 2011 came without any explanation as to what, if anything, had changed to justify the move away from the previously

agreed (and implemented) strategy of seeking a comfort letter to encourage bidders to believe that an amended consent was possible.

(3) Neither DP9 nor CBRE positively recommended to the FAs applying for planning permission themselves as the step they ought to take on or after 28 July 2011 (or indeed at any stage).

(4) Both Mr Chowdhury and Mr Burns of CBRE considered that the bidders had already made their own assessment of the chance of obtaining an amended consent and the costs and benefits of doing so for their own schemes. That view was passed on to the FAs. They were entitled to accept and rely on that advice.

(5) The FAs were entitled to take account of the fact that the existing bidders all had very different ideas as to how they might seek to reconfigure the Site and that even if the application was successful the amended consent might not suit the purposes of those potential or any future purchasers.

(6) The FAs had no funds available to pursue the application and reasonably concluded that the Syndicate would not agree to put them in funds to do so. I reject in this context the suggestion that Mirax at any stage offered to fund an application. The only suggestion which was made in a meeting on 31 August 2011 was that £7 million might be forthcoming from Mirax as a "deposit" towards repayment of the Company's debts. The offer was rejected.

(7) There was a real risk that the application might not succeed. DP9 were not prepared to say more than that the chances of success were "reasonable" in the note of 18 July 2011.

(8) Even if successful, it was reasonable for the FAs to doubt how welcomed the application would be in any event by the Council given (a) the long planning history of the Site and (b) it would be clear that the FAs were not going to be the developer in any event, so it was likely that any further application for an amendment to the amended consent would have to be made for the ultimate developer in any event.

(9) The risks and obstacles acknowledged by Mr Sharman.

384. It is just conceivable that another administrator might have interrupted the marketing and bid assessment process in July / August 2011 to pursue an application for an amended consent but I am more than satisfied that, in the circumstances described above, it was entirely reasonable for the FAs to decline to do so in August 2011 and to continue instead to engage with those who had submitted bids for the Site.

(vii) Should the FAs have sought to negotiate overage provisions or a conditional contract?

385. The amended particulars of claim contain an allegation that it was negligent of the FAs to conclude a contract which did not contain an overage provision or one which was not conditional upon planning permission being granted ('**a STPP sale**').

386. It was submitted on behalf of the FAs that it was reasonable for them to have preferentially sought and then ultimately accepted an unconditional offer without an overage provision.

387. The JLs' pleaded case gained some support from Mr Laughton's report. In his report, Mr Laughton expressed the view that a reasonably skilled insolvency practitioner would have sought to obtain value for that contingent asset through negotiating an overage clause, an anti-embarrassment clause or a STPP sale. Mr Laughton fairly stated even in his own report that details of potential overage arrangements were matters on which he was not qualified to give an opinion.

388. In cross-examination Mr Laughton stated that he had never been involved in an administration where a decision to sell has resulted in a conditional sale that is subject to planning permission or an overage clause. In the following passage from his cross-examination Mr Laughton accepted that there are essentially three different ways to realise planning value: (a) by seeking unconditional bids which may contain an element of hope value in respect of planning amendment; (b) overage provisions; and (c) a sale which is conditional upon a particular planning consent being obtained:

> *"If you are looking for overage, then in the absence of overage, you may get some hope value on top of the basic market price. If you are going for a conditional sale there is less certainty because it's conditional on something outside your control. The ultimate realisation may, however, be higher, and those are the parts of the things you have to take into account and compare when looking at the different options."*

389. My Sykes was very sceptical about the use of overage or sales conditional on planning permission. He said this:

> *"I personally – I find overage and conditional sales very tricky. I don't like them and I am never convinced that they ultimately necessarily give you value".*

390. The JLs' own marketing expert did not provide strong support for either overage provisions or a STPP sale. In relation to the overage provisions, Mr Sharman said this:

> *"It is widely recognised across the industry that developers (purchasers) tend to avoid overages where possible, preferring to pay more upfront in order that the overage falls away"*

391. In relation to STPP contracts, Mr Sharman explained that they were less common in the London market for a number of reasons, including:

> *"STPP transactions are more complicated to document legally; the market tends to prefer unconditional sales with clawbacks/overages; agents tend not to push STPP transactions as their fees are deferred until permission is gained; many vendors lack the patience for STPP transactions; in a strong market, the pricing differential between conditional and unconditional pricing tends to compress meaning that vendors are more inclined to go with the certainty."*

392. Mr Sykes considered that there was a lot to be said for the simplicity of the unconditional offer:

> *"The offers are what the offers are. They are being brought to you by people who have looked at the site and decided what they want to offer you".*

393. In my judgement, in light of the expert evidence, including in particular that of their own sales and marketing expert, the JLs fell a long way short of proving that it was negligent of the FAs to seek an unconditional sale without an overage provision for the following reasons:

 (1) The consistent strategy adopted by the FAs on the advice of CBRE was that unconditional bids for the Site would be likely to take into account the hope value that alternative planning permission might be obtained and that this hope

value should be promoted by a marketing strategy which drew attention to the planning potential of the Site.

(2) The FAs were not advised by CBRE or DP9 (or anyone else) at any stage that it would be advantageous to seek an overage provision or to offer the Site for sale on a STPP basis. This did not change even after DP9's suggestion on 27 July 2011 that the FAs consider making an application for revised planning permission themselves.

(3) CBRE did advise that an anti-embarrassment clause (which was one of Mr Laughton's three suggestions) be included in the sales contract and that advice was followed and implemented by the FAs.

(4) Bidders were not precluded from making conditional offers and overage-based offers. When potential purchasers were informed of the deadline for first round bids, CBRE stated that the FAs were "seeking to conclude an unconditional sale, however if any conditions are proposed these should be clearly stated". Accordingly, it was made clear that the FAs (and their advisers) would consider conditional bids, if any were made on appropriate or potentially attractive terms.

(5) I accept the FAs' submission that where offers were made on the basis of an overage, they were given consideration on their merits, as is clear from the CBRE marketing reports submitted to the FAs. In particular:

(i) The overage terms offered by potential purchasers were not thought to be achievable by CBRE at the material time (e.g. Sellar's potential overage of £10 million if permission was granted for a scheme with 400,000 sq ft net area of private residential).

(ii) Mr Sharman conceded that the overage thresholds proposed by both Sellar and St. George (average residential sales of £2,200 per sq ft, index-linked and net of sales costs) were "ambitious" and that he "would not have expected them to give rise to an overage payment". The view taken at the time was that none offered sufficient upfront cash or adequate security for the balance to be of sufficient interest to the FAs to be worth pursuing.

(6) As the JLs' own sales and marketing expert stated, overages are not liked: "It is widely recognised across the industry that developers (purchasers) tend to avoid overages where possible, preferring to pay more upfront in order that the overage falls away".

(7) To the extent that there remained any disagreement between Mr Laughton and Mr Sykes on this point, I preferred Mr Sykes' evidence because of his greater experience. I accept his evidence that overages and STPP sales are regarded with scepticism, not least because it was consistent with Mr Sharman's evidence.

(8) Any overage provision would have given rise to a substantial reduction in the initial purchase price, with uncertainty as to the prospect of receiving any overage, and delay in that amount being received (if at all).

(9) I accept the FAs' submissions that a sale conditional upon planning permission being obtained would have led to unacceptable risk and uncertainty.

(10) Finally, I accept the FAs' submission that there would have been a significant difficulty in defining and/or agreeing the terms of any overage provision or conditional contract with a potential purchaser, in particular in respect of e.g. (a) the parameters of the planning permission which might be obtained, (b) the deadline for such permission to be obtained (particularly bearing in mind the interests of the creditors being balanced with the realistic timeframes for obtaining planning permission and/or completing the development), and/or (c) the additional payment due if such permission was obtained.

(viii) Was there a failure to ensure the Site was appropriately marketed?

394. The JLs' pleaded case on marketing was short. Paragraph 50 of the FAs' particulars of claim contained two allegations of negligence / breach of duty: (i) failure to supervise the marketing of the Site and (ii) failure to insist on a "wider marketing" of the Site.

The alleged inadequacies in the marketing of the Site

395. The marketing itself was said to be inadequate in a number of respects as set out in paragraphs 51 and 52 of the APOC. It was said that the marketing "comprised only": (i) the placement of an advertisement in the Estates Gazette; (ii) the use of a marketing website from 27 April 2011; (iii) the sending out of a brochure to 60 parties known to CBRE; (iv) CBRE did not market the Site to purchasers outside the UK or did so only to a limited extent; and (v) the UK marketing was limited.

396. The FAs complained in their defence that the JLs' case was "embarrassing for lack of particularity". The FAs denied the allegations in any event and pleaded the steps taken by CBRE to market the Site both in the UK and internationally were adequate. When the FAs sought under CPR Part 18 in July 2018 particulars of the steps which the JLs alleged ought to have been taken to market the Site but which were not, the answer they received was: "This is a matter for expert evidence". That was of course not an appropriate answer. The requested particulars ought to have been pleaded in the first place or at the very latest by way of voluntary further particulars when the relevant expert input had been obtained.

397. The JLs' response in their Reply was (with emphasis added): "Sufficient particulars as to the steps which should have been taken for the marketing of the Site have *already been pleaded in that* marketing was not undertaken outside the UK and targeted marketing was limited to 60 recipients being sent marketing brochures". Any reader of this response would in my judgment consider that the party had taken a conscious decision to confine itself to those two particulars.

398. The JLs had a final opportunity to plead some further particulars when they amended their particulars of claim in August 2019. They did so, but added only these further allegations:

(1) That the FAs failed to determine an appropriate strategy for the marketing and sale of the Site. No particulars were provided.

(2) The FAs wrongly advertised in documents used for marketing that the Company was in administration. This was added by way of amendment to paragraph 51 and in a new paragraph 52A.

(3) The FAs "failed adequately or at all to prepare the Site for market by publishing in the Administrators' Proposals that there was unlikely to be a

distribution to unsecured creditors and that accordingly the Site would not sell for more than the secured debt".

(4) The points set out in (2) and (3) above combined to indicate to the market that the FAs were conducting "a distressed sale" which "tainted the market and acted as a cap on realisations".

(5) The FAs had ignored advice from DP9 that potential purchasers from abroad with less experience of UK planning laws might have an inaccurate understanding of the prospects of obtaining a revised planning consent for the Site.

399. The allegation that the FAs ignored DP9's advice about purchasers from abroad was a thoroughly bad point. The document relied upon was not produced by DP9 but was instead produced by Mr Bradman. There was no evidence that it was ever received by CBRE or the FAs. In any event, it failed because, as the sales and marketing experts agreed, any property developer from abroad seriously considering purchasing the Site would have their own planning adviser on which they would be expected to rely. The JLs did not purse this point in closing. It should never have been pleaded.

400. The argument that the FAs were wrong in allowing CBRE to refer to the Company being in administration was, in my judgement, an equally bad point. It was not supported by either Mr Laughton or Mr Sharman. I reject it for the following reasons:

(1) The administration was a matter of public record. The FAs were obliged to publish a notice of their appointment in the Gazette and wherever else they saw fit (pursuant to Paragraph 46(2) of SchedB1 and Rule 2.27 of the Insolvency Rules 1986).

(2) That the Company had gone into administration had been in any event widely reported. Any proposed purchaser of the Site who had somehow missed the fact that the Site was being sold by administrators would have discovered it (at the latest) in the course of negotiation and purchase in any event.

(3) The FAs were obliged to ensure that every business document issued by or on behalf of the Company or the FAs, as well as all of the Company's websites,

stated (a) the name(s) of the administrator(s) and (b) that the affairs, business and property of the Company were being managed by the administrator(s).

(4) The FAs cannot be in breach of duty for saying something that is a matter of public record and which they were obliged to make clear on all business documents sent on behalf of the Company.

401. The allegation that the FAs "failed adequately or at all to prepare the Site for market by publishing in the Administrators' Proposals that there was unlikely to be a distribution to unsecured creditors" was, in my judgment, an unsustainable allegation for the following reasons:

(1) Any interested purchasers who wanted to know the level of secured debt could simply look in the publicly available Statement of Affairs (which also stated the directors' estimated value of the Site of £135 million) and the Administrators' Proposals.

(2) the FAs were obliged to record their true assessment.

(3) The submission misrepresents what the FAs said. They (i) left open the possibility of pursuing Objective 2, (ii) indicated that the true value of the Site would be determined on marketing, and (iii) expressly contemplated the possibilities of solvency being achieved or a return for unsecured creditors in the Administrators' Proposals.

(4) I accept Mr Gillington's evidence that sale of the Site was inevitably a distressed sale by virtue of the fact that the Company was in administration and that the sales and marketing strategy was no different for a distressed sale in any event.

(5) I also accept Mr Sykes' and Mr Gillington's evidence that the market would have been well aware that the Site was being sold as part of an insolvency process and it is unlikely that a technical point in drafting of the Administrators' Proposals would be of much consequence to them.

402. As to the pleaded inadequacies in the marketing of the Site, they were not supported by Mr Sharman. In his report, under the heading "marketing reach", Mr Sharman said:

> *"CBRE were (and still are) the largest global property advisory business. Their capacity to achieve market reach in the context of disposing of One Blackfriars would have been in line with market practice at the time"*

403. Having reviewed the documents produced by CBRE in the course of their marketing of the Site, including the brochure, the marketing updates to BDO, e-mails to potential bidders, lists of agents and intermediaries contacted, he concluded that CBRE's approach to potentially interested parties was "appropriately comprehensive". He and Mr Gillington agreed that the marketing exercise was sufficiently wide.

404. It was clear from the disclosure produced by the FAs that the marketing of the Site extended far beyond that pleaded by the JLs. The Site was marketed globally both directly and indirectly through buyers' agents. The pleaded allegations of inadequate marketing and the allegation that the FAs should have "insisted on wider marketing" should all have been withdrawn as soon as it became clear, as it must have done well before trial, that the contemporaneous documents disclosed by the FAs demonstrated that there had been a wide international marketing effort and that the JLs' expert did not support their case.

405. The JLs sought in their closing submissions, quite improperly in my judgement, to advance a whole raft of new unpleaded allegations, including that there had been an absence of "pro-active", "meaningful", "soft" marketing, no "pre-marketing engagement" with "targeted bidders" and that the international marketing had not been "pro-active" enough and ought to have included "roadshows". Having been asked to provide further particulars of their case previously and having failed to do so, it was not in my judgement open to the JLs to advance these points.

No appropriate strategy

406. That leaves the pleaded allegations that the FAs failed to "determine an appropriate strategy for the marketing and sale of the Site" and "failed to supervise the marketing of the Site". Both allegations are pleaded without any proper particulars.

407. There were hints in both Mr Sharman's report and in the closing submissions of a failure to supervise case. It was said that there had not been a sufficiently robust client/adviser relationship between the FAs and CBRE, that the FAs did not ask

CBRE to report to them as sale and marketing agents and that the FAs failed to "self-inform". However, no such allegation had been pleaded by the JLs.

408. In relation to strategy, it was said in closing submissions that the FAs had failed to ensure that there was a detailed "planning underwrite". This too was not pleaded.

409. In my judgement, given that none of these points I have just referred to were pleaded, it was not fair to the FAs to allow them to be advanced in submissions. Mr Fenwick put down a marker at the opening of the trial that, insofar as Mr Davenport was seeking to go beyond his pleaded case, he objected. Mr Fenwick was fully entitled to take that stance, in particular in relation to the sale and marketing part of this case, given the unanswered request for particulars. I hold therefore that it was not open to the JLs to pursue any of unpleaded allegations of breach of duty relating to marketing.

410. In respect of the pleaded allegations of failure to determine a strategy and failure to supervise, I reject them for the following reasons.

411. There was in my judgment no doubt that a marketing strategy was discussed and agreed by the FAs and CBRE. It was recorded in a number of contemporaneous documents. To take just one example, the CBRE marketing report of 16 August 2011 states, and I accept, accurately:

> *"Following [CBRE's] confirmed appointment by the Administrators in January this year, a marketing strategy was put in place to achieve the following objectives:*
>
> - *Market the property to as wide an audience as possible*
> - *Provide potential purchasers with sufficient due diligence to enable them to be on an unconditional basis*
> - *Sell at the highest possible price"*

412. In light of the foregoing, it was for the JLs to show that either the FAs were at fault for engaging CBRE to advise on a marketing strategy or that the strategy itself as described was so deficient that no reasonable insolvency practitioner could have reasonably pursued it even though it was recommended by their chosen and apparently competent adviser.

413. The starting point is the agreed evidence of the insolvency practitioner experts. Their joint memo in respect of marketing states:

> *"The insolvency experts agree that a reasonably skilled insolvency practitioner would instruct professional real estate agents with appropriate experience, resources and expertise to market and sell the Site, if that were an appropriate strategy*
>
> *The insolvency experts agree that CBRE was such a firm*
>
> *The insolvency experts agree that any strategy for marketing and sale of the site would focus on an administrator's responsibility to take reasonable steps to obtain the best price that the circumstances, as the administrator reasonably perceives them to be, permit in the interests of the creditors of the Company as a whole"*

414. Mr Sharman accepted that it was reasonable for the FAs to appoint CBRE as sole agent to market and sell the Site. He also agreed that the fee structure agreed by the FAs and CBRE motivated CBRE to achieve the highest sale price possible.

415. Mr Sharman provided no support for the allegations pleaded in paragraph 40C that it should have been clear to the FAs that CBRE's estimate was inappropriate or inadequate. I reject them.

416. I have already held that the FAs were entitled to sell the Site on an unconditional sale basis without an overage provision. I find that there was a reasonable marketing strategy adopted by the FAs on the advice of CBRE and engaged with by giving instructions for the following reasons:

    (1) The contemporaneous correspondence demonstrates that the FAs instructed CBRE to market the Site globally, to invite bids and then to advise on those bids, which is what CBRE did (principally in the form of regular marketing reports). The FAs' instruction that global marketing was required was recorded by CBRE internally on 16 November 2010: "Shay Bannon made it clear that this would have to be a fully global advertising…".

    (2) CBRE had given consideration to a potential strategy from pre-appointment as described in the CBRE Strategy Report and discussed at the FAs' meeting with CBRE on 27 September 2010.

    (3) I accept Mr Gillington's evidence that "the CBRE estimates and associated strategic review documents were sufficient to inform the marketing strategy".

(4) Within a week of the marketing website going live, 107 parties had logged in and downloaded marketing. Before the first bid deadline over 1,400 documents were downloaded from the data room.

(5) Potential planning uplift was considered, as is demonstrated by various steps which were specifically directed at capturing the planning potential, such as: (a) implementing the Permitted Scheme; (b) engaging the architects to provide their proposed reconfigurations; (c) engaging with the Council (d) allowing bidders (who had their own professional advice and were also engaging with the Council) access to DP9; and (e) including DP9's letter of 18 July 2011 in the data room.

(6) Mr Baggley accurately recorded on 12 November 2010 that "given the international reach of the site, a comprehensive marketing strategy is being formulated to ensure global markets (the Middle East, Asia etc) are fully explored".

(7) CBRE ensured that the marketing of the Site was suitable for a campaign with global reach. In the brief to brochure designers it was noted: "The brochure will have a global readership, as we anticipate getting interest in the opportunity from Far East, Mid East and Russia."

417. I accept the FAs' submission that they were entitled to rely on the advice of CBRE as to how to market the Site and CBRE appeared entirely competent to do so. I accept in this context the following evidence from Mr Bannon, which is consistent with the contemporaneous evidence of his communications with CBRE:

> *"I was at all times during the course of the marketing process, satisfied that CBRE were conducting the process properly with a view to achieving a comprehensive exposure of the Site to the market ... While the Joint Liquidators have attempted to paint CBRE's marketing efforts as inadequate, I was at the time encouraged by the manner in which interest in the Site was generated from both well-known, credible bidders with a low execution risk (for example St. George) and from other bidders both in the UK and abroad. It was certainly not apparent to me that there were further steps that CBRE should have taken – and that remains my view. Furthermore, I am not aware of any additional potential purchasers who would have bid for the Site had it been marketed in some alternative manner".*

(ix) Was there a failure to conduct an appropriate bidding process?

418. The basic chronology of the bid process was not in issue. It was as follows:

- 9 April 2011 – marketing commenced by CBRE
- 25 May 2011 – bids were sought with confirmation of the source of their funds
- 15 June 2011 – deadline for first round of bids
- 16 June 2011 – process of bid assessment by CBRE
- 10 – 24 July 2011 – interviews by FA and CBRE
- 26 July 2011 – second round of bids
- 1 September 2011 – Essential Land given exclusivity
- 30 September 2011 – Essential Land's exclusivity terminated
- 19 October 2011 – contracts exchanged with St. George.

419. Although there are five sub-issues, which I address below, the parties have agreed that Issue 31 can be expressed in the question: "Did the Fas fail to ensure an appropriate bidding process?" Taking the issue at the level of generality, the answer is, in my judgment, straightforward on the evidence served by both parties.

420. Having reviewed the bidding process, Mr Sharman did not identify any fault at all in the bidding process. His evidence, which I accept, was as follows:

> *"The bidding process was in my opinion open and fair in so far as affording any market participant with the resources to conclude a £50 m+ unconditional sale at the time an opportunity to make a proposal to acquire the Site. Having regard to my understanding of CBRE's brief to achieve an unconditional disposal of the Site in as timely manner as possible, I am therefore of the opinion that the marketing timescale and bidding process was appropriate to that end"*
>
> *"... I consider the speed at which the marketing, call for bids, interview of parties, selection of Essential Land and subsequent selection of St. George [took place] was appropriate for the market at the time if the objective was to achieve an unconditional sale [in] as timely manner as possible".*

421. Mr Gillington also found no fault with the bidding process designed and implemented by CBRE.

422. The answer to Issue 31 is therefore 'No'. The FAs reasonably followed the advice of CBRE as to how the bidding process ought to be structured and then, having done so,

the outcome was, as the marketing experts agreed, a fair and appropriate bidding process.

423. Nevertheless, the JLs pursued a number of detailed complaints, expressed in the form of sub-issues.

Sub-issue (1): alleged failure to obtain improved offers

424. The allegation as pleaded is that the FAs failed to obtain improved offers from the bidders “when all of their offers fell below the market price”. This is, in my judgment, completely unsustainable. It was maintained but not explained in closing submission. In their Response to the FAs’ Part 18 Request, the JLs pleaded that no bid below £120 million ought to have been entertained in the first round of bids. There was no support for this allegation in either Mr Sharman’s or Mr Gillington’s report.

425. For it to make any sense as an allegation of a fault in the bidding process, it would have to be re-cast as an allegation that the FAs ought to have set a price in advance (presumably based on a formal valuation or average of a number of valuations) below which no bid would be accepted. However, that is not what was pleaded nor was it suggested by either Mr Sharman or Mr Gillington.

426. What is pleaded makes no sense because it was impossible for the FAs (or CBRE) to know what the “market value” of the Site was on 15 June 2011 when the first round of bids closed. The aim of the bidding process was to determine what the market would pay. All that the FAs could reasonably have ascertained at the end of the first round of bids was that there was a wide bid range between Stanhope at the lowest (£43 million) and Sellar (£110 million). I therefore reject the submission, which is unsupported by any expert evidence, that the FAs ought to have rejected all of the first round bids as too low.

Sub-issue (3): Proceeding with the process after final offers received

427. It is convenient to deal with sub-issue (3) here because it is a variation on sub-issue (1) and fails for the same reason. The pleaded allegation, which was maintained in closing submissions, was that on 26 July 2011 when the final round of bids had been received, the FAs ought to have abandoned the sale process because it ought to have been apparent that (a) “all of those offers fell below the market value of the Site” and

(b) the marketing process had "failed to engender sufficient interest from appropriate purchasers".

428. The allegation that the bidding process ought to have been abandoned at the end of the second round was not supported by the expert evidence. Insofar as it relies on an allegation that the FAs ought to have known the market value of the Site, I reject it for the same reasons as set out in relation to sub-issue (1).

429. Furthermore, I reject the argument, whether it is based on premise (a) or (b), that the allegation gives rise to a breach of duty by the FAs. The FAs were entitled in my judgment to rely on the advice received from CBRE as to the bids.

430. CBRE's advice was <u>not</u> that all the offers were so low that they all ought to be rejected or that the remaining (three) bidders were inappropriate. On the contrary, CBRE's advice as set out in their report to the FAs dated 26 July 2011 was that all three remaining bidders ought to be taken seriously as potential purchasers. CBRE had doubts about the Sellar bid because the source of funding had not been revealed. They recommended that Essential Land be given preferred bidder status but that the bid from St. George was a "strong candidate". CBRE advised that Essential Land be given a period of exclusivity to see if a sale could be concluded on satisfactory terms. The FAs were entitled in my judgment to follow that advice.

431. I also reject the submission that the FAs ought to have concluded that the marketing process had failed to generate sufficient interest because I accept the following evidence from Mr Gillington as to how matters reasonably appeared to the FAs at the end of July 2011 following the end of the second round of bidding, by which time the bid range had narrowed to £12.5 million and revealed the market value of the Site (emphasis added):

> *"There is a substantially smaller range than was initially the case after the first round of bids ... **This smaller range showed that the outlying bids had been excluded following a successful selection process of interviews and due diligence and that there were still three seemingly credible remaining bidders who represented both equity only and debt backed purchasers**."*
>
> *"Therefore, the fact that the Site had been widely exposed to the market ... **the three remaining bids following this process were all within a range of £12.5 m and that they were from a range of seemingly credible bidders, showed that***

> ***this was the level the market was willing to pay for the Site and that there was sufficient interest from appropriate purchasers**."*

432. I also accept Mr Gillington's evidence that abandoning the process at this point and going back to the market was a step which was "unlikely to have uncovered other interested parties who had not been aware of the opportunity already, given the comprehensive nature of the marketing process."

Sub-issue (2): downward re-education of the market

433. The heart of this allegation is that the FAs or CBRE on their behalf suggested to potential purchasers that offers at a level necessary to meet the Syndicate debt and/or below £100 million would be sufficient to stand a chance of being accepted. This process was described by way of an amendment made in August 2019 as a process of "re-educating the market downwards to below £100 million". Six examples were said to evidence the FAs' or CBRE's inappropriate behaviour.

434. Mr Sharman's report did not contain much support for this allegation. He did not say that any of the factual allegations, if proved, would fall below the standard to be expected of a reasonably competent sales and marketing professional. His report did not comment on the alleged statements separately. He addressed the topic only in very general terms.

435. On the one hand, he seemed to acknowledge that it was accepted that it is the role of the agent to provide "an indication of pricing consistent with their clients objectives". He added this:

> *"There is a value arc to every site and the property market loves numbers. Even where there is no guide price agents in my experience tend to adopt language along the lines of "There is no guide price on this one but…"*

436. This appeared to me to come close to an acceptance that it was a reality of life in the property market that individual agents may express their own unofficial views on likely price ranges but it would be clear (a) that this was not a guide price and (b) that any decision on level of bid would be for the bidder to take based on a whole range of factors.

437. Mr Sharman then added in respect of the allegations pleaded in paragraph 54(2) of the APOC:

> *"Any reference to market pricing by CBRE would quickly have formed part of market chatter. I have also commented above as to the risk that banks were seen to be driving a forced sale process. In my opinion the alleged statements made by CBRE, if true, would have been consistent with constraints on pricing arising from a swift unconditional sale without consideration of different structures and planning uplift value. They would have also have been consistent with purchasers' knowledge of the level of the secured debt".*

438. Before turning to the six alleged examples of 'guiding down', it is in my judgement necessary to deal with the issue head on as to whether there was any concerted plan or decision or understanding between the FAs and CBRE that such guiding down was to take place. I find that there was not. There was no evidence of any positive decision by the FAs to guide the market down to the level of the Syndicate debt or to a level below £100 million. It seems to me that this is an inherently unlikely thing to have occurred, not least because the FAs had no interest in doing so. The agreed strategy was to sell the Site for the highest price possible. I accept Mr Bannon's evidence in his witness statement:

> *"I should add that … neither SMR nor I took any steps that encouraged Sellar or any other bidder, to reduce the level of their bids for the Site. We had no reason whatsoever to take such a step. We, and CBRE, had every reason to do the exact opposite, and maximise bids."*

439. The same applies to CBRE. The experts agree that the fee structure agreed for CBRE incentivised them to aim for the highest possible price. That is what the agreed strategy was. The bidding process was designed to maximise the price and the marketing reports sent by CBRE do not suggest that CBRE was looking to do anything other than to sell for the highest price to a credible bidder. Indeed, the largest fee % was only triggered for a price above the Syndicate's debt. The FAs' terms for instructing CBRE therefore positively encouraged them to obtain a price above the secured debt level. The allegation that CBRE would have deliberately steered bids down to reduce their own fee income struck me as inherently highly unlikely.

440. The evidence of the evolution of bids suggested the opposite in any event. CBRE were successful in talking bids up, not down. CBRE successfully caused existing

offers to be increased. For example, Downing's bid went up to £64.5 million from £54.75 million, and Mrs Shirinova's offer went up to £63 million from £51 million.

The six allegations of educating down

441. The first allegation is that "someone at CBRE" indicated to ZLY (a potential purchaser from China) on an unidentified date that "they do not believe that the Site will sell for more than the bank debt". This was raised by Mr Frost with Ms Rayment in January 2011, who in turn raised it with Mr Bannon. In his evidence, Mr Frost said that he recalled someone (he believes Mr Yukang Li of ZLY) telling him that the FAs had said "they were looking for "less than £100 million".

442. I am not persuaded that this remark was made by someone at CBRE. The evidence is vague in the extreme. There is no evidence of who at CBRE is supposed to have made this statement, to whom at ZLY it was made, when it was said or in what context. There is also no evidence that ZLY passed it on to anyone else. It may have been a negotiation tactic by ZLY, who had been in discussions with Mr Frost in late 2010. If something like it was said, it seems to me it was likely to have been nothing more than an informal remark or private expression of opinion. I accept the FAs' submission that the FAs did not authorise or otherwise acquiesce in such a statement to be made. In any event, if the remark was made it was made at least three months before the marketing of the Site was launched and did not impact on ZLY as they did not make any offer in any event. For all those reasons, the JLs' first example, in my judgment, does not provide evidence of a decision or practice by CBRE or the FAs to educate bids down.

443. The second allegation is based on CBRE's email to the FAs of 17 June 2011. In this email Mr Chowdhury said: "One reason why a number of parties have only made expressions of interest, rather than actual offers, has been due to illicit information and "gossip" in the market place, suggesting that if bids weren't in excess of £100m, then they wouldn't be in the running. We will be working hard to re-educate those parties, thus making sure that their expression of interest turns into a bona fide offer".

444. To seek to use this email as evidence in support of an allegation that CBRE was creating market chatter which was depressing bid values was in my judgment completely unjustified. First of all, if anything it undermines the JLs' case that CBRE

or the FAs had created market chatter to the effect that bids of around £63 million would be likely to succeed. What Mr Choudhury is self-evidently feeding back to the FAs is that the market chatter is to the opposite effect, i.e. that only bids in excess of £100 million will be acceptable. Secondly, I accept Mr Gillington's evidence that in the circumstances described in the email it was entirely appropriate for CBRE to correct the misapprehension that only bids in excess of £100 million were acceptable in an attempt to elicit bids from parties who had expressed interest but had not yet bid.

445. I therefore accept the FAs' submission that the "re-education work" being referred to in this email was far from depressing bids, but rather would (a) encourage bids from those who had not yet bid and (b) help to create the necessary competitive tension between interested parties to achieve the highest possible properly funded bid.

446. The third allegation arises from Mr Beetham's letter of 30 June 2011 in which he expressed concern that CBRE had allegedly quoted a "guide price". Mr Beetham's evidence was that he recalled being told by someone at Knight Frank that CBRE "was touting it around the market that the Site could be bought for £70 million".

447. Whenever purchasers enquired whether there was a guide price, they were told there was not. There are a number of examples of internal CBRE emails where the issue of a guide price is raised and what is said is that there is not one. In my judgement, given the date on which this allegation is made, it is likely that the original source has been confused and that what CBRE said was confined to two bidders and to the issue that if they wished to get into the next round, their bids had to be above £70 million. The point is discussed in a letter from Mr Barnett of Dentons to Mr Bannon on 6 July 2011. The letter records Mr Bannon explaining that:

> *"Several major players had put in bids for the Site of around £50m or £60m. Only two had been told that, if they wanted to get into the next bidding round, they had to increase their bid to in excess of £70m".*

The letter goes on to record that it was the FAs' intention to keep some major players in the process to ensure that it was competitive and that there were some executable bids at the end of the day. The point was returned to at a meeting between Mr Bannon and Mr Frost on 17 August 2011. The note of the meeting records Mr Bannon as saying "no steering of bids towards £70m. Told to be in excess of £70m".

448. I do not therefore accept the Knight Frank guide price allegation as supporting the JLs' re-education case.

449. The fourth allegation is based on an alleged statement by Mr Bannon to Mr Beetham that "in order to get some of the credible parties which had not yet indicated the amount to state the amount they were prepared to pay, CBRE was indicating a target figure of £70m". I have already accepted that the more accurate account of this conversation between Mr Bannon and Mr Beetham is contained in the letter sent by Mr Barnett and Mr Bannon. It does not support the JLs' re-education case.

450. The fifth allegation is that CBRE, with the approval of the FAs, informed Tony Pidgley / St. George that, to be included in the second round of bids, they need only bid something in excess of £70 million. The allegation is factually undisputed but it is not a breach of duty. All that St. George were told is that if they wanted to make it into the second round they had to bid in excess of £70 million. It does not begin to support the JLs' re-education case that bidders were told that they only had to bid £63 million to succeed. It is implicit that further bidding would take place under competitive tension, driving the price up further.

451. The sixth allegation is that "CBRE spoke to Mr Irvine Sellar, who intended to make a second-round bid of over £100m, telling him that Sellar need not bid that high as the Site would sell for less". I am not persuaded that this happened for the following reasons:

    (1) The JLs adduced no evidence to support it. It is not mentioned in the witness statements of Mr Hugh Frost or Mr Beetham. The JLs were unable to point to any documentary evidence to support it.

    (2) It is inconsistent with CBRE's marketing report dated 22 July 2011 which notes the lack of explanation from Sellar for the reduction in its offer.

    (3) It is inherently unlikely that CBRE would have made this statement, in circumstances where CBRE was incentivised to obtain the highest possible sale price. If the Site had sold for £100 million as opposed to its actual sale price of £77.4 million, then CBRE would have been entitled to earn an additional agency fee of £678,000 (i.e. 3% of £22.6 million).

452. The six allegations relied upon as evidence of a re-education policy to depress the value of bids in my judgment came nowhere near to supporting the pleaded allegation.

Surrender of discretion / undue haste

453. Finally, the JLs allege that the FAs entered into a contract of sale with St. George "with undue haste" in a rising market and "notwithstanding that higher offers had previously been tabled". In support of this allegation, the JLs relied on a string of emails between 30 September 2011 (when the exclusivity period for Essential Land expired) and the FAs' letter dated 11 October 2011 in which the FAs formally recommended the offer from St. George.

454. The JLs' allegation that the FAs acted improperly was not supported by Mr Sharman's evidence or Mr Gillington. Mr Gillington's view was that when Essential Land pulled out "St. George were the only credible party remaining" and that it was reasonable to approach St. George. That was also CBRE's view at the time.

455. In short I accept Mr Gillington's evidence and find that there is nothing at all in the JLs' allegation that the FAs either surrendered their discretion or acted with undue haste for the following reasons:

(1) The FAs did not rush straight back to St. George. As is set out in CBRE's report dated 10 October 2011, CBRE approached two other shortlisted parties to see if they could be persuaded to re-enter the bidding process and engaged with another party (Hamilton) to encourage them to bid.

(2) CBRE held meetings with Tony Pidgley on 3 and 7 October 2011 at which potential terms were discussed. There was nothing to suggest to the FAs that there was anything out of the ordinary.

(3) At the meeting on 7 October 2011 Mr Bannon persuaded Mr Pidgley to increase St. George's offer by £2.5 million.

(4) Crucially and appropriately, CBRE took time to consider all the available options and advised the FAs as to the pros and cons of each option in a report dated 10 October 2011. CBRE's recommendation at the end of that report was that the FAs accept St. George's revised offer.

(5) The FAs accepted that advice and had no reason to doubt that it was reasonable.

(6) Whilst CBRE was conducting negotiations with St. George, Formby were pursuing separate negotiations with St. George which led to a side agreement between them.

(7) The allegation that the FAs failed to pay due regard to Formby's interests is contrary to the clear facts that Formby negotiated with St. George and had the benefit of legal advice from Dentons.

(8) It was in my judgment entirely appropriate for Mr Bannon to have detailed discussions with both RBS, on behalf of the Syndicate, and Formby (as he did). It was entirely to be expected that the FAs would want to gain the support of all the secured creditors to the proposed sale. Mr Bannon needed them to agree to release their charges over the Site.

(9) All the secured creditors (i.e. the Syndicate, RBS and Formby) formally consented to the sale on the terms agreed.

(10) Mr Bannon acted appropriately and in accordance with his promise to Mirax/Dryden by giving them notice if the FAs were about to enter into a sale contract. He kept Mr Frost and Mr Beetham informed of developments towards the exchange of contracts. Neither complained of undue haste.

(x) <u>Sale at an undervalue</u>

456. It follows from my findings of law and fact above in relation to the marketing and sale of the Site that the JLs' case on sale at an undervalue fails. I have found that the FAs took reasonable steps at every stage in the sale and marketing process to ensure that the Site was sold for the highest price reasonably obtainable in the circumstances as they appeared to be. There was therefore no breach of duty capable of supporting the claim.

457. Having concluded that the Site was appropriately marketed and the bidding process properly conducted and having accepted Mr Gillington's evidence as to what it is possible to infer about the market from the spread of bids in the first and second rounds, it follows that I also find that the price at which the Site was sold was its

market value. This follows because the Site, on the facts as I have found them, was sold at a price that a willing seller (and all charge holders) and a willing buyer had agreed following an open and transparent international marketing process and a properly conducted sale process – see Banque Bruxelles v Eagle Star [1995] QB 375.

458. I accept the FA's submission based on Michael v Michael [2004] EWCA Civ 282 that where a claimant asserts that a property has been sold at an undervalue it must establish that there has been a failure in the sale process before the court will consider hypothetical expert evidence as to value. I have found that the Site was fully exposed to the market both in the UK and internationally and the bid process was conducting properly.

459. It follows that it is not necessary for me to examine in detail the evidence of Mr Clarke who valued the Site (in October 2011) at £120 million and Mr Fourt who valued the Site on the same date at £70 million. However, I preferred the evidence and approach of Mr Fourt to that of Mr Clarke for the following reasons:

(1) Mr Clarke's valuations of each of the schemes in issue was based on "pricing exercise" which he claimed to have personally carried out. Mr Clarke's supporting evidence for this exercise in each case was a series of tables in which he set out his results.

(2) When it was pointed out in cross-examination that his table for the St George pricing exercise showed figures which were almost all exactly 92.5% of the subsequent known sale prices of the residential units he claimed that this was a coincidence and showed how well he had carried out the exercise.

(3) However, on the second day of his cross-examination Mr Clarke accepted that he had indeed carried out a mathematical exercise by taking the known sale prices and discounting them. However, he claimed that this had been a mistake, and that his secretary had hidden the wrong column of a spreadsheet.

(4) Mr Clarke then produced over the following days (a) the alleged spreadsheet he had referred to in evidence as his workbook (b) a witness statement explaining further what had happened both before and after he had produced his report and during the course of the proceedings, and (c) some further documentary material.

(5) Mr Clarke's workbook showed that "pricing exercise" column contained a formula the effect of which was to calculate 92.5% of the sale prices for certain cells. Mr Clarke nevertheless maintained that he had changed the individual apartment valuations to ensure that the apartment categories each totalled 92.5% of the sale prices for those categories because this was "*neater*".

460. I accept the FAs' submission that Mr Clarke's evidence as to how he had carried out his pricing exercise was, at best, confused, contradictory and unreliable. The JLs response to Mr Clarke's evidence was to disclaim any reliance on if in respect of the valuation of the St George Scheme. However, the JLs sought to continue to rely on Mr Clarke's valuation of the Permitted Scheme as at October 2011.

461. I do not accept that the JLs could ring fence Mr Clarke's evidence in this way for the following reasons:

(1) Mr Clarke's underlying methodology and approach was the same for both the Permitted Scheme and the St George Scheme;

(2) He had not produced supporting material to justify either exercise beyond the tables setting out his results;

(3) Mr Clarke's initial pricing exercise for St George arrived at figures some £90 million higher than those based on 92.5% of the St George's actual sales over the next 6 years, but he nevertheless did not revisit or reduce his December 2019 figures for the Permitted Scheme.

462. Furthermore, even if it were possible to ignore the unreliability of Mr Clarke's approach in relation to the St George Scheme, he was in my judgement, unable to give a satisfactory explanation for a whole series of major changes to the input values for his valuation of the Permitted Scheme compared to his earlier valuation. The combined effect of his changes was to produce the same end result, i.e. a value of £120 million. This was, as the FAs submitted, simply not credible.

463. Mr Fourt's valuation evidence in both in his reports and in cross-examination was by contrast measured, detailed, precise and transparent and I had no hesitation in preferring to the evidence of Mr Clarke.

464. I fully appreciate that the value subsequently attributed to the Site by St. George in its own accounts following its successful application for planning permission has caused Mr Frost and Mr Beetham to feel that St. George got a bargain. However, I would make two observations. First, there is no better evidence of its market value on the day of sale than the price that was achieved following what I have found to be a properly conducted free and open marketing and sale process. Secondly, the fact Mr Bradman, Mr Frost and Mr Beetham could not find an investor who was willing to step in and either outbid St. George or take the Company out of administration, notwithstanding their real-time knowledge of the level of incoming bids and all of their efforts, suggests that if St. George did get a bargain that was because they could see something which no-one else with the resources necessary to develop the Site could.

I. <u>SUMMARY OF CONCLUSIONS</u>

465. In summary, my conclusions are:

(1) The FAs fully complied with their statutory and other duties throughout the course of the administration.

(2) The FAs had due regard to the interests of all the creditors and the Company, in the light of (a) the circumstances as they reasonably perceived them to be and (b) the advice which they received from, amongst others, CBRE and DP9.

(3) There was no conflict of interest which prevented the FAs from appointing CBRE to advise them.

(4) The FAs had no reason to doubt the competence of CBRE or DP9 at any stage.

(5) The FAs gave proper and genuine consideration to the statutory objectives of the administration and gathered sufficient information to determine which statutory objective to pursue.

(6) Whilst there was an agreement at the outset that the administration could be considered “light touch” and was budgeted for on this basis, that did not involve the FAs surrendering any power or discretion to conduct the administration in accordance with their duties as administrators.

(7) At no stage in the administration did the FAs either (a) surrender their discretion to the Syndicate and/or RBS or (b) treat those creditors' interests as paramount. Nor did they at any stage disregard or fail to give adequate weight to the interests of Formby or the unsecured creditors.

(8) The Statutory Proposals accurately identified Objective 3 as the objective the FAs were pursuing. This reflected an agreement reached by the FAs following a discussion between them as to where the value of the Site was likely to break.

(9) The FAs reasonably concluded that Objective 1 was unlikely to be achievable but did not close their minds to the possibility that an investor might be found to refinance the project.

(10) The FAs reasonably left it to the joint venture partners and the directors of the Company to seek out potential investors (which they did albeit unsuccessfully).

(11) The FAs appropriately took, and gave proper consideration to, the advice they received on planning, marketing and sales matters from CBRE and DP9.

(12) It was reasonable for the FAs to decide not to pursue an amended planning permission for a particular reconfiguration of the Site themselves but instead to leave it to interested purchasers to decide with the benefit of their own expert advisors (a) what extra value might be generated from an amendment to the planning consent given their intended reconfiguration and (b) what the chances were of obtaining the necessary permission.

(13) Having consulted CBRE and DP9 and received their advice, the FAs decided that the appropriate strategy to pursue was to implement the Permitted Scheme (albeit with modified conditions), explore with expert architectural assistance potential reconfigurations for the Site, obtain some reassurance from the Council in the form of comfort letters about the prospects of obtaining an amended planning consent and to use the letters and configuration ideas to assist with the marketing of the Site.

(14) The agreed strategy was not akin to, nor did it in effect amount to, a plan to sell the Site as quickly as possible for cash. It was envisaged that the implementation process and the application to amend conditions would mean the Site could not be marketed and sold until early 2011. It was recognised that this would allow other stakeholders to pursue alternative options to potentially take the Company out of Administration.

(15) The strategy adopted by the FAs was discussed openly with Mr Frost and Mr Beetham in October and November 2010. It was not opposed by them or any of the other stakeholders.

(16) The FAs were open about the fact that the information on value they had been given by CBRE did not accord with the value the directors of the Company believed the Site had in light of valuations held by them.

(17) It was reasonable in all the circumstances for the FAs to decide not to obtain an independent valuation of the Site but instead to allow a properly conducted marketing and bidding process to determine the Site's value.

(18) The Site was appropriately marketed. Neither the FAs nor CBRE educated the market down either below £100 million or to the level of the Company's debt to the Syndicate. The FAs reasonably decided to give preference to an unconditional sale of the Site without overage provisions but the FAs did not preclude bidders from making conditional offers.

(19) The bidding process was appropriately conducted. There was no reason for the FAs to abandon it at any stage.

(20) The FAs took reasonable steps to obtain the best reasonably obtainable price for the Site. The price obtained for the Site was its then market price.

J. DISPOSAL

466. As a result of my conclusions of fact and law it has not been necessary for me to decide all the issues in the agreed list of issues. The JLs have failed to persuade me

that the FAs acted in breach of any of their duties. It was therefore not necessary for me to consider any of the issues relating to loss of chance, damages or causation.

467. The JLs' claim is dismissed in its entirety.