Neutral Citation Number: [2018] EWHC 2125 (Ch)

Case No: HC-2013-000401

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN ENGLAND AND WALES
BUSINESS LIST (Ch.D)

Trial: Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Judgment: a Manchester CJC, 1 Bridge Street West
Manchester M60 9 DJ

Date: 10/08/2018

Before :

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) AMANDA STEPHANIE CLUTTERBUCK
(2) IAN SCRANTON PATON **Claimants**
- and -
WILLIAM CLEGHORN
(Sued as Judicial factor to the Estate of Elliot Nichol Deceased) **Defendant**

- -
- -

Mr Angus Gloag (instructed under the Bar Direct Access Scheme) for the **Claimants**
Mr Jonathan Seitler QC and Ms Emer Murphy (instructed by **Squire Patton Boggs (UK) LLP**) for the **Defendant**

Hearing dates: 13-15, 18-22, 25-26 June and 2 July 2018 (Rolls Building) and 10 August 2018 (Manchester CJC)

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Judgment Approved

HH Judge Pelling QC:

Introduction

1. This is the trial of the claimants' claim for damages for alleged fraudulent alternatively negligent misrepresentation which it is alleged induced them to enter into a joint venture agreement with Westbrooke Properties Limited ("WPL") concerning a property development scheme ("Scheme") that I describe in more detail in paragraph 3 below, money allegedly due under the joint venture agreement and for damages for alleged breaches of the joint venture agreement.

Background

WPL

2. WPL is a company that was incorporated in accordance with the laws of the Isle of Man on 13 March 2006 on the instructions of Mr Elliot Nichol Deceased ("Deceased") solely for the purpose of carrying the Scheme into effect. The Deceased was WPL's ultimate beneficial owner until his death in late December 2009. It is now in insolvent liquidation. Its *de jure* directors were professional directors employed by Charterhouse Lombard Limited ("CLL"), an Isle of Man based corporate services provider. The claim is brought against the estate of the Deceased either on the basis that the Deceased was liable personally in respect of the alleged acts and omissions relied on by the claimants or under a guarantee contained in the joint venture agreement.

The Scheme

3. The Scheme concerned the redevelopment of a mid-terrace property at 9 Cliveden Place, Belgravia, London SW1W 5LA ("Property"). The Property is located in what is referred to by the claimants as "*… an ultra prime location …*" near Sloane Square. Prior to its redevelopment, it had five floors including a basement and was divided into four self-contained flats held on long leases granted by the head lessee of the Property, the Grosvenor Estate. It was in a dilapidated condition and suffered from a serious Japanese Knotweed infestation in its garden. The Scheme involved acquiring the leasehold flats at the Property followed by the freehold then redeveloping the Property into a single house in the expectation that it could then be sold as a single dwelling at a sum that substantially exceeded the price paid for the flats and freehold and the costs of redevelopment. Before the Scheme could proceed the developer had to acquire the flats and the freehold, obtain planning permission and listed building consent for the development proposed from the Local Planning Authority, Westminster City Council, and a redevelopment licence from the Grosvenor Estate.

4. On 17 March 2005, the claimants alternatively the second claimant ("IP") (it does not matter which) obtained planning permission to excavate and build a garden sub-basement (in part necessary in order to eradicate the Japanese Knotweed infestation) and extend the property at lower ground floor/basement level ("the March 2005 Planning Permission"). On 18 June 2009, planning permission to convert the Property into a single dwelling was also obtained and in November 2009, the Grosvenor Estate granted permission for the work encapsulated within the March 2005 and the June 2009 Planning Permissions to be carried out. In essence this was the development that was carried into effect.

5. The four flats at the Property were Flat 1, the long leasehold of which was registered in the name of IP, Flat 2, the long leasehold of which was registered in the name of the first claimant ("AC") and Flats 3 and 4, the long leaseholds of which were acquired by WPL on 22 March 2006 and registered in its name. Each lease was for 99 years commencing in December 2001. The claimants had acquired their flats much earlier than WPL with a view to acquiring the remaining flats and the freehold of the

Property either themselves or with a joint venture partner and then redeveloping the Property. The claimants introduced the Deceased to the Property and WPL acquired the two remaining flats for that purpose.

6. The freehold of the Property was purchased by WPL from the Grosvenor Estate and the Trustees of the Will of the Most Noble the Second Duke of Westminster Deceased in early October 2006 (following its acquisition of the claimants' flats as described further below) using the powers conferred on long leaseholders by the Leasehold Enfranchisement legislation. The price paid by WPL for the freehold was £250,000 together with stamp duty and a deposit of £50,000 repayable by the Grosvenor Estate once it had granted its redevelopment licence, subject to the deduction by it of its reasonable costs in connection with the grant of that licence. In September 2014, about £30,000 was repaid to WPL's liquidators by the Grosvenor Estate being the sum remaining after the deduction of various professional fees from the deposit. The claimants funded payment of the deposit and claim to be entitled to recover the whole of it from the Deceased's estate as described in detail below.

The Joint Venture Agreement

7. On 3 August 2006, WPL, IP and AC entered into a joint venture agreement to which the Deceased was a party only by reason of him guaranteeing WPL's performance of its obligations under the joint venture agreement. The joint venture agreement and guarantee are contained in a Deed made on 3 August 2006 ("JVA").

8. The JVA defined IP and AC as "*P&C"*, WPL as "*Westbrooke"*, the Deceased as "*EN*", "*the Westbrooke Flats"* as meaning Flats 3 and 4, " *the P&C Flats"* as meaning Flats 1 and 2, "*the Westbrooke Flats Value"* as meaning the sum of £832,500 and "*the P&C Flats Value"* as meaning:

> "… £3,000,000 less the Westbrooke Flats Value less one half of the costs and expenses of the Freehold … "

The JVA recited that the Bank of Ireland ("BoI") had agreed to lend WPL the sum of £3,940,000 towards the cost of purchasing the Property and converting it into a single property ("Loan") by a facility letter dated 31 July 2006 ("Facility Letter"). By clause 1(a) the JVA, it was agreed that WPL would deliver vacant possession of the Westbrooke Flats in consideration of the Westbrooke Flats Value and by clause 1(b) that the claimants would deliver vacant possession of the P&C Flats to WPL in consideration of the P&C Flats Value, to be paid as provided for by clause 1(e) – that is as to the sum of £450,000 (together with such sum as was necessary to discharge all sums charged against the leasehold titles for Flats 1 and 2) from the Loan with the balance being secured by an unregistered charge to be entered into by WPL on drawdown of the Loan as provided for by clause 1(f). By clause 1(c) WPL agreed to purchase the freehold "*… for the best price as circumstances reasonably allow …*".

9. Clauses 3 and 4 of the JVA respectively provided as follows:

> "3. The parties agree to carry out the conversion of the Property into a single family dwelling as soon as circumstances reasonably allow in a good and workmanlike manner and in compliance with all necessary building regulations planning and other statutory requirements and to a high standard suitable for the Property and its location and to thereafter market the same as soon as practical and to obtain the best price as circumstances reasonably allow.
>
> 4. Any Net Profit shall be paid by Westbrooke and belong as follows:
>
> (1)
>
> (a) First in discharge of the [Loan] and all other interest and other monies outstanding from time to time
>
> (b) Thereafter towards the discharge of the balance of the P&C Flats Value;
>
> (c) Thereafter as to 50 pert centum to Westbrooke and 50 per centum to P&C
>
> (2) Any Net Loss shall be borne as to 50 per centum by Westbrooke and 50 per centum by P&C."

By clause 5 of the JVA, WPL agreed that throughout the currency of the joint venture, it would "*…bear no liabilities nor enter into any contracts save as necessary in order to complement [sic] the terms of …"* the JVA.

10. The phrases "*Net Profit*" and "*Net Loss*" were defined in the Schedule to the JVA ("Schedule"). "*Net profit"* was defined in the Schedule as meaning "*… the excess of the aggregate of the income and sale proceeds over the aggregate of the Purchase price and Development Expenditure and Pre-Completion Expenses."* Income included rent, "*Purchase Price*" meant the sum payable for the acquisition of the Property and all costs in connection including specifically any SDLT and all legal fees incurred in connection with the acquisition of the Property and "*Development Expenditure*" included inter alios "*… all outgoings and expenses (excluding any item included in the Purchase Price) properly incurred or payable in connection with the acquisition of the Property and/or the holding or financing thereof … including without limitation all liabilities arising under the Bank Funding … and/or the Development and all other outgoings and expenses which be properly incurred in connection with the retention and management of the Property and eventual sale of the Property …"*. Neither "*Bank Funding"* or "*Development"* is defined but by necessary implication the former meant all sums advanced to WPL under the Facility Letter. It also included any replacement or additional facility by necessary implication since clause 5 of the JVA recognised the possibility of further borrowing being necessary to complete the Scheme. By necessary implication, "*Development*" meant the Scheme.

11. Clause 4 does not work well with the Schedule because the Schedule provides for Net Profit to be struck after taking account of all sums payable in respect of the Loan

whereas clause 4 provides for the Loan to be discharged out of Net Profit before payment of the balance due to the claimants in respect of the P&C Flats Value and distribution of any sum left to WPL and the claimants.

12. The guarantee given by the Deceased was contained in clause 6 of the JVA ("Guarantee"). In so far as is material, it provided that the Deceased guaranteed to the claimants on behalf of himself and his successors " … *the due performance and observance in full by [WPL] of the terms of and its obligations contained in this [JVA] including in particular the payment by [WPL] to P&C of its 50% of any Net profit …*".

The Loan

13. The Loan is contained in or evidenced by the Facility Letter. The Facility Letter defined the borrower as being WPL, the amount to be lent as up to a maximum of £3.94 million and the purpose of the Loan as being:

> "Towards the cost of purchasing and converting property at 9 Cliveden Place, London SW1W 5LA into a single family dwelling. Project expenditure is anticipated as follows:
>
> | | |
> |---|---|
> | Purchase Costs | £3,450,000 |
> | Build costs (inc VAT and fees) | £1,590,000 |
> | Interest roll up – 18 months | £ 250,000 |
> | (Borrower Contribution) | (£1,350,000) |
> | Total | £3,940,000" |

The Loan was for a term of 24 months and was subject to various security obligations including a requirement that the Deceased provide a Cost Overrun Guarantee capped at £300,000 and an Interest Cover Guarantee and that WPL provide a "*First and only legal charge over freehold/leasehold property …*" at the Property " … *to be registered in the Borrowers name*". Although linguistically unclear, in context this meant that the Property had to be charged by WPL to BoI to secure the Loan. It also meant that no other charges of the Property were permitted save by variation of the terms of the Facility Letter. The Facility Agreement also contained a number of conditions precedent including:

> "A satisfactory valuation to be undertaken in respect of the [Property] by the bank's nominated valuer showing a value of not less than £3,450,000 and an end value following completion of the conversion works of £6,500,000. "

The Misrepresentation Claim in Summary

14. The claimants allege that they were induced to enter into the JVA by an oral misrepresentation by the Deceased, which they allege was made fraudulently alternatively negligently, that on or before the date when the JVA was entered into, BoI had valued the four flats collectively at no more than £3 million ("Misrepresentation Claim"). The claimants maintain that it had been agreed between the claimants and the Deceased prior to the day when the JVA was executed that the combined value of the four flats was £3.45 million and that they only agreed to vary that agreement to the £3 million figure contained in the JVA because of the alleged misrepresentation. The claimants assert that the alleged representation was false and made fraudulently or negligently because in fact BoI had valued the four flats collectively at or at not less than £3.45 million as (they maintain) is readily apparent from the description of Purchase Costs and the condition precedent contained the Facility letter quoted above. The claimants maintain that they were not shown the facility letter at the time when the JVA was being negotiated or for many years afterwards.

15. The defendant ("WC") denies that the claimants have proved the representation alleged or any reliance by the claimants on the alleged misrepresentation. WC denies that there was any prior agreement between the deceased and the claimants to the effect that the combined value of the four flats was £3.45 million and maintains that there is evidence demonstrating or from which it can be inferred that the claimants and their solicitor had seen the Facility letter on or before 3 August 2006, when the JVA was signed and that the insertion into the JVA of the £3 million figure was the result of agreement between the parties reached on the day when the JVA was signed, prior to it being signed.

The £50,000 Claim in Summary

16. WPL drew down the Loan and completed the purchase of the freehold of the Property on or about 5 October 2006. The claimants were entitled to £1,307,346 by WPL pursuant to clause 1(e) of the JVA from the Loan inclusive of the £450,000 that they were to receive personally. The claimants allege they agreed with the Deceased that they would permit the £50,000 deposit payable to the Grosvenor Estate described above to be deducted from the £450,000 that was due to them personally. It is now common ground that (a) the claimants permitted the £50,000 to be deducted from the sum they were otherwise entitled to under clause 1(e) of the JVA, (b) the deposit was paid to the Grosvenor Estate by WPL, (c) in September 2009, the relevant licence was obtained, (d) in 2014 the Grosvenor Estate repaid the balance of the deposit remaining after deduction of its professional fees to WPL and (e) the claimants have not been paid £50,000 or any part of it by WPL.

17. The claimants maintain that (i) £50,000 became payable by WPL pursuant to clause 1(e) of the JVA once the necessary licence had been obtained as it was in September 2009, (ii) WPL did not pay and (iii) in consequence, the Deceased's estate is liable to

pay that sum to the claimants under the terms of the Deceased's guarantee contained in clause 6 of the JVA ("£50,000 Claim"). WC denies that the Deceased's estate is liable as alleged because repayment is not due under clause 1(e) of the JVA but under a separate loan agreement and thus is not a liability that comes within the scope of the Deceased's guarantee.

The Equity Release Claim in Summary

18. It is common ground that WPL borrowed an additional £1 million from BoI in December 2007 by amendment of the Facility Letter so as to increase the value of the Loan by £1 million to £4.94 million. The amended Facility Letter is dated 31 December 2007 ("Amended Facility Letter"). This sum (which was described by the Deceased and Mr Peter McCormick (whose role I describe below) as an "*equity release"* because its availability supposedly depended upon an increase in the value of the Property after the date when the Loan had been agreed) was paid to WPL on 7 February 2008 and then by WPL to the Deceased in what WPL's directors described initially as an "*interim dividend"* and then as a loan. Neither the Deceased nor his estate has repaid it or any part of it to WPL Only the liquidator of WPL could bring a claim against the Deceased's estate for its recovery The claimants allege that this conduct by WPL constituted a breach of clause 5 of the JVA for which the Deceased's estate is liable under the guarantee contained in clause 6 of the JVA ("Equity Release Claim").

19. This arrangement was prejudicial to the interests of the claimants because, either by reason of the definition of "*Net Profit"* contained in the Schedule to the JVA, or clause 4(1)(a) of the JVA, the Loan and all interest owing to BoI had to be discharged before the balance due to the claimants in respect of their flats could be repaid pursuant to clause 4(1)(b) or because such repayment would reduce the amount of any Net Profit available for distribution pursuant to clause 4(1)(c) of the JVA by £1 million and interest payable thereon. Thus the arrangement could prevent the claimants from recovering some or all of the P&C Flats Value remaining due in respect of their flats. Assuming there was any Net Profit to distribute, the effect of the arrangement was that the claimants would become liable to repay 50% of the £1 million and interest due thereon.

20. The claimants claim damages for breach of contract. WC denies that the Deceased's estate is liable as alleged. He maintains that IP knew of and consented on behalf of himself and AC to the arrangement. IP denies that this was so but WC relies on the contents of a pleading prepared by AC in proceedings against SAA in the Truro County Court as demonstrating that she knew of the arrangement at the date of that pleading, and on the evidence of Mr Peter Misselbrook, whose role I describe below, concerning a conversation that he claims took place between him and IP as consistent with IP knowing of and not objecting to the arrangement. WC also maintains that agreement between the parties that they might charge their interests as they thought necessary is to be inferred from the conduct of IP, who, on 8 April 2008, charged the claimants' profit interest under the JVA to secure borrowing from a third party lender

called Sator Properties Limited ("SPL"). In consequence WC asserts that the claimants are estopped from making the Equity Release Claim.

21. WC also alleges that WPL was entitled to £437,407.28 in any event as being the balance of the sum due in respect of the Westbooke Flats Value under the JVA. It is alleged by WC that only the sum of £395,092.72 had been used from the Loan to discharge borrowing secured against the Westbrooke Flats and he argues that on a true construction of the JVA, WPL was always to be paid all of the Westbooke Flats Value and by operation of clause 5 of the JVA to borrow any additional sums necessary to perform the JVA including paying the Westbooke Flats Value. The claimants challenge this construction of the JVA. They maintain that WPL was not entitled to receive anything other than 50% of any Net Profit after discharge of the Loan and payment to the claimants of the balance of the sum due to them in respect of their flats pursuant to clause 4(1)(b) of the JVA. This point depends on the true construction of the JVA. They also maintain that WPL was precluded from paying out any part of the Westbooke Flats Value (alternatively any part of that sum other than the part necessary to discharge any charges against the Westbrooke Flats registered prior to the date when the JVA was entered into) by reason of the provision within the Facility Letter that refers to a Borrower contribution of £1.35 million.

22. In any event, WC alleges that no loss was caused since the Deceased or his estate expended approximately £1.3 million on completion of the Scheme and thus no loss has been suffered since this would have had to be accounted for before either repayment of the balance due to the claimants in respect of their flats or the calculation of Net Profit for distribution between the claimants on the one hand and WPL on the other. The claimants do not accept that WC has proved this sum to have been expended as alleged but concede that if (contrary to their case) the Deceased and his estate expended such sums as alleged then this element of the claim must fail.

23. In the course of the trial, the claimants sought to advance the case that the increase in the Loan was obtained by WPL (a) concealing from BoI the existence of the JVA and (b) submitting to BOI's valuers either a forged planning consent to which was attached plans showing a much larger development scheme than had been given permission or representing to those valuers that the larger scheme had received planning permission. Neither allegation has been pleaded as forming the basis of a cause of action. The points cannot assist the claimants because they could not found a claim by either claimant against the Deceased or his estate even if true. It might have been relevant to the credibility of the Deceased as a witness but that is immaterial in the circumstances. It is not alleged that either Mr McCormick or Mr Misselbrook were involved in such conduct. In those circumstances, I say no more about these allegations.

The Delay and Defects Claims in Summary

24. The redevelopment of the Property commenced with some preliminary works in September 2006 and then proceeded intermittently. The Deceased died on 29

December 2009, when the redevelopment of the Property was partially complete. WPL and the Deceased's estate continued with the redevelopment, which was substantially completed by May 2011, when the Property was marketed at an asking price of £6.95 million. A sale was finally agreed in September 2012 at a price of £5.55 million, which completed on 8 January 2013. That left a surplus of £63,037.23 after discharge of the sums due to BOI and the costs of sale. After taking account of the costs of completing the development as required by the Schedule to the JVA, there was a loss. The claimants did not contribute to the loss and WPL was placed in creditors voluntary liquidation.

25. It is common ground that the redevelopment took longer and cost more than had been anticipated. The reasons why the redevelopment of the Property took longer and cost more than expected are in dispute between the parties.

26. The claimants allege that the redevelopment ought to have been completed and the property sold by the end of March 2008 and that by failing to complete it by then WPL failed to complete the redevelopment of the Property " … *as soon as circumstances reasonably allow in a good and workmanlike manner and in compliance with all necessary building regulations planning and other statutory requirements and to a high standard suitable for the Property and its location* …" in breach of clause 3 of the JVA ("Delay Claim").

27. The claimants allege that completion of the redevelopment was deliberately delayed by the Deceased in combination with at least FG in essence because it is alleged that the Deceased and his business empire was short of cash and the Deceased was able to obtain additional cash for other projects by causing or permitting FG to claim sums in excess of what was due to contractors and others carrying out the redevelopment of the Property. This of itself is a serious allegation of culpable wrongdoing not merely against the Deceased but also FG. It is alleged that the Deceased knew this practice would come to light if the Property was completed and sold, as would his (alleged) misrepresentation of the value placed by BoI on the claimants' flats and that he had procured the "*equity release*". It is alleged that the Deceased delayed completion of the Scheme for as long as it is alleged he delayed it because he could not afford to repay either the sums which it is alleged that he obtained as a result of the claims for payment in excess of the value of the work actually done or the sum obtained as a result of the equity release or for that matter the losses said to have been caused by the alleged misrepresentation.

28. It is alleged by the claimants that had the Property been sold by the end of March 2008, it would have achieved a price of £8 million and the claimants would in that event have received the balance of the P&C Flats Value (which they plead at £733,823) and £1,413,088.50 as their share of the resulting net profit. The claimants also allege that completion was delayed by the Deceased during his lifetime when to his knowledge IP was relying on completion and sale to discharge liabilities that he had incurred to SPL. The additional costs of managing this debt is also claimed as damages, which are quantified in paragraphs 36 and 50 of the Re-amended Particulars

of Claim ("RAPC") at £3.5 million. Normally, the value of a property at a particular date would be proved by expert valuation evidence. The claimants have not adduced such evidence.

29. There is a dispute between the parties as to whether the redevelopment was carried out to the standard required by clause 3 of the JVA ("Defects Claim"). This is an allegation that would normally be supported by expert evidence that proves both defective or sub-standard design and workmanship and also what if any impact such defects had on the value of the Property where, as here, it is being alleged that defective design and workmanship resulted in the Property achieving a lower price on sale than it would otherwise have achieved. The claimants have not adduced any evidence going to these issues.

Split Trial

30. Having drawn attention to the absence of any expert evidence in relation to the various quantum issues that arise in respect of the Delay and Defects Claims, I should add that I have asked myself whether the appropriate course would be to enter judgment for damages to be assessed in the event that I concluded that the claimants were entitled to succeed on the issue of liability. Mr. Seitler submitted that this was neither permissible nor appropriate in the circumstances. I accept that submission for the following reasons.

31. By an application notice issued by the claimants dated 13 February 2018, the claimants applied for an order that included an order that this trial be split as between liability and quantum. Mr. Lance Ashworth QC sitting as a deputy judge of the High Court dismissed that application – see paragraph 13 of his Order dated 23 March 2018 sealed on 4 April 2018. There has been no appeal from that Order, nor any application to set it aside under CPR r.3.1(7). Any such application would be bound to fail given the limited circumstances in which a court can exercise that power – see Tibbles v. SIG Plc [2012] EWCA Civ. 518 [2012] 1 WLR 2591. Thus any order for a split trial at this stage would impermissibly undermine the finality principle.

32. Even assuming that I had a discretion to order a split trial at this stage in the proceedings, it would be entirely inappropriate to do so. Whilst ordering a split trial might enable the claimants to succeed on quantum issues where otherwise they would fail, that ignores the fact that they could and should have applied for permission to adduce expert evidence at a much earlier stage in these proceedings. Making such an Order would not address the absence of expert evidence relating to the quality of the work carried out to the Property, which is relevant to liability in respect of the Defects Claim. Ordering a split trial at this stage will (i) result in additional cost to WC, (ii) delay final determination of this dispute in circumstances where the interests of the Deceased's principal beneficiary (his son who is still a minor) have already been prejudiced by the claimants instituting a claim that by reason of its size resulted in the appointment of WC, as I explain in more detail later in this judgment, and (iii) result in the use of additional public resources in respect of this claim, that would have been

avoided or mitigated had the claimants complied with the CPR in relation to adducing expert evidence. In those circumstances, even if the finality issue could be overcome it would nonetheless be inappropriate to order a split trial at this stage in the proceedings.

These Proceedings

33. In 2010, the claimants brought proceedings against Ms Sarah Al Amoudi ("SAA"). Asplin J as she then was dismissed that claim ("SAA Proceedings") following a lengthy trial. An application for permission to appeal by the claimants failed. It is not necessary that I describe those proceedings in detail. It is necessary to note at this stage only that both the claimants and all of WC's witnesses apart from Mr Davis and Ms Hamer gave evidence in the SAA Proceedings. Asplin J made adverse credibility findings against both claimants, which are relied on by the defendants in these proceedings.

34. The claimants commenced these proceedings by issue of a Claim Form on 4 October 2013. As originally pleaded, this claim consisted of three elements being the "*Pont Street Claim"*, the "*Oriel Claim"* and the claim concerning the Property that is the subject of this trial. The combined value of these claims was alleged to be about £50 million – see the statement of value on the Claim Form. When originally intimated in correspondence by the solicitors then acting for the claimants in April 2011, the claim had been valued at over £97 million. Many of the allegations made by the claimants against the Deceased in these proceedings were or could have been advanced in the SAA proceedings.

35. The sums claimed in these proceedings as they were formulated originally were massively in excess of the net value of the Deceased's estate, which is valued at about £14 million. If a claim in the value intimated (or for that matter in the sum identified in the Claim Form) succeeded, the Deceased's estate would be insolvent. The Deceased's executors, PMC and PM, were administering the Deceased's estate in Scotland when the correspondence intimating the claim valued at over £97 million was received. The executors sought advice from leading counsel in Scotland who advised that in order to avoid personal liability they should not further intermeddle with the estate but should seek the appointment by the Court of Session of a Judicial Factor pursuant to the Judicial Factors (Scotland) Act 1889. Following the appointment of WC as Factor, he has managed and administered the estate in place of the executors. WC alleges that the effect of his appointment has been to prevent administration of the deceased's estate as planned by his executors and has added significantly to the costs that must be borne by the estate.

36. In 2014, the claimants sought summary judgment in relation to what was then only part of their claim in these proceedings, being the part I am trying. WC applied to strike out the whole of these proceedings as they were then constituted, alternatively for judgment on the Pont Street and Oriel Claims in essence on the ground that the claims made in these proceedings could and should have been made in the SAA

Proceedings. At first instance, all the claimants' claims were struck out. On appeal, the Court of Appeal set aside that part of the Order striking out the part of the claim that I am trying but otherwise dismissed the claimants' appeal. In the result, a claim that was originally intimated as having a value of over £97 million and was originally pleaded as having a value of £50 million proceeds as a claim for a sum that is well beneath the value of the deceased's estate.

37. There has been significant interlocutory activity since the appeal referred to above. Most of it has focussed on what the defendant characterises as a failure properly to particularise the Delay and Defects Claims and numerous failed attempts by the claimants to further amend their claims by expanding the scope of the allegations they have made. It will be necessary for me to refer to these events in more detail later because WC relies on what he submits to be a failure on the part of the claimants to properly particularise elements of their claim in breach of various default orders as being in and of itself an answer to the Delay and Defects Claims.

The Trial

38. The trial took place between 13-15, 18-22, 25-26 June and 2 July 2018. I heard oral evidence on behalf of the claimants from AC, IP and Mr Duncan Hamilton-Irvine, a building surveyor. I heard oral evidence on behalf of the defendant from WC, Mr Peter McCormick ("PMC"), a long time business friend and colleague of the Deceased who acted on his behalf under a Power of Attorney at various times while the Deceased was disabled by recurring mental and drink related illness and was one of the executors of the Deceased's estate prior to his replacement by WC, Mr Peter Misselbrook ("PM"), the Deceased's Scottish solicitor and his other executor prior to his replacement by WC, Ms Pamela Hamer, a corporate client manager employed by CLL and director of WPL, Mr Francis Gonzalez ("FG"), a project manager engaged in relation to the Scheme and Mr Elliot Davis, a director of M2 Property Limited ("M2"), the agents that negotiated the sale of the Property on behalf of WPL following completion of its redevelopment.

Evidential Issues

Credibility – The General principles

39. This is a heavily documented, essentially commercial, dispute relating to events that took place between August 2006 and early 2013, when the Property was sold. The trial bundles runs to over 30 lever arch files of material. There was extensive oral evidence adduced from the witnesses referred to above, with wide ranging challenges by each party to the credibility of the witnesses called by the other.

40. Given these factors, I have approached the factual issues between the parties that are material to this dispute by testing the oral evidence of each of the witnesses wherever possible against contemporary documentation, admitted and incontrovertible facts, and inherent probabilities. This is entirely conventional - see Onassis and

Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 431 – and is particularly appropriate where (as here) the allegations relate to events that occurred years ago and the oral evidence is based on recollection of such events - see Gestmin SGPS SA v. Credit Suisse (UK) Limited [2013] EWHC 3560 *per* Leggatt J at paragraphs 15-22. It was this factor that led Leggatt J (as he then was) to observe at paragraph 22 that:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

Notwithstanding this being my primary approach it will be necessary for me to reach some conclusions concerning the credibility of the witnesses from whom I heard oral evidence. However, in my judgment that is an exercise that is best conducted for most of the witnesses by reference to the evidence given in relation to the substantive issues between the parties, not least because my conclusions concerning credibility will depend in large part on a review of the contemporaneous documentation.

Conclusions Concerning Credibility of Mr. Davies, Ms Hamer and WC

41. There are some witnesses about whom I can express a conclusion concerning credibility at this stage. First I am satisfied that Mr. Elliot Davies was an entirely truthful witness, who did his honest best to assist the court with his answers to the questions he was asked. My detailed reasoning leading to this conclusion appears below where I consider the quantum issues arising in relation to the Delay Claim.

42. Ms Hamer is more difficult. Whilst I am satisfied that she was an honest witness, I am also satisfied that she had no real recollection of most of the events about which she was asked. The most frequent answer that she gave was that she was unable to recall. Whilst sometimes witnesses resort to this formula in a dishonest attempt to avoid providing unpalatable evidence, I am satisfied that is not the case with Ms Hamer. The events with which this case is concerned happened many years ago. Ms Hamer was a director of WPL only by reason of her employment by CLL. In the course of her evidence she told me that during the period relevant to these proceedings she was a director of about 100 companies in that capacity. In those circumstances, it is entirely unsurprising that she has little recollection of the detail concerning the activities and management of WPL. In those circumstances, where Ms Hamer maintained that she had no recollection of the matters on which she was being asked

questions I have little choice but to adopt the general approach set out above. Where she claimed to be able to recall specific events, I have approached her evidence with caution because of the length of time that has passed and for the reason noted by Leggatt J – that is that " … *it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth …"*.

43. Finally, I am entirely satisfied that WC was an honest witness who did his honest best to answer the questions that were asked of him. By definition he was not involved in any of the events with which I am concerned until after his appointment. He is an office holder appointed by the Court of Session. He impressed me as an experienced and careful accountant and insolvency practitioner. However, the evidence that he could give that was relevant to the issues I have to decide was limited.

Absent Witnesses

44. For a large part of the period relevant to this dispute, the claimants were represented by Brook Martin & Co., a two-partner firm with offices in the West end of London. Mr. Stephen Brook, one of the firm's partners, acted for the claimants. Brook Martin also acted for WPL, the Deceased and, after his death, the Deceased's estate, in relation to the redevelopment of the Property and other matters. Mr Martin, the firm's other partner, acted for the WPL, the Deceased and his estate. It was common ground that Brook Martin were hopelessly conflicted from the point at which they started to act for WPL and the Deceased. It is fair to say that the claimants have commenced proceedings against the firm and have also reported the partners to the Solicitors Regulatory Authority ("SRA").

45. The claimants' case could have been corroborated in critical respects by Mr. Brook but he was not called to give evidence. This led Mr. Seitler QC to submit on behalf of WC that I should draw adverse inferences against the claimant from his absence applying Wisniewski v. Central Manchester Health Authority [1998] PIQR 324. In response, Mr. Gloag sought to rely on the transcript of Mr. Brook's evidence given before Asplin J in the SAA Proceedings. In my judgment that approach was misconceived – not merely was there no hearsay notice in relation to such evidence but more importantly that evidence is devoid of almost all weight because Asplin J had rejected it following the trial before her in which she had said:

> "Mr Brook gave evidence in an argumentative and aggressive style. On occasion he sought to put the claimants' case rather than confine himself to factual evidence. At times I found him to be extremely evasive … an extremely unsatisfactory witness and unless his evidence is consistent with contemporaneous documents I prefer the oral evidence of others where it differs from his account of events."

All this leads me to conclude that in principle, Mr. Seitler is correct to invite me to draw an adverse inference from the absence of Mr. Brook in relation to issues where he could have given evidence in support of the claimants' case. In practice however,

as I explain below, that conclusion is not decisive in relation to the issues I have to decide.

46. Mr. Seitler made a similar submission concerning the failure by the claimants to adduce evidence from Mr. Keith Pickstock, the managing director of National Underpinning Piling and Basement Construction Company, WPL's original main contractor. I determine that application below in the context in which it arises.

Approach to Dishonesty and Impropriety Allegations

47. In the course of the trial the claimants have made very serious allegations of wrongdoing, principally against the Deceased (against whom an allegation of fraud has been made as I have explained) and FG. Equally, WC has made wide-ranging allegations of dishonest misconduct in particular against IP. In those circumstances, I remind myself of three basic principles.

48. First, the legal and evidential onus of proof rests throughout on the claimants to prove on the balance of probabilities the claims they make in these proceedings. Equally (and apparently contrary to the submissions made by Mr. Seitler) the evidential burden rests on WC to prove the positive factual allegations he relies on.

49. Secondly, whilst the standard of proof in a civil case is always the balance of probabilities, the more serious the allegation, or the more serious the consequences of such an allegation being true, the more cogent must be the evidence if the civil standard of proof is to be discharged – see Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 per Lord Nicholls at 586, where he said:

> '"The balance of probabilities standard means that a court is satisfied that an event occurred if a court considers that on the evidence the occurrence of the event was more likely than not. In assessing the probabilities, the court will have in mind as a factor to whatever extent it is appropriate in the particular case that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before court concludes that the allegation is established on the balance of probabilities. Fraud is usually less likely than negligence…Built into the preponderance of probabilities standard is a generous degree of flexibility in respect of the seriousness of the allegation."'

50. Finally, it is necessary to remember that it does not necessarily follow from the fact that a witness has been shown to be dishonest or unreliable in a previous case that his evidence in all subsequent cases must be rejected. It is the duty of a judge determining a particular case to reach a conclusion concerning the credibility of the evidence given in that case on the material available to that judge in that case. Conclusions reached in other cases concerning the credibility of a particular witness may be a relevant consideration in reaching such a conclusion but is not necessarily decisive much less conclusive.

Relevant Substantive Legal Principles

51. This case is almost entirely a factual dispute, which will turn upon the findings of fact made in relation to a relatively small number of critical issues. However, the Equity Release Claim and to a lesser extent the £50,000 Claim each depend in part on disputed issues of construction of the JVA. In my judgment those issues are to be resolved by applying the following principles derived from the three most recent Supreme Court judgments on the topic – Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900, Arnold v. Britton [2015] UKSC 36 [2015] AC 1619 and Wood v. Capita Insurance Services Limited [2017] UKSC 24:

i) The court construes the relevant words of the relevant contract, in its documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the contractual provision being construed, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the provision being construed and the contract in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see Arnold v. Britton (ante) per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

ii) A court can only consider facts or circumstances known or reasonably available to both parties which existed at the time that the contract was made - see Arnold v. Britton (ante) per Lord Neuberger PSC at paragraph 20;

iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ante) per Lord Neuberger PSC at paragraph 17;

iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v. Kookmin Bank (ante) per Lord Clarke at paragraph 23;

v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v. Britton (ante) per Lord Neuberger PSC at paragraph 18;

vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v. Kookmin Bank (ante) per Lord Clarke at

paragraph 2 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v. Britton (ante) per Lord Neuberger PSC at paragraph 19;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v. Capita Insurance Services Limited (ante) per Lord Hodge at paragraph 11; and

viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v. Britton (ante) per Lord Neuberger PSC at paragraph 20 and Wood v. Capita Insurance Services Limited (ante) per Lord Hodge at paragraph 11.

The Misrepresentation Claim

52. The claimants' factual case is pleaded in paragraph 6 of the RAPC in these terms:

> "In discussions between the claimants and [the Deceased] it had been agreed that the value of [the Property] was not less than £3,450,000. [The Deceased] indicated that he proposed to obtain a bank facility in the name of [WPL] to fund the purchase and development. On the morning of 3 August 2006, the claimants met [the Deceased] at the Cadogen Hotel in London. At the meeting [the Deceased] told the claimants that his bankers had stated that they would not in fact accept a higher figure than £3,000,000 as being the value of the Property at that date. [The Deceased] wanted a joint venture reduced to writing and so the parties went to the offices of Brook Martin & Co solicitors. In the presence and hearing of Mr. Brook, one of the partners, [the Deceased] repeated his statement regarding the position of the bank."

The claimants plead in paragraph 7 of the RAPC that in reliance upon the alleged representation and believing it to be true they each signed the JVA. They allege in paragraph 12 of the RAPC that they were not provided with a copy of the Facility Letter "*… notwithstanding an assurance made by [the Deceased] to the claimants on 3 August 2006 that the … Facility Letter would be provided to the claimants prior to the signing of the … JVA …*". In paragraph 13 of the RAPC, the claimants allege that they first discovered that the representation on which they rely was untrue in the final week of October 2010 and that BoI had *" … accepted the value of [the Property] was £3,450,000 and indeed its confirmation of such value had been a condition precedent to the granting of the [Loan] …*". In paragraph 14 of the RAPC, the claimants allege that had the representation not been made the sum of £3,450,000 would have been inserted into the JVA rather than the sum of £3 million. WC denies both the representation and reliance.

53. In my judgment, two factual issues are critical to the resolution of the misrepresentation issue as it has been pleaded and advanced at trial. They are (a) whether, as the claimants allege, it had been agreed between them and the Deceased prior to 3 August that the property had an undeveloped value of £3.45 million, which they agreed to depart from by entering into the JVA on the term stated therein only because of the alleged representation and (b) whether, as the claimants allege, they were not shown the Facility Letter prior to signing the JVA. The first of these questions is important because the claimants maintain that there was an agreement or understanding to that effect between the parties which is the justification for what both maintain was considerable consternation on 3 August when they alleged the Deceased made the representation alleged and because it is highly relevant to the credibility of the claimants' evidence. The second question is critical both because it is the claimants' case that if they had seen the Facility Letter prior to signing the JVA then the agreed value of the Property would have been stated therein to be £3.45 million not £3 million and because it too is highly relevant to the credibility of the claimants as witnesses.

54. In my judgment there was no agreement or understanding between the Deceased and the claimants concerning the undeveloped value of the property or their interest therein prior to 3 August 2006. My reasons for reaching that agreement are (a) the existence of such an agreement or understanding is inconsistent with or contradicted by the contemporaneous documentation and (b) the conduct of the claimants on 3 August is inconsistent with there having been any such agreement or understanding. My detailed reasons for reaching those conclusions are as follows.

55. First, the documentary material demonstrates that in the period between mid December 2005 and mid June 2006, various valuers had arrived at a valuation spread for the property of between £2.675 million and £3.45 million, none of which had been agreed between the parties. On 15 December 2005, the property had been valued for IP on the basis of a bigger development than was in the end carried out at £3.135 million. On 12 April 2006, Savills valued the Property in its undeveloped condition but assuming all necessary consents for the proposed development had been obtained (in fact at that stage they had not been as the chronology set out earlier in this judgment demonstrates) at £2.675 million. On 16 May 2006, Stevens Scanlan LLP produced a valuation on the instructions of IP valuing the Property at £3.45 million. In view of the claimants' claim that had the Scheme been completed and the property sold by the end of March 2008 it would have been sold then for £8 million, it is also worth noting that Stevens Scanlan valued the Property at £6.5 million on the assumption that the development scheme they were asked to consider was completed. The scheme they were asked to consider was a much larger seven-storey scheme producing a building of 4,594 sq.ft. – see Section 4 on page 2 and section 5 on page 3 of the report - for which planning permission was never obtained. As the report notes at (vii) of the comments set out in the executive Summary, " … *should the proposed scheme deviate from that outlined within our report this may have a detrimental effect on our valuation* …".

56. Secondly, although the claimants rely on their email to the Deceased of 14 June 2006 offering to buy him out of the Property for a sum calculated using a value of £3.45 million as evidencing an agreement between them that the Property be treated as having such a value, that email does not demonstrate the agreement they assert. The only valuation at that figure had been that from Stevens Scanlan of the previous month. It had not been agreed between the parties as is apparent from (a) there being no contemporaneous documentation containing or evidencing such a agreement, (b) the response from PMC on behalf of the Deceased to the email of 14 June, which is inconsistent with there having been such an agreement and (c) the existence of such an agreement being inconsistent with IP's email to the Deceased, also of 14 June 2006, where in relation to negotiations between the Deceased and BOI, he said:

> "…Please can you aim for figures which lean towards the £3.45m valuation rather than the £2.5m which seems to come round the airwaves like a boomerang! I leave it to your sensible discretion vis a vis the bank but trust we can come to some sensible agreement between ourselves …"

57. Thirdly, the terms of the Facility Letter are inconsistent with there being the agreement alleged by the claimants. The Facility Letter does not record that the acquisition costs were or would be £3.45 million. It records only that project expenditure was anticipated to include such a cost. Likewise the condition precedent records that as at the date of the Facility Agreement, the Loan was dependent on the bank obtaining a *" … satisfactory valuation … by the bank's nominated valuer showing a value of not less than £3,450,000 …"*. Had the Deceased thought there was an agreement in place at that level there would have been no reason not to say so to the bank. The use of the word "*anticipated*" in the facility letter is consistent with exactly what IP had requested in his second email to the Deceased of 14 June 2006 referred to above and is inconsistent with an understanding on the part of the Deceased that there was an agreement to the effect alleged by the claimants in these proceedings.

58. Fourthly, the Facility Letter is dated 31 July 2006 (the same date as the Deceased's email quoted below in which he said he was flying to London "… *armed with the facility letter* …"). Openly referring to the Facility Letter in these terms was irrational if as the claimants allege the Deceased had decided at that stage to attempt to induce them to agree a departure from what had previously been agreed. It is however entirely consistent with the need for the parties to agree as between themselves an assumed valuation in the context of the facility offered by the Facility Letter.

59. If the claimants' case was correct the Deceased must have devised the alleged fraud between 31 July, after he had said he was flying to London with the Facility Letter, and the morning of 3 August when he met the claimants and then their solicitor. Even then rationally he could only have hoped for it to succeed if the Facility Letter was not made available on 3 August or at any time thereafter and the claimants had signed the JVA without sight of the Facility Letter they had been promised. This is inherently improbable and inconsistent with the contemporaneous documentation as I explain below.

60. Fifthly, the claimants' conduct on 3 August 2006 is inconsistent with it having been agreed between them and the Deceased that the Property should be deemed between them to have a value of £3.45 million. Their case is that although they had been promised sight of the Facility Letter, it was not in fact produced to them on 3 August but they nonetheless signed the JVA agreement valuing the Property as between them and WPL at £3 million. This is inherently highly improbable. Had it been agreed between the claimants and the Deceased prior to 3 August that they would attribute a value to the Property in its undeveloped state of £3.45 million, the claimants would in all probability have refused to agree a lower value without sight of the Facility Letter or other evidence of the alleged valuation by the bank. After all, as far as the claimants knew, the only valuation the bank had seen was that commissioned by IP, which had valued the Property at £3.45 million. Even at this stage the relationship between the Deceased and the claimants had been fractious. A reduction in the assumed value of the property in the context of the proposed JVA then being negotiated was financially significant for the claimants. If, as the claimants allege, there was an agreement or understanding between them and the Deceased to the effect they allege, it is difficult to see why they would have been willing to compromise without attempting to persuade the bank that its apparent valuation was too low, as for example IP had attempted to do with Savills, following the delivery of their valuation referred to earlier. Signing the JVA only makes sense if in truth there was no agreement or understanding as to the assumed value of the property prior to 3 August and an agreement concerning assumed value was reached between the Deceased and the claimants on 3 August prior to completion of the drafting of the JVA and its signature by the parties – a position that is consistent with the email traffic on 14 June and in particular the final email of that date from IP to the Deceased referred to above.

61. My conclusion on this point, when combined with the other considerations to which I refer below lead me to conclude that I should be cautious before accepting the evidence of either claimant save whether it is corroborated, is against their interest or is admitted. The claimants' case on the issue I have been considering could not and did not result from mere misrecollection due to the passing of the years. It was quite simply an untrue assertion. Even if this is wrong and the claimants could credibly explain away this element of their case as misrecollection, the degree of misrecollection on an important issue leads to the same conclusion in relation to the weight that I can safely place on their testimony.

62. Turning to the second critical issue identified earlier, in my judgment on the balance of probabilities the claimants saw the Facility Letter no later than 3 August 2006, prior to signing the JVA. It is inherently improbable that the claimants were not shown the Facility Letter by on or before that date and their assertion that they were not shown the Facility letter on that date is inconsistent with the contemporaneous documentation that is available. My reasons for reaching that conclusion are as follows.

63. First, contrary to what AC said in paragraphs 40-44 of her first statement, the genesis of the JVA did not arise suddenly and without warning at the meeting between the

claimants and the Deceased on 3 August 2006 at the Cadogen Hotel. The need for such an agreement had first been mentioned by the Deceased to AC not later than 23 June 2006 – see the Deceased's email to her of that date. AC had set out the claimants' proposals in an email of 26 June 2006. The Deceased asked AC to arrange a meeting between him, the claimants and Mr. Brook in order that the terms of the JVA could be agreed. These discussions culminated in an email from the Deceased to AC on 31 July 2006 in these terms:

> "… I trust … that you have nailed down Mr. Brook for [3 August 2006] as I am flying in especially armed with the facility letter to finally get this thing moving! I have heard no more from you on the JV which is crucial to the meeting. Have you taken this any further with Stephen [Brook]? Please send me copies of everything in advance of the meeting, as I really do want to sign off …"

On the same day, AC emailed Mr. Brook, informing him that the Deceased was travelling to London on 3 August, that he wished to "…*set up* …" all the transactions relating to the Property and asking him to be available. This was followed by an email from the Deceased on 1 August stating in effect that the meeting on 3 August would be pointless "*… if the JV documentation has not been formulated in advance of the meeting …*".

64. A number of points arise from this email traffic. First, it is entirely inconsistent with AC's assertion that the meeting with Mr. Brook on 3 August was unplanned and insisted upon by the Deceased for the first time on the morning of 3 August when he mentioned for the first time the requirement that everything be reduced to writing. That proposition is inconsistent with the Deceased's email of 1 August and was untrue. This of itself leads me to conclude that I ought to be cautious before accepting AC's evidence save where it is admitted, against her interest or corroborated.

65. Secondly, the emails are inconsistent with AC's evidence to the effect that the parties arrived at the offices of Mr. Brook on 3 August without appointment. That assertion too is untrue and further supports my conclusion referred to in the last sentence of the previous paragraph of this judgment. Her own email to Mr. Brook of 31 July is inconsistent with that being so. It is also highly improbable that Mr. Brook could or would have drafted an agreement such as the JVA from scratch while the parties were present at his office as alleged. It is much more likely that it was prepared in at least first draft form prior to the meeting and completed at the meeting on 3 August. That such is what happened is consistent with the email from the Deceased of 1 August.

66. Thirdly, given the terms of the Deceased's email of 31 July quoted above, the Deceased clearly considered that it was important that the claimants should see the Facility Letter, which was why he was planning to bring it with him. If, as the claimants maintained in their evidence, they considered they would have personal liabilities under the Facility Letter, there is no doubt in my mind that they would have insisted on seeing it before proceeding further. In any event the claimants are and were very experienced property developers. It is inherently improbable that they

would have contemplated entering into a joint venture agreement with an offshore company controlled by the Deceased in which they had no interest without being satisfied that the funding was in place to enable the joint venture to proceed since it was not contemplated that they would contribute anything other than the value of the flats they owned at the Property for which they were to receive a substantial part payment almost immediately following the signature of the JVA. The only source of funding for that payment was the Loan. If by some mischance, the Deceased had forgotten to bring a copy of the Facility Letter with him it is inconceivable in my judgment that the claimants would have proceeded without sight of it whether by faxed copy or otherwise. This is all the more the case given the meeting between the claimants and the Deceased with the claimants' solicitors.

67. Fourthly, as I have said earlier in this judgment, the JVA recited that BoI had agreed to lend WPL the sum of £3,940,000 by a facility letter dated 31 July 2006 – see Recital 1(h) of the JVA. It is difficult to see how that could have been included in the JVA if the claimants or their solicitor had not seen the Facility Letter prior to completion of the drafting of the JVA and its signature by the claimants. It is also worth noting that the JVA provides that the balance due to the claimants in respect of their flats was to be secured by an unregistered charge. This is a less satisfactory form of security than a registered charge for obvious reasons. It is not something that an apparently competent solicitor would advise the claimants to agree unless there was a good reason to do so. There was such a reason apparent on the face of the Facility Letter. Paragraph 2 of the Security Conditions set out in the Facility Letter required a "*first and only legal charge over freehold/leasehold property at …*" the Property. This prevented the registration of any charge in favour of the claimants over the Property. In my judgment the willingness of the claimants and their solicitor to accept an inferior form of security for payment of the deferred portion of the P&C Flats Value is consistent only with them having seen the Facility Letter and understanding why such an inferior form of security had to be accepted. Given the express reference to the Facility Letter in the JVA and provision for an unregistered charge to secure the sum due to the claimants in the future, it is highly implausible that Mr. Brook would not have had the Facility Letter before him when he was drafting or at least finalising the draft of the JVA.

68. In fact there is an email string between Mr. Brook and PMC that demonstrates that Mr. Brook had the Facility Letter on 3 August – see the email from Mr Brook to PMC of 3 August 2006 (17.29) recording that "… *I have a copy of the Bank of Ireland's letter* …", which in context is a reference to the Facility Letter – see the email from PMC to Mr Brook of the same date at 17.25. Since the JVA was completed and signed much earlier in the day, Mr Brook must have had the Facility Letter from no later than the arrival of the Deceased and claimants at his office on 3 August. Indeed, even IP was willing to accept in the course of his oral evidence that Mr. Brook had a copy of the Facility Letter – see T4/44/15.

69. Thus I conclude that Mr. Brook had a copy of the Facility Letter by no later than the arrival of the Deceased and claimants at his office on 3 August. If he had sight of it, as

in my judgment he did, I consider it highly unlikely that he would not have shown it to the claimants, who were his clients. There is absolutely no reason why he would wish to conceal it. If there was a commotion (as the claimants allege) about the value to be attributed to the Property in its undeveloped state, that is all the more reason why he would have wanted them to see the Facility Letter. In reality it is inherently much more probable than not that the Deceased showed the claimants the Facility Letter when they first met on 3 August before going together to Mr. Brook's office.

70. The claimants both signed the JVA on 3 August. The document referred on its face to the Facility Letter. It is simply not credible that two experienced property developers would have signed the JVA without seeing the Facility Letter when (i) the JVA referred to a Facility Letter on its face, which ostensibly they considered imposed personal liabilities on them, (ii) they had been promised sight of it by the Deceased, who had expressly stated that he was " … *flying in especially armed with the facility letter …*", (iii) the Loan that was the subject of the Facility Letter was the only source of funding for the initial payment due to them under the JVA and (iv) their JV partner was an offshore company in which they had no interest and over which they could exercise no control.

71. In light of the conclusions that I have reached so far, I do not consider it necessary to consider further the submission made by Mr. Seitler noted earlier in this judgment that I ought to draw an inference from the failure of the claimants to call or issue a witness summons for service on Mr. Brook.

72. Given that it is the claimants' case that it was readily apparent from the terms of the Facility Letter that BoI had not valued the four flats collectively at £3 million, it was submitted by Mr. Seitler that if I found that the claimants and/or their solicitors had sight of the Facility Letter before they signed the JVA it necessarily followed that the Misrepresentation Claim must fail. Mr. Gloag did not challenge this submission, which I accept.

73. Given that both claimants' evidence was that they did not have sight of the Facility Letter on 3 August, my conclusions on this issue lead to the further conclusion that I ought to be cautious before accepting the oral evidence of the claimants save where it is either admitted, contrary to their interests or corroborated. Indeed, it simply bolsters the view I had formed already on this point expressed earlier in this judgment. Their evidence on this issue cannot be dismissed as the result of misrecollection or misunderstanding. The claimants advanced a positive case alleging fraud against the Deceased that was untrue.

74. Although it is not necessary in those circumstances to consider whether in fact the assumed value of the Property was the subject of negotiation between the Deceased and the claimants that occurred on 3 August 2006, prior to the signature of the JVA, I should record my conclusion that on the balance of probabilities that is what happened. My reasons for reaching that conclusion are as follows.

75. First, as I have concluded already, there was no agreement between the parties prior to 3 August 2006 as to the value that ought to be attributed to the Property for the purposes of their own commercial arrangements. Secondly, the structure of the JVA required that the parties reach an agreement on this issue before drafting of the JVA could be completed and signed. Thirdly, IP's email of 14 June referred to above refers expressly to the need for the parties to reach such an agreement. Finally, the valuation history set out above shows that there was no emerging consensus as to the value of the Property in its undeveloped condition at any stage down to 3 August other than that it was within a range of about between £2.675 million and £3.45 million – an average of just over £3 million. In those circumstances, agreement by the parties of a value of £3 million would represent a pragmatic agreement on that issue. In all those circumstances, it is inherently probable that the parties reached such an agreement on 3 August, in all probability when they first met on 3 August before going to Mr. Brook's office.

76. In those circumstances the Misrepresentation Claim fails.

The £50,000 Claim

77. This claim does not depend upon anything other than agreed primary facts. I have summarised them already. However, I emphasise that the Grosvenor Estate made clear in the email from Mr. Hughes of 29 September 2006 that it was prepared to sell the freehold of the property to WPL only conditionally upon the payment to the Grosvenor Estate of a deposit of £50,000 from which it would be entitled to deduct its reasonable expenses in dealing with any approval applications and which would be repaid only once WPL had obtained formal approval under the Estate's management scheme for the redevelopment works. It was agreed between the parties that they would proceed in accordance with the JVA but on the basis that the claimants would "*… advance the £50,000 to the Grosvenor Estate out of their £450,000 so that the cash payment receivable is £400,000 …*" – see the email from Mr. Brook to PMC dated 5 October 2006. The completion statement for the purchase of the freehold and payments to the claimants in respect of their flats records a payment to the Grosvenor Estate of £300,060.61, being the price of the freehold plus the deposit, and a payment to the claimants of £400,000 being the sum they were entitled to under the JVA less the sum of £50,000, which they had agreed could be used to fund the deposit payment to the Grosvenor Estate. Following grant of the relevant licences, the Grosvenor Estate returned £34,610.21 to WPL's liquidators being the balance of the deposit after the deduction by Grosvenor of their reasonable expenses in connection with WPL's approval applications.

78. The claimants' pleaded case is that the whole of the £50,000 became repayable to the claimants "*… as a debt due under recital 1(e) of the …JVA …*". The reference to recital 1(e) is erroneous. It is intended to be a reference to the obligation contained in clause 1(e) of the JVA that WPL would pay the claimants £450,000 on completion of drawdown of the Loan. In my judgment this allegation must be rejected for the following reasons.

79. First, although Mr. Gloag submits at paragraph 6.5 of his closing submissions that "*the sole matter for the claimants to establish is whether there was an agreement that the £50,000 paid by IP and AC was a refundable deposit repayable to them on the licence to alter …*" being granted, that is mistaken. The claimants can recover the sum they claim only if WPL were obliged to repay the sum by operation of the JVA. That is so because WPL is in insolvent liquidation and thus any sum due from WPL to the claimants can be recovered from the Deceased's estate only by operation of the guarantee contained in clause 6 of the JVA.

80. Secondly, the money that the claimants were otherwise entitled to receive under the JVA for their flats was theirs to do with as they pleased. They chose to lend £50,000 to WPL to enable it to pay the deposit required by the Grosvenor Estate. In that regard they were in no better or worse position than the Deceased and his estate lending money to WPL or paying money on behalf of WPL in order that the Scheme could be completed. There is no evidence that it was agreed that the £50,000 was to be treated as deferred consideration payable under clause 1(e) of the JVA but only once the Grosvenor Estate had repaid the net sum remaining from the deposit or after grant of the relevant licences. Had that been the intention, it is probable that Mr. Brook would have been told that was what had been agreed and would have recorded it in his email dated 5 October 2006. The sum was a loan to WPL. That was the description that both claimants applied to it in their written evidence – see the summary at paragraph 6.1.15 and 6.1.16 of Mr. Gloag's written closing submissions and it was how IP described the arrangement in his oral evidence – see T5/57/16-19.

81. If there was an agreement between WPL and the claimants to the effect that WPL would repay the whole sum once the Grosvenor Estate had granted formal approval under its management scheme, that was a term of the loan that the claimants agreed to make to WPL. It was not an obligation that would come within the scope of the guarantee contained in clause 6 of the JVA because that obligation would not be an obligation contained in the JVA.

82. In those circumstances, the £50,000 claim fails.

The Equity Release Claim

83. The primary facts relating to this element of the claim are not in dispute and are as summarised earlier in this judgment. It is alleged by the claimants in paragraph 25 of the RAPC but disputed by WC that the raising of the additional £1 million lending to WPL from BoI and the payment over of the sum raised by WPL to the Deceased or other companies controlled by him "*… was undertaken without the knowledge, authorisation or consent of the claimants and was concealed from them …"*. This bald assertion is expanded on in some Further Information supplied by the claimants pursuant to CPR Part 18 where at paragraph 7 they assert that the fact of the Equity Release was concealed from them "*… for over 2 years, including in the accounts that accompanied the Report that was produced by Westbooke and the Executors for the claimants in February 2010 …"*. The claimants assert that had they known of what was proposed, "*… they would not have consented to or authorised the same"*.

84. The cause of action that the claimants assert by reference to these facts is that set out in paragraph 27 of the RAPC that is that by acting as alleged, WPL "*… acted in reach of clause 5 of the [JVA] by extending the loan facility and using the same for purposes other than that permitted by the [JVA] … alternatively the uses to which the extension to the loan facility was put by [WPL] were outwith those permitted as set out in recitals 1 and 2 of the [JVA] and thereby constituted a breach of the [JVA] by [WPL]."* The claim is alleged to be one for which the Deceased's estate is responsible by operation of the Guarantee – see paragraph 28 of the RAPC – or because the Deceased procured the breach by WPL of the JVA or procured breaches of fiduciary duty by WPL or is liable by reason of the Deceased being a shadow director of WPL.

85. WC's Defence does not admit concealment and denies that if the claimants had known they would not have authorised what took place – see paragraphs 25.2 and 25.3. Breach of contract is denied and it is averred that in any event the Deceased and/or his estate "*… contributed more than £1 m (plus interest costs) to the Cliveden Place development. Accordingly, even if this breach occurred … no net loss thereby arose"*. This is expanded upon in some Further Information supplied by WC to the claimants pursuant to CPR, Part 18. In paragraph 44 of the Further Information, WC accepts that the Equity Release was an "*… extension of the …"* Loan and at paragraph 45, WC pleads that:

> "The parties mutually adopted a shared assumption that neither would treat any charging by the other of their respective interests in anticipated profits under the [JVA] as a breach … The claimants charging of their own interest to Sator Properties Limited is evidence of such assumption being adopted by the claimants who therefore are accordingly estopped from alleging any such breach against the Defendant"

Finally, in paragraph 61 of the Further Information, WC alleges that there is no term within the JVA that required the knowledge or consent of the claimants to the Equity Release. This was further expended upon in paragraph 7 of WC's Request for Further information in which WC states in the course of that request "*… So there is no*

misunderstanding, the gravamen of the allegation is that there was no difference in principle between any borrowing of £1,000,000 secured over Westbrooke's beneficial interest in [the Property] and the second claimant's giving of security to Sator over the Claimant's interest therein."

86. Had Mr. Gloag asserted that it was not open to WC to set up a positive case by assertions set out in Further Information supplied, and/or a request for Further Information made, pursuant to CPR Part 18, that objection would have had some force, particularly given the number of iterations the pleadings in this case have been through. No such objection was taken however. Since both parties were content to argue this point on its legal and factual merits I resolve it on that basis as well.

Breach of Contract

87. WC asserts that the Equity Release did not constitute a Breach of Contract and/or that there was no provision within the JVA that required WPL to inform the claimants of the additional borrowing or obtain their consent to it. I am not able to accept these propositions for the following reasons.

88. By entering into the Equity Release arrangement, WPL plainly breached clause 5 of the JVA because by entering into the arrangement, WPL breached its obligation that it would "*… bear no liabilities nor enter into any contracts save as necessary in order to [compliment] the terms of …"* the JVA. Aside from the issue concerning the payment to WPL of the Westbooke Flats Value addressed below, the only circumstances in which that would not be so is if WPL could point to conduct on the part of the claimants that could constitute a variation, waiver or estoppel. No variation or waiver has been pleaded. The only estoppel on which WC can rely is that referred to in the Further Information.

The Estoppel Issue

89. The factual premise of this part of WC's defence to this element of the claim is that the Equity Release is materially similar to the charge in favour of SPL of the claimants' interest under the JVA. As I made clear in the course of the closing submissions I do not accept this premise as correct. I accept that the SPL charge was a breach of clause 8 of the JVA, which prohibited either party from assigning, charging or otherwise dealing with "*… the terms of this [JVA] without the written consent of the other party …"* The Equity Release engineered by WPL at the request of the Deceased was not even arguably a breach of clause 8 of the JVA because what was being charged was not WPL's interest under the WPL but its interest in the Property.

90. Functionally, the two arrangements were entirely different. The SPL charge charged the claimants' ultimate interest in the balance of the P&C Flats Value and any Net Profits resulting from the Scheme. Although contrary to clause 8 of the JVA, ultimately it could have no direct financial impact on WPL because it had no interest

in what was being charged. The position in relation to the increase in the Loan to fund the Equity Release was entirely different because the whole of the Loan (including the additional sum borrowed) had to be discharged before any Net Profit could arise and before payment to the claimants of the balance due in respect of the P&C Flats Value. Thus, in the absence of knowledge or consent by the claimants to the arrangement, their interests would be prejudiced in the ways explained above, unless WPL agreed to meet the whole of the cost of borrowing the additional £1 million.

91. In those circumstances, I reject WC's contention that " … *there was no difference in principle between any borrowing of £1,000,000 secured over Westbrooke's beneficial interest in [the Property] and the second claimant's giving of security to Sator over the Claimant's interest therein …"*. The alleged estoppel is not made out because the facts relied on by WC do not demonstrate the necessary shared assumption. Any shared assumption that WPL and the claimants would not treat any charging by the other of their respective interests in anticipated profits under the JVA as a breach could not justify the Equity Release arrangement because the additional borrowing was not a charge in anticipated profits. It was a charge to secure borrowing that would have to be repaid before any profits arose and would impose on the claimants half the cost of the additional borrowing for which they derived no benefit. For similar reasons, I reject WC's assertion that the claimants would have agreed to the Equity Release scheme had they known about it.

No Breach by Reason of Entitlement to Westbrooke Flats Value

92. WC submits that insofar as the £1 million increase in the Loan was needed (in part) to enable WPL to receive the balance of the Westbrooke Flats Value under the JVA, clause 5 of the JVA was not breached.

93. This point is not one that has been pleaded although as already noted breach was denied in general terms. As far as I can see the first time it received any mention was in paragraph 80.1 of Mr Seitler's written opening submissions, where, under the sub heading "*D's defence in a nutshell"*, it was asserted that:

> "There was no breach of the JVA … in respect of the £1m drawdown which related to the balance of the Westbrooke Flats value (£437,407.28) … as (on the true construction of the JVA Deed) it was always intended that this would be paid from monies borrowed from the BoI. Therefore [WPL] did not breach the JVA …in drawing down further sums to repay itself this sum."

The sum of £437,407.28 has been arrived at by deducting from the Westbrooke Flats Value as specified in the JVA (£832,500) the sum of £395,092.72, being the sum needed to discharge a charge in favour of Citibank secured against the Westbrooke Flats. This last mentioned charge was discharged on drawdown of the first part of the Loan at or about the same time as payment was made to the claimants of the sum to which they were entitled under clause 1(e) of the JVA.

94. In my judgment, the claimants would have been fully entitled to object to this point being deployed in this manner. WC was required to plead the whole of the positive case he wanted to advance at trial – see CPR r.16.5(2) and PD 16, paragraph 10.2 - and this element had not been pleaded. This point was not relied on by the claimants however in either their opening or closing submissions. Indeed, whilst Mr Gloag reproduced the terms of paragraph 80.1 of WC's written opening in paragraph 3.17 of his written closing submissions, the point was not mentioned again. In the course of his oral submissions, Mr Gloag maintained simply that on a true construction of the JVA, WPL was not entitled to receive any part of the Westbrooke Flats Value, or was entitled only to the sum necessary to discharge the Citibank charge, but was otherwise only entitled to receive 50% of any Net Profit that became available for distribution following completion of the Scheme. I do not consider that I can refuse to consider this issue on the basis that it has not been pleaded when neither the claimants nor their counsel have objected to its absence from the pleadings.

95. The question turns in the first instance on two related points of construction, being an assertion by WC that WPL was entitled to recover the whole of the Westbrooke Flats Value following execution of the JVA and an assertion by the claimants that WPL was not entitled to any sum under the JVA (other, perhaps, than the sum necessary to discharge borrowing secured against the Westbrooke Flats) apart from 50% of any Net Profit available for distribution following completion of the Scheme. In resolving these issues I have applied the principles relating to the construction of contracts set out earlier in this judgment.

96. It is necessary to note at the outset that save in one respect, neither of the parties submitted that there was any background material relevant to the issue I am now considering other than the factual, documentary and commercial context in which the JVA came to be agreed, which I have summarised already. The only other background fact was that relied on by WC, who submitted that by no later than 23 June 2006, it was the mutual understanding of the claimants and Deceased that they each wanted to release equity from the flats that they each respectively owned. I accept that submission. That it is correct is apparent from the Deceased's email to AC dated 23 June 2006, the material part of which is in these terms:

> "… it is now imperative that you have a meeting with Stephen Brook re the transfer of the properties into the new offshore vehicle, as the funding has been agreed on this basis. We both want to release equity, and this is by far the quickest route. …"

97. Having regard to my conclusions concerning when the Facility Letter became available to the claimants set out above, I consider that the documentary, factual and commercial context known or reasonably available to both parties, which existed at the time that the JVA was signed on 3 August 2006 included the contents of the Facility Letter. Thus both WPL and the claimants were aware that the purpose of the Loan was to contribute towards the purchase costs of the Property then anticipated to be £3.45 million. All parties were aware of the need to acquire the Freehold of the Property but no one thought it would cost £3.45 million. That much is apparent from

the various valuations that had been produced in the period down to 31 July 2006, when the Facility Letter was issued by BoI, each of which I have referred to earlier in this judgment. It is apparent too from Condition Precedent 3 contained in the Facility Letter, which required a valuation for the Property by the Bank's valuer in a value of not less than £3.45 million.

98. Against that background I turn next to the JVA. I start with the express terms of that document read as a whole. The recitals included the definition of the Westbooke Flats Value as being £832,500. If as the claimants maintain, the intended effect of the agreement was either that WPL should receive nothing for its two flats while the claimants were to receive a total of £3 million as reduced in accordance with the definition of P&C Flats Value contained in the JVA, it is necessary to ask why it was necessary for this Westbrooke Flats Value to be defined at all. If the intention had been merely that WPL would receive a sum sufficient to discharge all borrowing secured against the Westbrooke Flats at the date when the JVA was signed, it is necessary to ask why the Westbrooke Flats Value was not defined by reference simply to the sum needed to discharge any existing mortgages over the Westbrooke Flats. The claimants have offered no answer to these points.

99. It is next necessary to note that Recital 1(h) of the JVA records that the BoI had agreed to advance the Loan in part "… *towards the costs of purchasing the Property with vacant possession and freed of the Westbrooke Flats and the P&C Flats …"* This implies (consistently with the terms of the Facility Letter) that payments were to be made from the Loan for these purposes.

100. I have drawn attention earlier in this judgment to the inconsistency between the terms of the Schedule (which defines Net Profit for the purposes of the JVA) and clause 4 of the JVA. Notwithstanding this inconsistency, the one thing that is clear is that the Schedule is a definitional provision that defines Net Profit as meaning the aggregate of income and sale proceeds over the aggregate of the *Purchase Price* and *Development Expenditure* and the phrase *Purchase Price* means the sum payable for the acquisition of the Property. Whilst this provision might assist the claimants in an argument concerning *when* the sums due to WPL for the Westbrook Flats was to be paid, it is inconsistent with the notion that nothing is payable, particularly when read with the other provisions to which I have so far referred.

101. Against this background, it is next necessary to consider the operative provisions of the JVA relevant to the issue I am now considering. Clause 1(a) provides that WPL had agreed to surrender its title to the Westbrooke Flats and deliver vacant possession "*… in consideration of the Westbrooke Flats Value and to utilise the Facility for that purpose"*. In my judgment the inclusion of the words concerning utilisation of the Facility makes it entirely clear that it was expected that WPL would receive the whole of the Westbrooke Flats Value (that is £832,500) by way of drawdown from the Loan just as the claimants were to receive the first part of the P&C Flats Value.

102. This is not only clear from the language used and from the factual, documentary and commercial context noted already but is also consistent with commercial common-sense, as the parties would have perceived it on 3 August 2006. As I have said, the claimants contended that WPL's only entitlement was to a share of the Net Profit after completion of the Scheme. If that was right it would follow that the claimants were entitled to the whole of their original investment (the value of their flats) including all sums borrowed by them and charged against their leasehold interest in their flats, to be paid as to part immediately and part following completion of the Scheme, whereas WPL would get only 50% of whatever was left after the Loan and interest thereon had been repaid and the claimants had been paid the sums due to them under clause 4(1)(b) of the JVA. This is a commercially improbable outcome, particularly when it is remembered that the relationship is a joint venture.

103. There is a potential subsidiary issue as to when WPL was to be paid. It might have been submitted that the effect of the JVA was that payment to WPL was postponed until after completion of the Scheme. No such submission was made however, there is nothing in the terms of the JVA that would support such a submission and there are some provisions that either contradict or are inconsistent with such an approach. I deal further with this point only out of fairness to the claimants since Mr. Gloag was instructed at a very late stage.

104. First, had it been the intention that WPL only receive payment after completion of the Scheme then there would have been a provision to that effect in clause 4 of the Agreement in combination with a provision in broadly similar terms to clause 1(f) in relation to the deferred sum hypothetically due to WPL. Had that been the intention, there is no sense in, or reason for, this omission given what was provided for so far as the claimants were concerned.

105. Secondly, in my judgment clause 1(a) is consistent only with the entitlement to payment arising no later than the delivery of vacant possession. Prior to the JVA each of WPL and the claimants were entitled to deal with the flats they owned as they chose. After the JVA became binding they surrendered that right so as to permit the Scheme to proceed. In my judgment the conclusion that the entitlement to payment arose on delivery of vacant possession receives some support from the fact that clause 1(b) concerning the claimants' obligation to transfer the P&C Flats is in the same terms as clause 1(a) except that the obligation to utilise the Loan is qualified by the word "*partly*". What the claimants were entitled to is then further spelt out in clause 1(e) and (f). This suggests that WPL on the one hand and the claimants on the other were to be treated in the same way in relation to the payment for their respective flats except that payment of part of the consideration due to the claimants was deferred. This suggests to me that the common understanding of the parties at the time the JVA was entered into was that in principle the parties would become entitled to payment on completion of the drawdown of the Loan save and except in relation to the deferred element of the sums due to the claimants. This is consistent too with both parties wanting to release equity.

106. It might have been argued on behalf of the claimants that the terms of the Schedule to the JVA are consistent with payment being made to WPL only at the point at which Net Profit could be defined. In my judgment such a submission would have been mistaken. Had that been the intention, it would have been necessary to distinguish between discharge of sums charged against the title to the Westbrooke Flats at the date when the JVA was signed and WPL's equity therein. I say that because it would have been necessary for all existing charges to be discharged in order to comply with paragraph 2 of the Security Conditions set out in the Facility Letter namely that the BoI required a "*first and only legal charge over freehold/leasehold property at …*" the Property " … *to be registered in [WPL's] name*". There is no such distinction set out within either the body of the JVA or the Schedule, even though all parties had access to the Facility Letter on 3 August 2006 and at least the claimants had the benefit of legal advice from Mr Brook, who was responsible for drafting the JVA and had the Facility Letter in his possession. This omission is consistent with the intention of the parties being that WPL would become entitled to payment of the whole of the Westbrooke Flats Value no later than drawdown of the Facility.

107. Finally, to the extent that there is an inconsistency between the Schedule and clause 4 of the JVA, in my judgment, that is to be resolved by preferring clause 4 where it differs from the Schedule, since the latter appears to be precedent boilerplate material whereas what is set out in the body of the JVA is more likely to reflect what was agreed between the parties at the time. Once that course is adopted, it becomes clear that the consideration for the flats became payable well before the point at which Net Profit became calculable since clause 4 is silent as to any payment for the Westbooke Flats and makes provision only for the deferred consideration provided for by the JVA – that payable to the claimants.

108. Before reaching a final conclusion on WC's submission that WPL was entitled to the whole of the Westbrooke Flats Value following signature of the JVA, I need to consider two further submissions made by the claimants.

109. First, it was submitted that WPL had no remaining entitlement to payment of the Westbrooke Flats Value at the time when the equity release occurred. IP was the main proponent of this argument. He was unable to explain it coherently when cross-examined about it. In my judgment it is misconceived and I regret to say disingenuous on the part of IP for the following reasons.

110. Initially the Deceased paid for the Westbrooke Flats from cash that he supplied. He then raised a loan secured against the Westbrooke Flats, being the Citibank loan. This all occurred before the JVA was signed. Following drawdown of the Loan, the Citibank loan (and the registered charge securing it) was discharged from the Loan and the Loan was secured against the Property as provided for in the Facility Letter.

111. The claimants submitted that the effect of this is that the Deceased had received two payments for the Westbrooke Flats being the sum received from Citibank and the sum drawn down from the Loan and that these sums together exceeded the sum of

£832,500. This is obviously unarguable and to suggest it was disingenuous. The Citibank loan had reduced but did not eliminate WPL's equity in the Westbrooke Flats and the sum paid out following drawdown of the Loan simply substituted BoI for Citibank as lender for the amount lent initially by Citibank.

112. The other argument advanced by the claimants was to the effect that the requirement within the Facility Letter for WPL to provide a *"Borrower Contribution"* of £1.35 million meant that it was precluded from receiving payment for any part of the Westbrooke Flat Value unless and until it had received cash from other sources to make good that requirement. In my judgment this approach too is wrong (and known to the claimants to be wrong) for the following reasons.

113. First, all parties understood that WPL was a single purpose offshore vehicle formed exclusively for the purpose of carrying the Scheme into effect. No one thought that it had any cash other than what could be drawn down from the Loan. Aside from the benefit of the Loan, the only asset it owned was the Property. That this was the understanding of the claimants is apparent from AC's email to the Deceased of 26 June 2006, where, having referred to the claimants' earlier understanding that the Deceased would be "*… putting up capital to finance the project …"*, AC then stated:

> "As discussed above, this has not transpired to be the case as we are now financing the project through the Bank of Ireland …"

114. Secondly, consistently with the understanding of the parties being as set out in AC's email quoted above, there is nothing within the JVA that imposes on WPL (much less the Deceased) an obligation to provide £1.35 million of cash funding in addition to the Property free of the various leasehold interests and any debt charged against those interests. What was contained in the agreement between BoI and WPL did not add to or qualify the agreement between the claimants and WPL contained in the JVA. The terms of the Facility Letter were not incorporated into the JVA by reference or otherwise. It was merely referred to for definitional purposes in a recital as containing or evidencing the Loan – see recital 1(f).

115. Thirdly, the way in which BoI managed the Loan meant that WPL was unable to draw down more than £2.14 million to meet acquisition costs - that is £3,940,000 – (£1,590,000 + £250,000). It followed that by the time the claimants and their lenders had been paid £1.3 million pursuant to clause 1(e) of the JVA, £300,000 had been paid for the freehold (inclusive of the deposit paid for by loan from the claimants) and £395,092 to discharge the Citibank loan there was no funding available to enable WPL to receive payment for what remained due in respect of the Westbrooke Flats Value. That fact however does not lead to the conclusion either that WPL was obliged to forego a payment it was otherwise entitled to under the JVA or that WPL was precluded from borrowing more in order that it could recover what it was entitled to under the JVA. Such a loan was plainly one that was necessary in order to comply with the terms of the JVA. The references in clauses 1(a) and (b) to the utilisation of the Loan were permissive not mandatory and clauses 4(1)(a) and 5 clearly contemplate that sums other than the Loan would be borrowed before the Scheme

could be completed. If and in so far as it borrowed from a lender other than BoI, it would not place WPL in breach of the Facility Letter as long as the security conditions all remained complied with and if BoI was prepared to increase its lending that was a matter for it.

116. Although the claimants alleged that the agreement of BoI to finance the Equity Release was obtained by the Deceased by fraud, it is not necessary for me to attempt to resolve that dispute – firstly, it is not an allegation that has been pleaded by the claimants in these proceedings and secondly, in any event, it is not relevant to these proceedings. It is relevant only as between the liquidators of WPL, the Deceased or his estate and BoI.

117. All this leads me to conclude that WPL was fully entitled to increase the borrowing from BoI in order to fund the balance of what it is entitled to receive under the terms of the JVA. There is nothing in the JVA that imposed on WPL a requirement to take the risk that there would be insufficient funds after the Scheme had been completed to pay the balance of the Westbrooke Flats Value. The only parties required to take that risk were the claimants and they had expressly agreed to take that risk. There was nothing within the JVA that required WPL to retain that sum once it had been obtained. There is nothing that suggests the sum used by the Deceased to purchase the Westbooke Flats was a gift to WPL. To the contrary, AC's email of 26 June 2006, quoted above is entirely inconsistent with that being so by referring to the wish of the claimants and the deceased to release equity from the flats they each owned.

The No Loss Point

118. WC submits that the Deceased and his estate paid £1,244,637.90 by way of additional funding to complete the Scheme, that had WPL not borrowed the additional £1 million (and incurred the borrowing costs associated with it of about £182,000) those sums would have been repayable by WPL to the Deceased or his estate given the definition of "*Development Expenditure*" contained in the Schedule to the JVA included all outgoings and expenses payable in connection with the Scheme, that nominally the estate is still owed money by WPL net of the equity release amount and interest thereon and in the result the outcome would have been precisely as it was – WPL would have ended up in liquidation with no Net Profit available for distribution. The principle that WC is entitled to set off the sums lent by the Deceased and his estate to WPL to complete the Scheme against the additional sum borrowed from BoI and associated borrowing costs is not in dispute.

119. In light of the conclusions I have so far reached, the point I now turn to is relevant only to the difference between the amount of the equity release (and interest thereon) and £437,407.28. In reality however, if WC is right as a matter of principle then the sum he claims was injected into completion of the Scheme by the Deceased and his estate exceeds the whole of the equity release and interest thereon so that on WC's case the set off defence provides a complete defence independently of the question

whether WPL was entitled to recover the balance of the Westbrooke Flats Value and then deal with it as it chose.

120. In his closing submissions Mr. Gloag submitted that the burden of establishing that the Deceased or his estate supplied more to WPL than the sum of the equity release and associated borrowing costs rests on WC. I accept that WC bears the evidential burden of establishing this to be so. The claimants dispute that all the sums identified by WC have been proved to have been incurred in completing the Scheme, largely because a significant amount of money has been paid by the estate in cash to FG and also because it is alleged that the Deceased utilised part of the Loan for purposes unconnected with completion of the Scheme.

121. The claimants sought to advance their case by reference to a schedule produced in its most recent iteration as a document attached to Mr. Gloag's closing submissions entitled "*Summary of the economic value extracted from WPL and the re-development of 9 Cliveden Place for Elliot Nichol/Randolph Hill*". I should say at this stage that Randolph Hill is a reference to the Deceased's main operating group of companies. This document alleges that WPL extracted a sum of in excess of £4 million. This is very strongly disputed by WC, who submits that the document should be ignored in its entirety. I accept that submission for the reasons that follow.

122. First, the first thirteen entries relate to events that occurred prior to the date when the parties executed the JVA (3 August 2006). I accept WC's submission that on that ground alone these items should be disregarded. Secondly, each of these items make no sense in some cases for reasons already explained earlier in this judgment. Thus the first item is a complaint that having purchased the Westbrooke Flats with cash provided to it by the Deceased, WPL then obtained a mortgage on the flats from Citibank and remitted the sum realised to the Deceased. Aside from the fact that this pre-dated the JVA (the date relied on by the claimants being 4 May 2006) it is entirely unclear how any of this is relevant to the issue that arises. The Citibank loan was known to all parties prior to the making of the JVA, as was the desire of all parties for equity release of the money tied up in the flats that they each owned. The Citibank loan was discharged from the Loan following execution of the JVA, as were the sums charged against the claimants' flats. This not only benefitted WPL and the claimants respectively but it had to be done if the Loan was to be utilised. No allegation to the effect that the Citibank loan was in any respect wrongful has been pleaded and an attempt by the claimants to make such an allegation by further amendment was dismissed by the court at a hearing preceding the trial. Not merely has the inclusion of this item in the claimants schedule caused confusion, wasted time and caused costs to be incurred that could have been avoided, but it undermines my confidence in the rest of the document as an agenda for testing the claimants' case on the issue I am now considering.

123. There then follow five entries that each relate to expenditure by the Deceased of the money raised by WPL from the Citibank loan and paid over to the Deceased. All pre-date the JVA. The inclusion of these items by the claimants in their schedule is

substantively incomprehensible since it relates to money spent by the Deceased not money spent by WPL, has not been pleaded and, as with the item considered in the previous paragraph of this judgment, the inclusion of these items has caused confusion, wasted time and caused costs to be incurred that could have been avoided as well as further undermining the rest of the document as an agenda for testing the claimants' case on the issue I am now considering.

124. The effect of the conclusions that I have so far reached is that I reject as entirely irrelevant items from the claimants schedule with a total nominal value of over £784, 000.

125. The claimants have included the sum of £450,000, describing it as "*undervalue of building"*. This harks back to the Misrepresentation Claim. It makes no sense however since it is not and cannot sensibly be suggested that either the Deceased or his estate received this sum either by drawdown of the Loan or at all. In any event, the Misrepresentation claim (and with it any entitlement for the claimants to recover £450,000) has failed. This takes the total value of the items I have so far rejected from the claimants' schedule as unarguable to over £1,234,000.

126. The next item included is the Borrower contribution referred to in the Facility Letter. I have already considered this issue at some length. It is sufficient to note for present purposes (as I have noted earlier) that neither the Deceased nor his estate owed a contractual or any other duty to the claimants to advance this sum to WPL and no allegation to that effect has been pleaded by the claimants. Had there been such an obligation it is difficult to see how it could have been on terms other than requiring it to be treated as Development Expenditure and thus repayable by WPL before arriving at Net Profit. There was no obligation on WPL under the JVA to introduce any such sum. Any obligation to introduce this sum was owed by WPL to BoI. When and in what circumstances BoI permitted draw down of the Loan was a matter for it and WPL. This issue has nothing to do with the no loss issue I am now considering. This takes the sums referred to by the claimants in their schedule that I have rejected as unarguable and irrelevant to over £2.263 million.

127. The next sum referred to by the claimants is £279,000 but the claimants have offered no explanation for why that has been included and so I leave that out of account. The claimants then include within their schedule the sum of £395,092.72, which was the sum paid to Citibank to redeem its charge over the Westbrooke Flats. Its inclusion in the schedule is said by the claimants to be because the loan should have been repaid prior to drawdown of the Loan. This is unarguable since, for the reasons I have given, the whole of the Westbrooke Flat Value was payable on surrender of the leasehold interests in those flats.

128. There is then included a sum of £125,030.31 which is half the cost of acquiring the freehold from the Grosvenor Estate and the sum of £50,000, which I have already considered as a separate head of claim. The underlying justification for the inclusion of these claims within the schedule is that the claimants allege that they should have

been funded by the Borrower contribution referred to in the Facility Letter. Aside from the fact that including both the total Borrower contribution sum and the elements of expenditure that it is alleged should have been met from it involves double counting, as must have been obvious to the claimants as they prepared the schedule, these items are not properly claimable for all the reasons already set out above concerning the Borrower contribution. These items are both irrelevant and unarguable as an answer to the no loss point I am currently considering. This conclusion takes the nominal value of the points made by the claimants in their schedule that I have so far rejected to not less than £3,112,773.

129. The next payment relied on by the claimants is the payment of £10,000 to DWF, the solicitors who acted for BoI in relation to the Loan. No explanation has been offered by the claimants as to the basis on which they allege this sum does not constitute Development Expenditure. In my judgment alleging that this sum was in some way a benefit for the Deceased or his estate is unarguable. The Facility Letter incorporated by reference BoI's general terms, which were included as an Appendix to the Facility Letter. Clause 8.1 of the Standard Conditions imposed on the borrower (WPL) the obligation to meet all professional fees incurred by BoI in connection with the grant of the Loan. Whilst that provision requires that sum to be met in cleared funds prior to drawdown, as is submitted by WC plainly that is a cost that falls within the scope of the definition of Development Expense as defined in the Schedule to the JVA. As with the other items I have so far considered, including it in a schedule of expenses that it is alleged benefitted the Deceased or his estate has caused confusion, wasted time, and caused costs to be incurred that could have been avoided as well as further undermining the document as an agenda for testing the claimants' case on the issue I am now considering.

130. The next item included is stamp duty said to be £44,000. No explanation is offered as to where this figure comes from – it does not appear in the completion statement that is referred to in the claimants' schedule. If it relates to the purchase of IP's flat within the Property by WPL then it was payable by WPL as purchaser. Similar considerations apply to any SDLT payable as a result of the payment to WPL of the Westbrooke Flats Value. It is recoverable by WPL before Net Profit can be arrived at because SDLT is expressly included within the definition of Purchase Price defined by the Schedule to the JVA. If it is alleged that it was paid by IP on behalf of WPL then there is no evidence that supports that assertion. If it refers to stamp duty paid by IP when he acquired his flat originally that is irrelevant and immaterial because the only sum due from WPL in respect of the claimants' flats is that specified in the JVA. It is unarguable in those circumstances that this sum represents some form of benefit that accrued to the Deceased or his estate.

131. The next item is £33,156.12 that was paid to the Deceased.. That sum is incorrectly stated. The correct sum is £33,111.94 as is apparent from the document the claimants refer to in their schedule. It was paid out to the Deceased as provided for in the completion statement at the same time that £30,000 was paid out to the claimants. It is unclear why that sum was paid to the Deceased rather than WPL or why it was

£3,111.94 more than the £30,000 paid to the claimants. No allegation that this sum was wrongly paid out has been pleaded. If and to the extent it is alleged that the sum should have been paid out to WPL, that is an allegation available only to the liquidators of WPL not the claimants.

132. The next item in the claimants' schedule is the sum of £18,600. The claimants do not explain in the schedule what this sum is or why it constitutes a benefit to the Deceased. WC submits that it is the sum of two payments made on 13 and 14 December 2006 – one being the payment of £411.25. That was a payment to Farrer & Co who acted for Citibank in relation to the redemption of the Citibank loan charged to WPL's flats. It would appear from the completion statement that the Deceased had paid this initially. WPL became liable for this charge only because of the need to redeem the Citibank loan. That was necessary in order that the Westbrooke Flats could be merged into the Property in order to give effect to the Scheme and also because of the security condition imposed by BoI noted earlier. On that basis, it is a Development Expense within the meaning of the schedule to the JVA and thus something that WPL was entitled to recover before Net Profit could be calculated. On this basis, it is equally clear that WPL was entitled to borrow funds in order to meet this cost without breaching clause 5 of the JVA and it is equally the case that if the Deceased paid a sum that should in fact have been paid by WPL he was entitled to be reimbursed by WPL. Even if this is wrong, because it ought to have been paid by WPL out of the Westbrooke Flats value, the sum is immaterial to the issue in this case. The remainder was reimbursement of money paid to the contractor engaged by WPL to carry out the building work element of the Scheme. In those circumstances it is not arguable that either sum represented a benefit to the Deceased. It was the reimbursement of payments made by him that should in fact have been made by WPL.

133. The next item is £1 million. This is not explained expressly within the claimants' schedule but in fact is the Equity Drawdown that is the subject matter of the element of the claim that I am now considering. There is not now nor has there ever been any dispute that this sum ultimately came to the Deceased as a payment from WPL. It should not have been included in a schedule that supposedly answers the point made by WC that no loss has been suffered as a result of this payment since sums exceeding £1 million have been paid to or on behalf of WPL either by the Deceased or his estate.

134. There is a reference within the claimants' schedule to £10,000 for "*Calleva Kitchen*". It is not explained how this sum constituted an economic benefit to the Deceased and no such allegation is pleaded in these proceedings.

135. The next item is £264,884.25, which is said to be "*interest*". There are a number of points to be made about this. Assuming this to be interest attributable to the additional equity release loan, the points made in paragraph 133 above apply with equal force to this element. If and to the extent the reference is to interest due in respect of the Loan then it was a sum that was Development Expenditure and thus was payable before arriving at Net Profit and was payable out of the Loan as is apparent from its inclusion

within the list of purposes of the Loan set out in the Facility Letter. If and to the extent that it is interest that was incurred in respect of the Loan because the scheme took longer than planned, then it is immaterial to the allegation I am now considering and is only potentially recoverable as part of the claim for damages for delay to which I turn in the next section of this judgment.

136. Finally, the claimants allege that £150,000 was charged by the Deceased to WPL in respect of the legal costs of divorce proceedings concerning a Ms Moir. No such allegation has been pleaded. An application to amend the Particulars of Claim so as to include this allegation was dismissed and there has been no appeal from that decision. There is no evidence that any such payment was made by WPL. If any such payment was made, it was made by the Deceased following receipt of the interim dividend/loan from WPL.

137. WC submitted that the claimants' schedule is " … *entirely flawed and misleading* …", "… *woefully inaccurate and misleading* …' and in consequence ought to be disregarded in its entirety. I accept this submission for the reasons set out above. In addition, in my judgment it is directed to an issue other than the issue I have to decide. That issue does not require the taking of an account that seeks to compare the total sums taken out against the total sums put into WPL or paid on its behalf by the Deceased or his estate. The issue that arises is much narrower than that – the claimants having alleged that by borrowing and paying over the equity release sum to the Deceased, WPL acted in breach of contract so as to render the Deceased's estate liable under the Guarantee. The defence to that allegation is that the Deceased and his estate paid more than that sum (and the interest arising from the additional borrowing) either to or on behalf of WPL in relation to the Scheme. As the claimants accepted throughout the trial, if that is established then the claimants have suffered no loss.

138. WC claims that the Deceased or his estate have paid £1,244,637 90 to or on behalf of WPL in relation to the completion of the Scheme. The detail relating to this is set out in the schedules referred to by Mr. Seitler in paragraph 9.7.9 of his closing submissions. Aside from the points made by or on behalf of the claimants already considered, the claimants disputed the accuracy of this on two grounds.

139. The first concerned interest. In my judgment that submission was mistaken for the reasons already identified in paragraph 135 above and I need say no more about that. The other focussed on the fact that after the death of the Deceased large cash sums were paid by the estate to FG for which there is no corresponding documentary "*audit trail*" (by which is meant an invoice or receipt from a third party or a specific book entry relating to each payment) or where there was an audit trail, some of the invoices did not refer in terms to the Property.

140. The claimants set out the substance of this submission in the document annexed to their written closing submissions entitled "*Analysis of Bundles F1 and F2*". First, there is an allegation about the failure to reclaim VAT. That allegation is not pleaded and is irrelevant to the point now being considered namely whether the Deceased or

his estate paid to or on behalf of WPL in relation to the Scheme sums that exceeded the sum of the amount borrowed to fund the equity release and the cost of borrowing that sum. That is so because any entitlement to claim VAT was WPL's entitlement not an entitlement of the Deceased or his estate.

141. The real allegation made is that a total of £824,049.80 has been paid to FG, that the documentation available supports payments by FG in relation to the Scheme totalling £478,561.67 in addition to fees for his activities totalling £125,499.93. It follows, so the claimants allege, that £389,285.16 was paid to FG over and above the sum of his fees and the disbursements proved by the contemporaneous documentation. The claimants' case as to what happened to that money is not spelt out but in summary it appears to be suggested that FG used it in connection with other projects in respect of which the deceased was interested.

142. If correct, that leads to the conclusion that the total paid by the Deceased and his estate towards the development of the Property is £1,244,637.90 - £389,285.16 which comes to £855,352.74. As mentioned earlier, the sum of the equity release and the finance costs relating to that sum come to £1,182,000. Assuming the claimants are correct in the assertion I am now considering, the balance of the Westbrooke Flats value to which WPL was entitled (£437,407.28) when added to £855,352.74 comes to £1,292,760, which exceeds the sum of the equity release and the finance costs relating to that sum. That being so, the claimants' point is an entirely academic one.

143. Mr. Seitler addresses the points made by the claimant in Appendix 5 to his closing submissions. As he observes in the opening rubric, that response focuses only " … *on invoices contained in Bundle F that were omitted from the Cs' schedule but that on D's case relate to* …" the Property and were paid by FG. As to these I accept those submissions because the claimants did not challenge them in the course of their closing oral submissions. The effect of these submissions is to decrease the unidentified disbursements referred to in the claimants' schedule by £128,637.69. When that sum is added to the balance of the Westbrooke Flats value to which WPL was entitled (£437,407.28) the resulting sum comfortably exceeds the value of the equity release loan and its attendant finance costs.

144. Aside from the point considered in the previous paragraph, there is a more general point that is relevant. The underlying thesis that the claimants sought to advance at trial was that the sums that could not be referred back to a specific document were syphoned off for use elsewhere. That would have required the Deceased and his executors to have been working in concert with FG since the money that the claimants rely on for these purposes was all paid to FG. This is a very serious allegation against all whom it is made but particularly against FG, a construction professional whose livelihood depends upon the management of construction projects on behalf of others, WC, a chartered accountant and insolvency practitioner and PM, a solicitor. It is classically an allegation that engages the principles set out in Re H (Minors) (Sexual Abuse: Standard of Proof) (ante) summarised in paragraph 49 above.

145. There is no direct evidence of any such activity. The best that the claimant is able to do (apart from pointing to an absence of documentation to support the use of all the sums paid to FG in furtherance of the Scheme) is to allege that the Deceased and his main corporate group were suffering cash flow difficulties episodically in the period between the end of March 2008 and the date when in the end the Property was completed and sold. Both PMC and PM rejected this as correct, saying merely that like all entrepreneurs, the Deceased stretched himself financially to build his business. Mr Davis's evidence was that he saw no evidence of the Deceased being strapped for cash – see the summary of his evidence below – and FG made clear in the course of his oral evidence that all the money he received was spent on the Property – see T8/62/17-63/4. There is no evidence to contrary effect. There is no evidence which shows this to be an incorrect analysis and nothing from which it can properly be inferred to be wrong. PMC in particular was better placed than anyone to judge the financial position of the Deceased and his companies. There were no concessions made that devalued this evidence nor is there any contemporaneous documentation that contradicted their evidence. I have no reason to disbelieve PMC's evidence on this issue.

146. The claimants' schedules do not demonstrate commercially significant sums of money that are not supported by documentation as the analysis set out above shows. It plainly does not justify AC's description that "*… the project was completely plundered …*" [T3/16/18]. In my judgment the gaps are explained by FG's evidence (which I accept) of the need to make cash payments – see the list entitled "*Small Contractors – Payments made in cash ONLY*" and FG's oral evidence at T8/71/11-15. None of the allegations made in or by reference to the schedules relied on by the claimants were put to FG. This was a serious omission given the implicit allegations being made against FG. I make clear that I do not criticise Mr. Gloag for this – the schedules should have been produced if at all before not during the trial. In those circumstances, I conclude that the defendants have discharged the evidential burden that rested upon them to demonstrate that no loss had been suffered by WPL as a result of the equity release arrangement.

147. In those circumstances, the Equity Release Claim fails.

The Delay Claim

Introduction

148. The claimants allege that by failing to complete the Scheme and sell the Property by no later than the end of March 2008, WPL breached clause 3 of the JVA and that had WPL completed the Scheme and sold the Property by no later than the end of March 2008, the Property would have sold for no less than £8 million and that in consequence (a) the claimants would have recovered the balance of the P&C Flats Value, (b) the Scheme would have made a Net Profit of not less than £2,826,177 and the claimants would have received 50% of that sum being £1,413,088.50 and (d) the claimants would have avoided interest payments on the SPL loans totalling £3.5

million. For reasons that I set out below, I have concluded that the claimants have failed to prove that the Property would have sold for not less than £8 million in March 2008 and thus that this element of the claim fails irrespective of what delay in fact occurred and what the causes of that delay were. Further and again for reasons that I set out below, I have concluded that the claimants have failed to prove that interest payments of £3.5 million would have been avoided had the Property been sold by the end of March 2008. It follows that the Delay Claim must fail irrespective of the conclusions that I reach concerning why the Scheme was not completed and the Property sold by no later than the end of March 2008.

149. In order to make good their delay claim it is not sufficient for the claimants to prove that the Scheme could or ought reasonably to have been completed by the end of March 2008. In addition, they must prove that the Deceased (and/or his executors or WC) have deliberately induced WPL to delay completion down to the date when in fact the Property was sold "*… so as to enable the diversion of money away from the joint venture and into projects personal to [the Deceased] and companies controlled by him.*" There is no dispute that this is what the claimants need to establish – as Mr Gloag put it in his written closing submissions, the Deceased "*… caused WPL to breach the [JVA]. He did this for his own benefit. He caused delay, in conflict of WPL duties to the claimant. After his death the estate continued despite the protestations of the claimants, to cause delay. … The losses included the [SPL] loans and were as a result of the various breaches and resulting delays occasioned by …*" WC.

150. Mr Seitler maintained that this element of the claim has not been properly pleaded and should fail on that basis without the need to look further into the detail of the claim, that there was no evidence at all to make good the critical allegation that the Deceased induced WPL deliberately to delay completion of the Scheme beyond March 2008 as well as submitting that the claimants have not proved that if the Scheme had been completed by March 2008, the property would have sold for £8 million or that the SPL loan or loans would not have been taken out or what if any of the sum claimed by reference to the SPL loans was caused by failure to complete the Scheme by March 2008.

The Pleading Point

151. This point is of rather more significance than would usually be the case because of the procedural difficulties that have surrounded this case. In summary, there have been at least two orders made in these proceedings which have required the claimants to plead their delay and defects claims in a form that enables WC to understand the case he must meet. WC maintains that the claimants have failed to comply with these orders and ought not to be permitted to advance the delay and defects claims in consequence. No attempt has been made by Mr Gloag to address this point in his written or oral closing submissions, even though it was set out at length in paragraphs 84-89 of Mr Seitler's written opening.

152. WC considered that the original Particulars of Claim failed to plead what periods of delay were being asserted, what was alleged to have been the cause and effect of each period of delay relied on and what loss was alleged to have been caused by each period of delay relied on. This criticism resulted in an Order by the Master made on 5 December 2017, paragraphs 4 -7 of which required the claimants to properly particularise the allegations made by setting out a concise statement of the facts relied upon and not to "*… introduce new or different allegations*". The claimants failed to comply with either element of this Order, which resulted in a further application and the making of a further order by Mr Lance Ashworth QC sitting as a deputy Judge of the High Court on 23 March 2018. That order was in similar terms to that made by the Master but included a provision that the unparticularised allegations would stand struck out unless the directed particularisation was provided by 4 pm on 9 April 2018. The claimants purported to comply with this direction but WC maintains that the claimants have in reality failed to comply with Mr Ashworth's Order.

153. Where a claimant's case depends on an allegedly actionable wrong that is alleged to have caused a loss the nexus between alleged cause and alleged effect must be pleaded in an intelligible form. Where loss is alleged to have been caused by allegedly actionable delay, it will usually be necessary for a claimant to plead the period of delay relied on, plead why it is alleged to be actionable as against the defendant, what the result of the delay was and what loss is alleged to have been caused thereby. Where there have been multiple intermittent periods of delay it will usually be necessary to satisfy each of those requirements in relation to each period of allegedly actionable delay and explain how each period of delay impacted on the ultimate completion date.

154. There is no clear statement of cause and effect within the RAPC that links breach to delay to loss other than an allegation that the whole of the claimed loss was caused by the delay in completion of the Scheme between the end of March 2008 (when the claimants maintain it should have been completed) and the date when the Property was in fact sold by WPL. Since there was no contractually fixed or otherwise agreed date for the development to start and finish, it was for the claimants to plead and prove at trial:

(a) the date when it is alleged work could and should have started,

(b) the date when it is alleged redevelopment of the Property should have been completed had it been started on the date when first it could and should have been commenced;

(c) those parts of the period between March 2008 and the date when in fact the Property was sold that were attributable to delay deliberately induced by the Deceased and then his executors and WC;

(d) That the Property would have been sold for at least £8 million if sold before the end of March 2008;

(e) That no money would have been borrowed from SPL but for the failure of WPL to complete the Scheme and sell the Property by the end of March 2008 or, alternatively that had the Property been sold for at least £8 million by the end of March 2008, the claimants would not have become liable to SPL for interest payments of at least £3.5 million.

No attempt has been made by the claimant to spell out any of these elements in any sort of logical or coherent sequence. In relation to the SPL loan head of loss, no attempt has been made to plead or particularise when the SPL loan or loans was or were taken out, what amount was borrowed, at what rate of interest, and when it was repaid (fixing the sum claimed at £3.5 million implies that it has been repaid on, or that interest has ceased to accumulate from, some date prior to the date of the original Particulars of Claim since that was the figure pleaded originally and it has never changed). No attempt has been made to explain how the claimants could have expected to both recover both the Net Profit they claim in these proceedings and avoid the liability to SPL of £3.5 million other than on the basis that the whole of the sum to which the £3.5 million interest payment is allegedly attributable was borrowed after the end of March 2008.

155. I have come close to accepting Mr Seitler's submission on this point. However, in my judgment a claimant is entitled to plead a claim of this sort by reference to an unbroken period of delay allegedly deliberately induced by the Deceased, his executors and WC between the end of March 2008 and the date when the Property was in fact sold, that had the Property been sold by no later than the end of March 2008, it would on the balance of probabilities have sold for not less than £8 million and to allege that by reason of that delay they then borrowed money they would not otherwise have borrowed resulting in interest charges payable to SPL of £3.5 million they would not otherwise have incurred and lost the balance of the P&C Flats Value and Net Profit of £1,413,088, which they would otherwise have been paid. Viewed in that way the claim has been adequately pleaded. I accept however that had the claimants sought to advance a narrower alternative case that focussed on particular shorter periods of alleged delay that it was alleged caused specific losses they would not have been entitled to do so on the pleadings as they stand. However, they did not attempt to adopt such a course.

Culpable Delay

156. In my judgment the claimants have failed to prove that the Deceased or his estate has caused the delay they allege deliberately. My reasons for arriving at those conclusions are as follows.

157. In considering whether the claimants have proved that the Deceased caused the delay relied on deliberately, the claimants maintain that I should be willing to draw inferences. Whilst it is possible to prove a case of this sort inferentially, the principles set out in Re H (Minors) (Sexual Abuse: Standard of Proof) (ante) summarised at the outset of this judgment must be borne in mind when deciding whether such an

inference can properly be drawn, given the nature of the allegations made by the claimants.

Delay - August 2006 to December 2009

158. The Deceased died on 29 December 2009. Thus any delay deliberately induced by the Deceased must of necessity have occurred in this period.

159. Unlike the position with most construction contracts, here there is no fixed or ascertainable start date and no agreed fixed or ascertainable end date because neither is specified in the JVA. The only obligation (which was shared by WPL and the claimants) was to *"… carry out the conversion of the Property in to a single family dwelling as soon as circumstances reasonably allow … and … thereafter market the same as soon as practicable …"* It is necessary to ascertain the date when redevelopment of the Property could and should have started before attempting to decide whether the project was delayed and if so for what reasons.

160. The claimants' case is that the construction work and marketing of the Property would have taken no longer than 12-14 months – see paragraph 33A of the RAPC. Since the claimants' case is that the Property ought to have been sold by no later than the end of March 2008 – see paragraph 51.1 of the RAPC - it follows that their case is that work should have started by no later than January 2007. The claimants allege that marketing of the property should have taken place while redevelopment work was taking place. This is contrary to what they say should have happened when the Property was in fact offered for sale, where they maintain that attempts to market the Property before it was completed adversely affected the value of the Property as it was perceived by the market. I have no expert evidence to assist me on this issue. I consider it likely that there would be a gap between completion of the redevelopment and sale of the property though how long that would have been is entirely speculative. In those circumstances, I leave this factor out of account. However, if I conclude that construction could not have started by January 2007, it necessarily follows that the Scheme could not have been completed by March 2008.

161. Preliminary works were commenced at the property on or shortly after 15 September 2006, prior to the acquisition of the freehold from the Grosvenor Estate – see the letter of instruction from FG to National Underpinning and Piling Construction Company of that date. The work directed was stripping out, preparing some trial holes to determine ground conditions where major excavation was to take place, erecting a hoarding and clearance of excess weed growth from the rear garden – see FG's evidence at T7/123/20-24. Commencement of this work resulted in a letter from the Grosvenor Estate dated 22 September 2006 stating that it did not consent to any work at the Property and requesting confirmation that it would cease. The Grosvenor Estate's solicitors were then instructed to delay completion of the transfer of the freehold until this issue had been resolved – see the letter from Boodle Hatfield to Brook Martin (by now acting for WPL) dated 27 September 2006. This resulted in an instruction from FG to the contractors to cease work. It resumed only in December 2006. That such

work was commenced prior to completion of the transfer of the Freehold and draw down of the Loan and came to an end in those circumstances is inconsistent with any deliberate delay on the part of WPL or the Deceased.

162. Excavation work could not be commenced in accordance with the 2005 Planning Permission until Party Wall Awards had been obtained in relation to the neighbouring properties, the conditions imposed by the 2005 Planning Consent had been complied with and the consent of the Grosvenor Estate obtained. The Party wall issues were a major source of delay. Although IP asserted that there were party wall awards in place prior to 4 August 2006, those have not been disclosed and the assertion is contradicted by IP's email to Mr Brook of 26 March 2007 where he acknowledges that negotiations between party wall surveyors were on going. The necessary party wall awards were not published until February 2008 – that is a month prior to the date when the claimants allege that the redevelopment of the property should have been completed and the property sold.

163. The delay in obtaining the necessary party wall awards was predominantly the result of the antipathy of neighbours to the Scheme and the role of the claimants in it. There is no evidence whatsoever that the Deceased was responsible for this antipathy.

164. According to FG (who had been instructed initially to act as WPL's party wall surveyor), it was made clear to him by the party wall surveyor instructed by the owners of 8 and 10 Cliveden Place that he been instructed that he was to be "… *very difficult* …". I accept this evidence because it is consistent with a significant volume of contemporaneous material including but not limited to that referred to later in this paragraph. The neighbours had objected to the claimants' applications for permission to develop the Property as is apparent from the LPA committee reports included within the trial bundles. The continuing hostility between the claimants and their neighbours is apparent from IP's email to Mr Brook of 28 September 2006 – see the third paragraph – and his email to Mr Hughes of the Grosvenor Estate dated 29 September 2006 – see the first paragraph. The hostility of the neighbours to the claimants is also apparent from Mr and Mrs Mills' instruction of Clifford Chance to look after their interest in relation to the development of the Property – see the letter from Clifford Chance of 13 October 2006 - and the express request by the party wall surveyor instructed by the owners of 8 and 10 Cliveden Place on 7 February 2007 for confirmation that IP "… *has nothing to do with [the Property] or development either by way of shareholding or side agreement* …" None of this was the responsibility of WPL or was deliberately or otherwise caused by the Deceased.

165. The Grosvenor Estate's solicitors had made clear that they would not countenance the commencement of any work at the building until WPL had obtained party wall, planning, listed building and management scheme consents – see the letter from Boodle Hatfield of 1 March 2007, by which an undertaking not to commence work until all these consents had been obtained was requested and the undertaking given by Brook Martin & Co on behalf of WPL by a letter of 2 March 2007. There is no evidence that the complaint was deliberately brought about by the Deceased. Such a

case would require evidence that, or from which it could be inferred that, it was the Deceased who had induced the conduct leading to Boodle Hatfield's letter with the intention of triggering an objection that would result in work being stopped. There is no such evidence. Once the Grosvenor Estate threatened proceedings, it was inevitable that the undertaking sought would be offered since there was no realistic basis on which WPL could resist any proceedings brought against it. Attempting to get on with the project in this manner is not consistent with any attempt to induce delay. The delay that occurred following the giving of the undertaking would have occurred in any event given the basis on which the undertaking had been sought and given.

166. There is no evidence that more progress could have been made down to the end of 2007 than in fact was made. The structural engineer's and architect's drawings only became available at the end of July 2007. There is no evidence from which it can be inferred that the Deceased induced any part of this delay. This part of the delay was contributed to in large part by a change in architects. That in turn resulted from the unwillingness of the former architect to continue to be involved in the project. There is no evidence that FG failed to pursue the party wall issues as rigorously as possible but even if that is wrong there is no evidence that any lack of rigour was deliberately or otherwise induced or encouraged by the Deceased. In his report to Brook Martin in January 2008, FG stated that delay had been caused due to "… *instances of interference and disruption caused by one particular adjoining owner including visits from English heritage, Planners, the Police, Health and Safety officers, Grosvenor Estates surveyors, allegations of drug trafficking, squatters, improper conduct, unauthorised works when none were being carried out, trespass and damage done to an overgrown Jasmine* …". The underlying material supports this analysis. There is no basis for suggesting that it is fabricated by FG either in concert with the Deceased or otherwise. There is no documentary material or any other evidence apart from assertion by the claimants that supports the case put to FG in cross examination that the project was not being got on with, much less that it was not being got on with because the Deceased was encouraging FG to incite, condone or not seek to address causes of delay.

167. The difficulties caused by the neighbours continued during 2008. These included a particularly disruptive allegation by Mr. and Mrs Mills that the foundations as laid by WPL's contractors had trespassed onto the neighbouring property. This resulted in the foundations having to be re-dug. There is no evidence that any of the delay resulting from this was caused or contributed to by FG much less deliberately induced by the Deceased.

168. Further delay then ensued because of a unilateral change by WPL's contractor of the method of underpinning. This resulted in the need for amendments to the Party Wall Awards. There is no evidential basis for asserting that this was the result of deliberate delay on the part of WPL or the Deceased. It was submitted on behalf of WC that it would have been open to the claimants to call the principal of WPL's contractor if they had wished to advance such a case. They did not do so. That is significant in my

judgment given the absence of any evidence from which deliberate collusion between the contractor and the Deceased can be inferred and that WPL's contract with its contractor was terminated following an allegation by WPL of overcharging. The absence of the director (Mr. Keith Pickstock) in those circumstances is a factor leading to the conclusion that the delay attributable to the underpinning issue was the result of activity by the contractor not induced or encouraged by the Deceased.

169. The March 2005 planning consent was to excavate and build a garden sub-basement and extend the property at lower ground floor/basement level and was subject to conditions. In May 2008, the LPA threatened WPL with prosecution for failing to satisfy the conditions imposed by the March 2005 Planning Permission. This led to all work being stopped pending resolution of this issue. Satisfaction of the conditions imposed by the March 2005 planning consent was confirmed by the LPA only on 23 September 2008 – that is 6 months after the date when the claimants maintain the project should have been completed and the Property sold. Work recommenced in October 2008. There is no evidence from which it can be inferred that WPL ought to have proceeded notwithstanding the threat of prosecution, much less that the failure to do so was deliberately induced by the Deceased.

170. Conversion of the Property into a single dwelling from four flats required a further planning and listed building consent as well as the consent of the Grosvenor Estate. None of these required consents had been obtained by October 2008. This resulted in a further threat of prosecution by the LPA in relation to internal works being undertaken at the Property. Any work to the upper floors of the Property then ceased pending grant of the required Planning Permission. Planning consent to convert the Property into a single dwelling was not obtained until 18 June 2009. Work then continued down to about August 2009.

171. It is arguable that these additional planning and Grosvenor Estate consents ought reasonably have been applied for earlier than they were. However there is no evidence to support the proposition that the failure to do so was the result the Deceased deliberately inducing WPL not to do so in the hope of thereby delaying completion of the Scheme. The failure to do so must be viewed in the wider context described above including the attempts I have described to make progress that was ended only following the threat of prosecution by the LPA or legal action by either neighbours or the Grosvenor Estate. It is much more likely that the failure to make the application was an error or, possibly, negligent omission on the part of the professionals with responsibility for managing the project on behalf of WPL. It is not part of the claimants' case that WPL was liable for delay caused by negligence. Their case is exclusively that all of the delay relied on was deliberately induced by the Deceased, his executors and WC.

172. In August 2009, it became apparent that what has been referred to in this case as the "*aspirational scheme*" was unachievable at a site meeting that took place on 3 August 2009. This scheme is the seven-storey scheme referred to earlier in this judgment and involved principally the creation of a sub basement under the Property. The discovery

that the aspirational scheme was not achievable resulted in changes to the internal layout of the property, which required further planning and listed building consents and a further licence to alter from the Grosvenor Estate. Predictably, there were difficulties in obtaining amendments to the Party Wall awards and objections by Mr. and Mrs Mills to the further planning applications. This resulted in delay down to the beginning of April 2010. This coincided with a very serious dispute between Mr Pickstock and FG and WPL concerning the sums that had been claimed by way of payment from WPL. It was concluded that Mr Pickstock had overcharged for the work that he had done and in consequence WPL ended its relationship with him. In my judgment the effective cause of the delay during this period was the need to make further planning and listed building applications, applications to amend party wall awards and to obtain further Grosvenor Estate consents. Even if there had been no dispute between WPL and Mr Pickstock the delay I am now considering would still have occurred.

173. There is a significant factual dispute between the parties about the aspirational scheme. WC alleges that the claimants misled the Deceased by suggesting there was planning permission to construct a sub-basement under the property when there was not and when they knew that permission would never be obtained for such a scheme from the LPA or the Grosvenor Estate. Neither claimant disputed that they knew this to be the position at the date when the JVA was entered into – see T2/56-7 and 71-5. Their case was that the Deceased knew the true position from the outset.

174. A great deal of time was spent during the trial and in WC's closing submissions in exploring this issue but its substantive impact is limited given the conclusions I have reached already. It is not necessary in those circumstances for me to consider all of the detailed submissions made concerning this issue. I find that the Deceased did not know of the limited nature of the planning permission that had been granted for the property until mid 2008. This was FG's written evidence and also his oral evidence – see T7/120/17 – 121/11. Although that evidence was challenged by Mr Gloag in the course of his cross examination of FG – see for example T7/132/6-15 - I accept it because it was corroborated by Mr. Elliot Davis, whose evidence I accept, who stated in paragraph 41 of his witness statement that:

> "I remember [the Deceased] complaining to me at a meeting at the Lanesborough Hotel Library on 11 June 2008 (I have checked the date from my diary) that [IP] had badly misled him about the planning position on [the Property]. He told me that [IP] had shown him planning application which had been put in to the local authority for a very substantial refurbishment of the building. However, [the Deceased] told me that [IP] had then withdrawn them before they had been turned down but not informed [the Deceased] about this. He felt that [IP] had done this deliberately to induce him to enter the joint venture and that he would not have gone into it had he known of the planning difficulties. …"

This evidence is consistent with the planning position having been recently discovered by the Deceased. It is consistent with FG's evidence that the Deceased discovered the actual planning position during discussions about the threat of

prosecution from the LPA in mid-2008. Although it was suggested to FG that as far as he was aware the true position had not been concealed from the Deceased – see for example T7/141 *passim* – that must be viewed in context. All communications concerning the aspirational scheme were between IP and FG and FG's evidence remains constant that he did not discuss the planning position with the Deceased but only with IP.

175. Mr Gloag did not challenge Mr Davis's evidence on this issue – see T9/180-182/13. Mr Davis confirmed that he had an entry for the date had mentioned within his diary – see T9/180/15-18. He explained that he had an additional reason for remembering the meeting other than the diary entry – see T9/180/19-24. He confirmed his evidence concerning the terms of the conversation as correct and added that the Deceased was "… *extremely angry* …". In my judgment this is consistent with recent discovery on the part of the Deceased. As I have said already Mr Davis is an independent witness whose evidence I accept. His detailed evidence concerning what happened after the Property had been sold by WPL referred to below below demonstrates him to be a witness in whose evidence I can have confidence. He had no reason to mislead me. He had known IP for a number of years, IP introduced him to the Deceased, and M2 had acted for AC in the sale of two properties. He was asked whether the Deceased ever gave him the impression of being "*strapped for cash"* to which the answer was that Mr Davis never got the impression that there was an issue with cash. His evidence was that he first met the Deceased in 2004 and met him every couple of months thereafter.

176. As I have said already, the result of it becoming apparent on 3 August 2009 that the aspirational scheme had no prospect of obtaining permission from either the LPA or the Grosvenor Estate, was delay between then and the following April caused principally by party wall and planning issues arising from the need to further alter the design to mitigate the effects of the aspirational scheme not being possible. Whilst there are a number of things that might be said about this episode including that WPL and its professional team ought reasonably to have crystallised the position in relation to the aspirational scheme much earlier than August 2009 and much closer to the date in 2008, when the Deceased first discovered the true extent of the planning permission for the Property, there is no evidence that suggests the failure to do so was deliberate for any of the reasons alleged by the claimants. It is not alleged that the purpose or one of the purposes of the Deceased in delaying progress was to enable an application for permission to be made to construct the aspirational scheme – see RAPC, paragraphs 33B, paragraph 33C, phrase (b) in the final sentence and paragraph 33E, penultimate and final sentences.

177. It is unnecessary that I consider further the delays that occurred after this date. The claimants' delay claim depends upon them proving that redevelopment of the Property could and should have commenced by no later than January 2007 and finished with the property sold no later than the end of March 2008. They have failed to prove either of these foundation allegations simply by reference to what I have set out above. They have also failed to prove that the Deceased induced WPL deliberately

to delay completion of the Scheme beyond March 2008. Given the way in which the claimants have advanced the delay claim, these conclusions mean that this element of the claim cannot succeed.

Losses Alleged to have been caused by Delay

178. I turn to the claimants' case as to the losses that it is alleged they were caused by the delay they rely on.

Loss Due to Alleged Decline in the Market

179. As I have said already, the Property was sold in early 2013 for £5.55 million. In paragraph 41 of the RAPC, the claimants allege that had the redevelopment of the Property been completed by March 2008, it would have sold at a price of £8 million and that had the Property been completed to what they regard as a contractually compliant standard it would have sold on the date when in fact it was sold for a price nearer to £8 million than £5.55 million. As noted at the outset of this judgment, there is no expert evidence to that effect.

180. The claimants sought to make good the first of these deficiencies by relying first on various development valuations obtained prior to commencement or completion of the Scheme and secondly on the fact that the individuals who purchased the Property in January 2013 at a price of £5.55 million put the property on the market almost immediately after completing their purchase at a price of in excess of £8 million. I reject this as a proper foundation for the inferences the claimants seek to draw for the following reasons.

181. Turning to the valuations relied on by the claimants; it is necessary firstly to note that the claimants have not obtained permission to rely on any of these reports. Had they wished to adduce expert evidence on the issue I am now considering they could and should have applied for permission to do so at a stage in the life of this litigation when WC's advisors could have hoped to obtain such evidence as well or, perhaps, apply for the appointment of a single joint valuation expert. Secondly, the various reports available disclose markedly different values by reference to different assumptions. So for example Savills' valuation of 12 April 2006, valued the Property on a completion of a larger redevelopment scheme that was never built at £5.65 million and Stevens Scanlan had valued the larger scheme as at May 2006 at £6.5 million.

182. The report that the claimants sought to rely on was that prepared by Mr. Alex Hills MRICS of Matthews & Goodman ("MG"). The report contains a valuation of the property as at 8 January 2008. The report was prepared on the instructions of BoI. MG's instructions were to give an opinion of the "*… current Market Value of the freehold interest …*" in the Property. The report expressly states that it " *… is provided for the stated purpose and for the sole use of the Bank of Ireland …"* and that *"… neither the whole nor any part of this report may be included in any published document, circular or statement, nor published in any way without the*

valuer's written approval of the form and context in which it may appear …". The report does not comply with the requirements of the CPR concerning the preparation of expert evidence. This is not a criticism of Mr. Hill since he was not instructed to prepare an expert's report for use in this or any other litigation and there is no evidence that his consent has been sought for the use of his report for the purpose it is being used by the claimants. The report describes the development that is the basis on which the report proceeds as the conversion of the existing flats:

> "… to a substantial five bedroom property over seven floors with planned approximate measurements of 411.28 sq.m (4427 sq.ft). … The house will be extended at the rear on all floors with a swimming pool and gymnasium inserted under the patio garden …"

The report estimates the cost of building out the development the report describes as being £6 million. The report concludes that the Market Value of the Property "… *based on the assumption of planning consent for the scheme set out at section 4 of this report* …" at 8 January 2008 was £6 million and the Market Value following completion of that redevelopment scheme was £9 million.

183. In my judgment the claimants are not entitled to rely on this report to justify their assertion as to the value of the Property assuming that the Scheme was completed and the Property sold by no later than the end of March 2008. First, as I have said, the claimants do not have permission to rely on expert valuation evidence. Secondly, the MG report was not prepared for the purpose of giving expert evidence on behalf of the claimants or anyone else in this or any other litigation. Thirdly, the report does not comply with the requirements of the CPR concerning expert evidence. Fourthly, the report purports to value the Property as at 8 January 2008. Although the difference between that date and the end of March 2008 is not very great, the report expresses some caution about the way the market was operating as at the date of the valuation – see section 11 of the Report at page 8 of 12. This is significant when it is remembered that for example the Savills and Stevens Scanlan reports valued the property at a significantly lower value than Mr. Hill. It is significant too because the Recession started to take effect in the UK shortly after the end of March 2008. As the MG report noted, price inflation in the Central London property market had slowed rapidly over the three months prior to 8 January 2008 and went on to express the view that "… *vendors of the very best properties will still be able to name their own price (almost) but for the rest of the market, <u>such as the subject property</u>, price growth will be noticeably lower than seen in recent months …"*(Emphasis supplied). Finally and most importantly, the report values the property on the basis of a redevelopment scheme that was never built. The Scheme was as I have described it earlier in this judgment. WC has not had the opportunity of testing any of these points by cross examination of Mr. Hill.

184. I turn now to the point made by the claimants concerning the post completion conduct of the purchasers of the Property from WPL. Mr Davis, a director of M2 Property Limited ("M2"), the agents who eventually sold the property on behalf of WPL, gave evidence to the effect that the purchasers instructed M2 to place the property on the

market at a price of in excess of £8 million notwithstanding advice from M2 that such a price was greatly in excess of the Property's true market value. He told me, and I accept, that there was no interest shown by the market in the Property at that price and that eventually it was withdrawn from the market for that reason. It has not been placed on the market since and remains in the ownership of the purchasers from WPL.

185. I accept Mr Davis's evidence because (i) there is no evidence to contrary effect, (ii) his evidence remained entirely unaffected by cross examination, (iii) there is no reason, and no reason was suggested to him in cross examination as to, why he would wish to mislead me, (iv) his evidence is entirely consistent with (a) the advice received from other agents attempting to sell the Property on behalf of WPL that the price should be dropped if the Property was to sell, (b) the fact that the Property only sold following drops in price from an initial asking price of £6.95 million first to £6.65 million then to £6.25 million, (c) an offer of £5.85 million falling through and no similar offer being received; and (v) the eventual sale price was achieved only following a sales campaign lasting from August 2011 until September 2012 involving at least three agents.

186. In those circumstances, I conclude that the claimants have failed to demonstrate that the Property would have sold at a higher price if offered for sale in 2008. It follows that this element of the claimants' claim would have failed even if they had been able to demonstrate that the failure to complete the redevelopment of the Property and sell it by the end of March 2008 was deliberately brought about by the Deceased. It follows that the damages claims set out in paragraph 52.1 and 52.4 of the RAPC are bound to fail. These are the only two claims relevant to the issue I am now considering that are set out in the Prayer to the RAPC – see paragraphs 1(b) and 2.

The SPL Loan Head of Loss

187. The only other head of loss for which damages are claimed by reference to the Delay Claim is that set out in paragraphs 36 and 50 of the RAPC - a claim for interest in respect of the SPL loans referred to earlier, which the claimants allege accrued due and owing from the claimants as a result of the Scheme not being completed and the Property sold in or about March 2008. It is alleged by the claimants in paragraph 36 of the RAPC that because the claimants did not receive the balance of the P&C Flats value and what they maintain would have been their share of the profit had the Property been completed and sold in March 2008, "*…the claimants had to enter into loan agreements with third party funders …the claimants believe that the amount of interest that has accrued due and owing on those loans to date is a sum of approximately £3,500,000* …". WC's case on this issue is that claimants have not proved this head of loss or that it was caused as alleged or that the loans relied on by the claimants were reasonable mitigation of the loss supposedly caused by the failure to complete the Scheme and sell the Property by March 2008. He does not take the point that this element of the claim has not been pleaded either in paragraph 51 of the RAPC or its Prayer.

188. The SPL interest head of loss is bound to fail because the claimants have not proved either that the Scheme would probably have been completed and the Property sold by no later than the end of March 2008 but for the deliberate delay to completion caused by the Deceased or that had the Scheme been completed by the end of March 2008, the property would have been sold for (approximately) £8 million. My reasons for reaching those conclusions are set out above. In addition, in my judgment, the claimants have failed to prove that they borrowed from SPL only because they had not received either the balance of the P&C Flats Value or any Net Profit from the Scheme by March 2008 and they have also failed to prove that the amount due and owing under any such loan is £3.5 million. My reasons for reaching that conclusion are as follows.

189. Aside from asserting that the whole of the sum borrowed was borrowed in or about March 2008, at no stage in these proceedings have the claimants attempted to particularise in any meaningful way when the SPL loan was first made available, the amount allegedly loaned, when it was drawn down (and if in tranches, when and in what amounts it was drawn down) and what the terms of the SPL loan were including in particular the rate of interest that applied.

190. The only contemporaneous document relating to the SPL loan that was drawn to my attention is a letter from Brook Martin & Co dated 4 June 2009. It refers to the Charge by which IP charged the claimants' share of any profits from the joint venture with WPL to secure the SPL loan. The letter refers to the Charge as being dated 8 April 2008. It describes the sum secured as being "… *in the region of £2,000,000* …". On this material, it would appear that the SPL loan was made on or about 8 April 2008.

191. WC sought a breakdown of the sum claimed of £3.5 million by a CPR Part 18 Request for Further Information ("RFI") made in July 2014. The response to this RFI was that "… *the sums have been broken down by Stephen Brook in his third witness statement* …" in the SAA Proceedings. This is of itself a surprising answer since as debtors, the claimants ought to have, or have been able to obtain, copies of the loan agreement and copies of statements of account in relation to the loan from SPL. That is all the more the case because Mr. Brook was SPL's solicitor.

192. Mr. Brook's statement attached a schedule, which purported to set out the sums borrowed and the cost per day of such borrowing. Mr Brook's statement is dated 15 March 2013. I accept WC's submission that the schedule provides minimal information (because for example it does not provide a total for interest much less an interest total for each loan identified) and does not evidence the £3.5 million claimed. I accept that submission for the following reasons.

193. The sums referred to in the schedule start with the sum of £182,698.54 allegedly borrowed on 13 November 2006. The sums recorded in the schedule that were drawn down prior to 8 March 2008 total £474,954.24. This is inconsistent with the claimants' case that the sums borrowed were all borrowed at or about the end of March 2008. It does not demonstrate the reason for the borrowing. The sums

supposedly borrowed after 8 March 2008 total £249,500. Neither Mr. Brook's statement nor the schedule attached to it attempts to break down interest between that accruing after 8 March 2008 and that accruing after that date.

194. Mr Brook says in his statement that the last loan was made on 7 October 2009. That is inaccurate in that the last loan on the schedule is 9 October 2009. However, it remains the case that Mr Brook (whose client was SPL) was asserting that the schedule attached to his statement showed the total of borrowing down to the date of his statement (15 March 2013). Although the position is entirely opaque, because no attempt was made to calculate the interest due on the sums borrowed or state when such interest accrued due, Mr Brook suggests that the liability to SPL was crystallised on 1 April 2010 in the sum of £1,500,000. If that is so, it includes all the outstanding principal and interest thereon from the loans that pre-date 8 March 2008 and is inconsistent with the claimants' case that they have incurred interest due and owing as a result of borrowing from and after the end of March 2008 that totals £3.5 million.

195. Neither the statement nor schedule mentions the sum claimed in these proceedings (£3.5 million) or how the figure of £3.5 million has been arrived at. No attempt has been made to explain how the compromise promissory note, which appears to have capped the claimants' liability to SPL at £1.5 million, leads to the sum claimed of £3.5 million.

196. In those circumstances, the claimants have failed to prove that they borrowed from SPL only because they had not received either the balance of the P&C Flats Value or any Net profit from the Scheme by March 2008 and they have also failed to prove that the amount of interest due and owing under any such loan is £3.5 million.

197. In those circumstances, the Delay Claim fails.

The Defects Claim

198. The claimants' case is that WPL carried out the redevelopment work in breach of the obligation contained in clause 3 of the JVA by carrying it out otherwise than in a good and workmanlike manner and to a high standard suitable for the Property and its location. They allege that but for these breaches the Property would have sold for a price that was higher than that which was in the end obtained for it. Conventionally, such allegations would be proved by expert evidence from a building surveyor in relation to the allegedly defective work and from a valuer in relation to effect the allegedly defective work had on value. The claimants have adduced no such evidence.

199. Three allegations have been pleaded by the claimants – that the standard of finish was *"basic"*, and that the value of the Property was reduced by the inclusion within it of a lift that was a disabled persons lift and too slow to be practical and a swimming pool. The allegation that the finish was basic and a further allegation that the work done to the Property was not done in a good and workmanlike manner is wholly un-particularised. Their quantum case as pleaded is that the total build costs should have

been 50% of what was in fact spent – an assertion they seek to advance by reference to the MG Report referred to earlier. As I have said earlier the claimants have not obtained permission to rely on that report. It was not prepared by reference to the allegations that have been made or by reference to what has actually been constructed.

200. In my judgment the claimants are not entitled to rely on the broad general allegation that the finish was basic and that the work was not carried out to a good and workmanlike standard in the absence of proper particularisation. The claimants were ordered in December 2017 and again in March 2018 to properly particularise this element of their case. They have failed to do so save in respect of the swimming pool and lift allegations. The claimants rely on some estate agent feedback concerning finish but that is largely generalised comment. The nearest the claimants come to particularising the allegation is by placing reliance on the Henderson Report which in summary suggests that the standard of finish is not high end because porcelain tiles have been used in wet rooms rather than marble, paint finish rather than wall paper has been used and there were no radiator covers, or a designer kitchen. None of these allegations have been pleaded. FG identified in cross examination what he considered to be the indicia of a "*high end finish*" – see T7/136/12-19. The claimants could have but have not pleaded whether and if so which of the elements identified by FG were missing.

201. The swimming pool allegation is not comprehensible as pleaded. The pool was removed from the design on the advice of selling agents. It had been included initially because the Deceased and claimants considered it appropriate and in keeping with the Scheme to include it. They can have no complaint about it being included and then removed in those circumstances. There is no evidence that the Property was worth less that it was eventually sold for. What evidence there is suggests that the lift was perceived by the purchasers and by at least some of the agents instructed by WPL to sell the Property to add value.

202. There is no evidence that the property would have achieved a higher price much less a price of £8 million but for its finish and the inclusion of the lift. The price achieved was £2.5 million less than that figure. It is inherently improbable that such a difference could be accounted for by porcelain tiles being used in wet rooms rather than marble, paint rather than wall paper being used and because there were no radiator covers, or a designer kitchen even assuming that it was appropriate to permit the claimants to rely on those allegations.

203. The claimants therefore cannot succeed in their claim that but for what they allege to be defective work they would have recovered the balance of the P&C Flats value and £1,413,088 by way of Net Profit. It is no answer for the claimants to submit as set out in paragraph 5.5 of their closing submissions that it can be inferred that finish and workmanship was likely to be a material consideration in the price obtained and that what they submit to be a failure to complete the redevelopment to an acceptable standard had a material impact on the sale price. There was a difference of view between various selling agents as to the quality of finish at a very general level but the

key point is that there is no evidence from which it can be inferred that the price achieved was less than the price that could have been achieved as a result of the issues concerning finish that the claimants are entitled to rely on. Even assuming that I was satisfied that a higher standard of finish was required, I cannot simply pull a figure from the air as to what price might have been achieved with such finishes.

204. In those circumstances, the Defects Claim fails

Conclusion

The claim fails and is dismissed.