Neutral Citation Number: [2010] EWHC 2253 (Ch)

Case No: HC 07C 02463

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 October 2010

Before :

MR. RICHARD SNOWDEN QC

(sitting as a Deputy Judge of the High Court)

Between :

EMMET THOMAS SCULLION	**Claimant**
- and -	
BANK OF SCOTLAND PLC (trading as Colleys)	**Defendant**

Philip Noble (instructed by **Miller Rosenfalck**) for the **Claimant**
Tom Leech QC (instructed by **Walker Morris**) for the **Defendant**

Hearing dates: 25 May 2010 and 6 September 2010

Approved Judgment

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

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MR. RICHARD SNOWDEN QC

RICHARD SNOWDEN QC :

Introduction

1. On 18 March 2010 I handed down a judgment in this case, [2010] EWHC 572 (Ch), finding that the defendant firm of valuers, Colleys, had breached duties of care that they owed to the claimant, Mr. Scullion, in relation to a valuation report concerning Flat 17, Fieldgate Court, 42 Portsmouth Road, Cobham, Surrey. I adjourned for further argument all questions relating to causation, quantum and contributory negligence. For reasons that I will elaborate below, I heard argument on two dates, 25 May and 6 September 2010. I now give judgment on those remaining issues.

The Facts in Outline

2. The facts are set out at length in my earlier judgment and I shall not repeat them. A summary will suffice. I shall adopt the same abbreviations in this judgment as in my earlier judgment.

3. Mr. Scullion was a self-employed builder who was engaged in property maintenance. He decided to enter the buy-to-let market to supplement his pension and, with the assistance of an organisation called Portfolios of Distinction ("POD"), he bought Flat 17 in October 2002. His intention was to let it for an amount which would have enabled him to pay the mortgage and outgoings on the flat and to obtain some extra income. He also hoped in due course to make a capital profit by selling the flat.

4. Colleys were engaged to value Flat 17 for the mortgage lender, Mortgages plc, though in the usual way the money to pay their fee was provided by Mr. Scullion. Colleys produced a Valuation Report which gave the open market value of the flat as £353,000. This was just above at the price of £352,950 which Colleys had been told by the mortgage broker, a Mr. Garvin of Affinity, that Mr. Scullion would be paying for the property. Colleys' Valuation Report also stated that Flat 17 could be expected to achieve a rental of £2,000 per calendar month: in their instruction letter they had been told by Mr. Garvin that the "rental coverage" which was required for the buy-to-let mortgage was £1,600 pcm.

5. In my first judgment I held that having regard to appropriate comparables a careful and competent valuer would have valued the property at £300,000 with a permissible "bracket" of between £270,000 and £330,000. I also held that if he had sought information from local letting agents, a careful and competent valuer would have advised that Flat 17 could only be expected to achieve a rental of about £1,100 per calendar month, with an upper limit to the bracket of about £1,350 pcm. I found that Colleys had acted negligently in over-stating both the capital value of the flat and the expected rental income.

6. One of the notable features of this case is that because of discounts which POD negotiated with the developers, the "headline" purchase price of £352,950 which had been notified to Colleys and Mortgages plc was not in fact the price which Mr. Scullion ended up paying for Flat 17. The contract included a "gifted deposit" of 15% and a term as to deferred payment of a further 10%, with the result that Mr. Scullion in fact agreed to buy Flat 17 for a total of £300,007.50, of which £35,295.00 was deferred for a year with interest. In the event, Mr. Scullion resisted paying the developers the full amount of the deferred price and interest, and in 2004 he finally paid the developers a total of £32,500.00 in settlement of his deferred payment obligations.

7. After the purchase of Flat 17 completed in October 2002, Mr. Scullion found that POD were unable to find a tenant for the flat as he had envisaged, and on consulting local agents he discovered that it could not be let for anything like the amount predicted by Colleys, or indeed, the amount of the rental coverage required to meet the payments due under the mortgage. Mr. Scullion eventually managed to let Flat 17 in April 2003 for a rent of only £1,050 pcm.

8. Thereafter Mr. Scullion sought to sell the flat. Although he had some interest from a prospective purchaser at a price of £322,500 in August 2004, that interest fell away when it was discovered that Mr. Scullion's solicitors had not properly registered the title. In the end, Mr. Scullion managed to sell the flat in May 2006 for £270,000 and Mr. Scullion paid the mortgage lender about £260,000 on 1 June 2006. In my earlier judgment I stated that this left a balance outstanding to Mortgages plc of £61,932.15 as at 1 June 2006. In fact, a more up-to-date mortgage statement which was provided to me by Mr. Scullion after oral argument on quantum had been concluded, shows that he was refunded an early repayment charge a few days later. On this basis, the true balance outstanding from Mr. Scullion to Mortgages plc after sale of the flat was £59,795.37.

9. As I shall explain later in this judgment, the amounts which Mr. Scullion has paid under his mortgage have been increased by various administration charges and other fees which Mortgages plc levied on Mr. Scullion after he encountered difficulties meeting the interest payments due and in respect of the outstanding balance since June 2006. The most recent statement from Mortgages plc shows that the amount owing has been increased by the addition of numerous items of legal fees so as to amount to £70,863.16 as at 24 May 2010.

Mr. Scullion's Claims

10. Mr. Noble argued that Mr. Scullion was entitled to damages to reflect the two respects in which Colleys had been negligent – namely the inaccurate capital valuation and the inaccurate rental valuation.

11. Under the first heading, Mr. Noble accepted that Mr. Scullion had in fact paid very slightly less for Flat 17 than the amount which I have held was its "true" value. Taking into account fees of £2,587.50 for Mr. Peakall, an adviser who assisted in negotiating a reduction in Mr. Scullion's deferred payment obligations,

Mr. Scullion ended up paying a total of £299,800 for Flat 17 as against its "true" value of £300,000.

12. Nevertheless Mr. Noble argued that Mr. Scullion was entitled to damages to reflect the fall in value of the property between the date upon which it was purchased and the date upon which it was eventually sold (i.e. £300,000 - £270,000 = £30,000). Mr. Noble suggested that Mr. Scullion had only bought the flat on the basis of Colleys' excessive valuation, and that it was foreseeable that if the valuation was inaccurate, he would be forced to sell and might do so at a loss if the market fell in the meantime.

13. Under the second heading, Mr. Noble submitted that Mr. Scullion would not have bought Flat 17 if he had been informed by Colleys that the rental which it would generate would not be enough even to cover the interest payments on the mortgage, still less other costs and outgoings, so that the transaction would not be self-financing. He contended that as a consequence, all of the payments and expenses which Mr. Scullion incurred in relation to the purchase, under the mortgage and in respect of the outgoings on Flat 17 were recoverable, subject to giving credit for the rents actually received from letting the property.

14. In his initial written submissions, Mr. Noble also suggested that Mr. Scullion should recover the valuer's fee charged by Colleys and interest which Mr. Scullion had had to pay as a result of the late completion of the purchase, but he accepted in argument that neither of those amounts were recoverable, because they were not losses caused by the deficiencies in the valuation. He also accepted that £10,000 paid under Mr. Scullion's contract with POD were not attributable to Colleys' negligence and hence were not recoverable.

Scope of duty and recoverable losses

15. Any discussion of the correct measure of recoverable loss in this type of case must start with a consideration of the decision of the House of Lords in South Australia Asset Management v. York Montague Limited [1997] AC 191 ("SAAMCO"). In SAAMCO, Lord Hoffmann drew attention to the connection between the scope of the duty which the law imposes on a defendant and questions of causation of loss. In a well-known passage at page 213C-F, Lord Hoffmann observed,

> "Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.
>
> I can illustrate the difference between the ordinary principle and that adopted by the Court of Appeal by an example. A mountaineer about to undertake a difficult climb is

> concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.
>
> On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct."

16. Lord Hoffmann noted that the approach adopted by the Court of Appeal would offend common sense because, in his example of the doctor and the mountaineer, it would result in the doctor being responsible for consequences which, though in general terms foreseeable, did not appear to have a sufficient causal connection with the subject matter of the doctor's duty. Lord Hoffmann then summarised the general principle at page 214C-F,

> "I think that one can to some extent generalise the principle upon which this response depends. It is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.
>
> The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of

> action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong."

17. The subsequent decision in Nycredit plc v. Edward Erdman Limited [1997] 1 WLR 1627 was, like the other conjoined appeals in SAAMCO, a case brought by a lender against a negligent valuer. At page 1631F-H, Lord Nicholls reiterated the limitations on the extent of a valuer's liability. He stated,

> "...a defendant valuer is not liable for all the consequences which flow from the lender entering into the transaction. He is not even liable for all the foreseeable consequences. He is not liable for consequences which would have arisen even if the advice had been correct. He is not liable because they are the consequences of risks the lender would have taken upon himself if the valuation advice had been sound. As such they are not within the scope of the duty owed to the lender by the valuer.
>
> For what, then, is the valuer liable? The valuer is liable for all the adverse consequences, flowing from entering into the transaction, which are attributable to the deficiency in the valuation."

18. In the instant case, I held in my earlier judgment that Colleys were under a duty to Mr. Scullion in tort to take care to provide an accurate valuation of the open market value and the attainable rental value of Flat 17. Though not directly engaged by Mr. Scullion, Colleys knew that Mr. Scullion was a buy-to-let purchaser and they knew or ought to have known that he would be relying upon both aspects of their valuation to decide whether or not to purchase Flat 17. Colleys knew or should have known that as with any other prospective purchaser, Mr. Scullion would be relying upon their assessment of market value to confirm that he was not paying more for Flat 17 than it was worth; and because they knew that Mr. Scullion was a buy-to-let purchaser, they knew or ought to have appreciated that he would also be relying upon their opinion as to the estimated rental value to confirm that the income which he would be able to receive from letting the flat would be sufficient to make the transaction at least self-financing. See, in these respects, paragraphs [48] - [52] and [91] – [92] of my earlier judgment.

19. However, Colleys were plainly not engaged to advise Mr. Scullion in general terms whether or not he should go ahead with the purchase. They also did not

give him any contractual warranty of the accuracy of their Valuation Report. In those circumstances, it seems to me that the application of the SAAMCO principles means that I must recognise that the scope of Colleys' duties in tort were limited, and that Mr. Scullion cannot recover all losses flowing from his decision to acquire Flat 17. Applying the SAAMCO principles, in my judgment Mr. Scullion is limited to recovering the losses which are the consequences of and attributable to the two aspects in which Colleys' Valuation Report were wrong, namely (i) the overstatement of the market (capital) value of Flat 17 and (ii) the overstatement of the rental value which it was anticipated could be obtained from letting out the flat.

20. As to the first of these categories, the assessment of the loss which is attributable to the overstatement of market value must recognise that the consequence for Mr. Scullion to which Colleys' valuation was directed was the possibility that he might be paying more for the property than it was worth. That being so, I accept the submissions of Mr. Leech QC for Colleys that Mr. Scullion is limited under this head to recovering the difference between the price which he paid for Flat 17 and the true value of the property. This has been said to be the normal measure of damages for the purchaser of a property in reliance on an overvaluation by a valuer: see e.g. Watts v. Morrow [1991] 1 WLR 1421 and the affirmation of that principle in light of SAAMCO in Patel v. Hooper & Jackson [1999] 1 WLR 1792 at 1800H-1801C.

21. In my judgment, the SAAMCO principles mean Mr. Scullion cannot recover compensation for any fall in value of Flat 17 due to market movements in the period between purchase in October 2002 and its eventual sale in 2006. The purpose of Colleys' valuation and hence the scope of their duties did not extend to advising the mortgage lender (still less Mr. Scullion) as to the wisdom of entering into the transaction generally or the possibility that the market value of Flat 17 might fall after purchase.

22. I would observe that the particular facts of this case provide a further reason why the damages for Colleys' negligence in stating the capital value of Flat 17 cannot include any amount for the fall in value of the property after completion. As I have indicated above, after its purchase by Mr. Scullion in October 2002, Flat 17 was placed on the market in the Spring of 2004 and in August 2004 it attracted a potential purchaser who expressed interest at a price of £322,500. However, the prospective purchaser lost interest after the sale was delayed by the discovery that title to the property had not been properly registered. By the time Mr. Scullion was finally able to sell the property in May 2006, he only realised £270,000. If the difficulties in registration (which were in no way due to any act or omission of Colleys) had not been encountered, it is possible that the property would have been sold for £322,500 in 2004. On that basis, Mr. Scullion would have suffered no capital loss on the purchase and might have made a small capital profit.

23. For completeness I should add that because this is a claim in tort and not a claim under a contractual warranty, Mr. Scullion cannot recover compensation for any loss of capital profits which he might have expected to make on reselling the property.

24. In relation to the second head of loss which is attributable to the overstatement of the attainable rental value, one must recognise that Colleys knew that Mr. Scullion was a buy-to-let purchaser and hence they ought to have appreciated that the statement of attainable rental value was critical for him to ensure that when he committed himself to make periodic payments under the mortgage and to pay the normal outgoings of an owner/landlord of the flat, he was doing so on the basis that he could expect to receive sufficient rent to discharge those liabilities so that the transaction would be at least self-financing. The adverse consequence to which this aspect of Colleys' Valuation Report was directed was that if the rent received was insufficient, Mr. Scullion would have incurred liabilities which he would have to discharge by making good the shortfall from his own resources.

25. In my judgment it follows that under the second head of loss, Mr. Scullion is entitled to recover damages to compensate him for the losses caused by the fact that he was unable to let Flat 17 for a rental that gave him sufficient income to cover his mortgage payments and the other outgoings on the property.

26. In passing I should again note that because this is a claim in tort and not in contract, Mr. Scullion cannot recover damages in effect for loss of anticipated profit based upon the difference between the rental value which Colleys advised would be achieved and that which was in fact achieved.

27. Whilst naturally embracing the SAAMCO limitation in relation to the negligent capital valuation, Mr. Leech QC, who appeared for Colleys, went further and submitted that on the facts of this case, Mr. Scullion should not be entitled to any damages in respect of the negligent rental valuation, or indeed any damages at all. He had two arguments in this respect.

28. Mr. Leech's first argument was that the scope of Colleys' duties and hence of their liabilities to Mr. Scullion could not exceed the scope of their duties and hence of their liabilities to Mortgages plc, by whom they were directly engaged. Building upon that submission, he contended that the only real purpose for which Mortgages plc obtained the Valuation Report was to ensure that the capital value of the property was adequate security for the loan that it was making. He said that Colleys' statement of the anticipated rental value was merely a further piece of information relevant to the decision whether to lend, rather than a piece of information upon which Mortgages plc had placed, or was entitled to place, any independent reliance. Mr. Leech submitted that if Mortgages plc could not have claimed to have relied upon the rental valuation so as to recover any losses if it was overstated, then neither could Mr. Scullion.

29. I do not accept this submission. First, I do not necessarily think that Mr. Leech is right in his assumption that the scope of Colleys' duties to Mr. Scullion could not be wider than those which were owed to Mortgages plc. I can well envisage situations in which, for example, it was appreciated that the purposes for which reliance might be placed upon a valuation report might differ between mortgagee and mortgagor; or in which a contractual limitation was placed upon the valuer's liability to the mortgagee which did not apply or was not communicated to the mortgagor.

30. Secondly, whilst the capital valuation was of course of great importance, I consider that it was also very important to both lender and borrower in this buy-to-let transaction that the rental which could be achieved by letting the flat should exceed the mortgage payments by a specified margin, and that Colleys knew or ought to have appreciated this.

31. As I have indicated above, as a buy-to-let purchaser, from Mr. Scullion's point of view the transaction made no sense unless it was at least self-financing. But it is obvious that Mortgages plc would also want to ensure that its customer could service the mortgage from the available rental stream. In that way it could ensure, so far as possible, that it would have a profitable, performing loan. This would minimise the risk that it might have to take enforcement action, with the potential that it might not recover the amount outstanding and that time and costs would be wasted. It might well be the case, for example, that even if the capital valuation of the property was accurate, a forced sale of the property at a later date would not realise sufficient to replay the outstanding loan. In such circumstances, I think that a statement from a reputable valuer that the likely rental which could be achieved from letting the property exceeded the mortgage payments by some margin would be of significant value to a lender.

32. In this case, moreover, the importance of the rental valuation was clear: Mortgages plc made it a condition of its mortgage offer that the estimated rental should exceed the payments due under the mortgage by a specified margin, and as I have indicated, the letter by which Colleys were engaged to provide the Valuation Report specifically stated the "rental coverage" required in addition to the agreed purchase price. In short, I think that the suggestion that Mortgages plc would have been largely indifferent to the attainable rental stream that Mr. Scullion could expect to obtain is unreal.

33. I therefore see no reason why the scope of Colleys' duties to Mr. Scullion and of his recoverable losses ought to be restricted to one element only of the Valuation Report as Mr. Leech suggested.

34. The second argument which Mr. Leech advanced reflected an argument which he had also deployed at trial. Mr. Leech suggested that Colleys' negligence in preparing the Valuation Report had no real causal connection with Mr. Scullion's decision to accept the mortgage offer or complete the transaction, and that he had been misled into doing so by a combination of POD, Mr. Garvin of Affinity (the mortgage broker) and Kings (the solicitors). In his written submissions Mr. Leech referred to Man Nutzfahrzeuge AG v. Freightliner [2008] 2 BCLC 22, a passage from the speech of Lord Phillips in Stone & Rolls v. Moore Stephens [2009] 1 AC 1391 at paragraphs [84] - [85] and to Lord Hoffmann's example of the mountaineer's knee in SAAMCO. Mr. Leech summarised his submissions in this way,

> "... although it was generally foreseeable that Mr. Scullion would rely upon the Valuation Report in deciding whether to purchase Flat 17, Colleys should not be liable for consequences which do not have a sufficient causal connection with the subject matter of their duty. It was not within the scope of their duty to protect Mr. Scullion

> against the risk that he might be a victim of fraud and the fact that Flat 17 and their Valuation Report was used by Mr. Garvin and Kings to perpetrate the fraud should not make them liable for the loss."

35. Although I accept Mr. Leech's point that it was no part of Colleys' duties to guard Mr. Scullion generally against the risk that he might be fraudulently induced by others to enter into a disadvantageous transaction, I do not think that this provides Colleys with a defence as Mr. Leech suggests. Contrary to the thesis underlying Mr. Leech's submission, I have not held Colleys liable for breach of any generalised duty, nor have I held them liable for "the loss" caused by any fraud perpetrated by others on Mr. Scullion. Instead, I have held that Colleys had a limited duty to provide accurate information concerning the market value and attainable rental values of Flat 17, that they breached that duty and, applying SAAMCO principles, that they are only responsible in law for the limited consequences attributable to those breaches. I have not held Colleys liable for all of the consequences for Mr. Scullion of having entered into the transaction.

36. Put another way, the fact that, say, Kings might have owed a more extensive duty to Mr. Scullion when advising whether he was obliged to, or should complete the purchase, so that when they told Mr. Scullion that he had no choice in the matter, they might have been liable for all of the consequences, does not thereby relieve Colleys from their more limited responsibility to Mr. Scullion for the negligent provision of information. As I held in paragraphs [148] – [151] of my earlier judgment, I consider that Mr. Scullion's losses can properly be said to have been caused both by Colleys' negligence, without which the finance needed for the purchase would not have been available in the first place, as well as by Kings' failure to advise him that he could legitimately avoid completion.

37. With that summary of my findings on the relevant legal principles, I turn to consider the specific losses claimed by Mr. Scullion.

Losses attributable to the open market valuation

38. In relation to the overstatement of market value, although Mr. Scullion would be entitled to recover the difference between the price which he paid for Flat 17 and the true value of the property, for the reasons which I have outlined above, Mr. Scullion in fact suffered no loss because he ended up paying £200 less for Flat 17 than its "true" value of £300,000. In addition to the price paid for the flat, Mr. Scullion also paid £4,000 for carpets and a fireplace, but no-one suggested either that this was an inappropriate figure or that it was in any way affected by the Colley's valuation of the property.

39. Mr. Noble also submitted that Mr. Scullion should be entitled to damages to compensate him for various costs and disbursements which he paid in connection with the purchase of the flat and to buy a mortgage bond which provided additional security to the mortgage lender for the loan. These items included

£2,823 in fees to an entity called Acquisition Investment Consulting ("AIC") which I was given to understand related in some way to the finding of Flat 17; £2,907 in mortgage brokers' fees to Affinity; stamp duty of £10,590; and £1,100 in legal fees to Kings, together with other miscellaneous fees and smaller items.

40. I do not see how expenditure of those items could be said to be a loss which was attributable to Colleys' negligence in overstating the market value of the property. These were all items which Mr. Scullion would have paid in any event and it was no part of Colleys' duties to give any advice or information in relation to such matters.

Losses attributable to the overstatement of the attainable rental

41. As I have described, by entering into the transaction, Mr. Scullion committed himself to make periodic payments under the mortgage and to pay the normal outgoings of a landlord of the flat. In the event, the rent received was nowhere near enough to enable Mr. Scullion to discharge such liabilities and hence he ended up having to make good the shortfall from his own resources. I have held that Mr. Scullion is entitled to recover damages to compensate him for such losses caused by the fact that he was unable to let Flat 17 for a rental that gave him sufficient income to cover his mortgage payments and the other outgoings on the property.

42. Mr. Noble produced a schedule suggesting that the total outgoings (including mortgage payments) which Mr. Scullion paid or which he was liable to pay in relation to his ownership of Flat 17 from the time of purchase to the time of sale amounted to £169,818.02. During that period it is common ground that Mr. Scullion received rentals amounting in total to £22,500. Hence Mr. Noble claimed that Mr. Scullion suffered a net loss of £147,318.02 which was attributable to the overstatement of the rent achievable.

43. Although there was some measure of agreement, a number of the items claimed in Mr. Noble's schedule were challenged by Mr. Leech. It is therefore necessary for me to deal with the schedule, which was broken down into calendar years, in some detail.

October 2002 – December 2002

44. For this period, omitting POD's fees of £10,000 which, as indicated above, were plainly was not attributable to the negligence of Colleys, Mr. Scullion claimed £27,566.43.

45. However, this amount included a large number of items which related to the purchase of Flat 17 to which I have referred above. Such amounts included fees to AIC, Affinity and Kings, the costs of the carpets and fireplace, stamp duty and various other miscellaneous fees and disbursements.

46. I cannot see how expenditure on such items can be regarded as attributable to the negligence of Colleys in the preparation of the Valuation Report as to achievable rental value. In the ordinary course of events, such items would be expected to be discharged by a purchaser from his own resources at the time of purchase.

47. This result is, in my view, even clearer on the particular facts of this case. Rather than being paid by Mr. Scullion from his own resources, the items to which I have referred were in fact paid out of the advance from Mortgages plc which, for reasons which I explored in the earlier judgment, was based upon an overstated purchase price of £352,950 and which amounted to £290,766.

48. Moreover, consistently with the assumptions underlying the statement of rental value in the Valuation Report, it could fairly be assumed that it might take a little time to let the property after completion. Hence it could not readily be assumed that a purchaser would be relying upon the rental stream from the property to fund his acquisition costs.

49. I therefore do not see how such items could be said to be losses attributable to the overstatement of anticipated rental value achievable.

50. The remaining items claimed in respect of this period include the first payment of interest to Mortgages plc in respect of the period to the end of October 2002 in the sum of £1,090.16. This was in fact paid out of the advance from Mortgages plc itself, and given that there would be expected to be a period of time before the property could be let in any event, for similar reasons to those set out above I do not think that this payment can be characterised as a loss attributable to the overstatement of the achievable rental for Flat 17.

51. The amounts that remain are two payments of mortgage interest for November and December 2002, each for £1,441.71 and payments in respect of ground rent and a gas check totalling £121.76. It seems to me that those sums, which together amount to £3,005.18, are sums which ought to have been covered by the rental to be received from letting Flat 17, and that they are recoverable as damages by Mr. Scullion.

2003

52. The parties agreed that during 2003, Mr. Scullion was liable to pay and in fact paid some £17,751.02 under the mortgage to Mortgages plc, together with routine service, utilities and other charges relating to the property totalling £3,380.39. Over the period Mr. Scullion received nine months rent at £1,050 per month, totalling £9,450. The net result is that Mr. Scullion was out of pocket by some £11,681.41.

53. In my judgment this sum represents the losses suffered by Mr. Scullion over this period which are attributable to the deficiency in the Valuation Report as regards the achievable rental. He is therefore entitled to recover this amount by way of damages.

2004

54. The mortgage statement that is in evidence shows that during 2004 Mr. Scullion made payments of mortgage interest totalling £18,218.74. Although it was suggested in submissions that Mr. Scullion had made more payments of a greater total amount, on closer analysis of the mortgage statement, it appears that several "payments" were in fact direct debits which were rejected.

55. However, for the purposes of assessing loss it seems to me that the relevant figure from which to start is the amount of the liabilities which Mr. Scullion in fact incurred to Mortgages plc during the year. To the regular interest payments which fell due, which amounted to £23,832.14, I believe that Mr. Scullion is also entitled to add £278 in "direct debit rejection fees" and "monthly arrears administration charges" which he incurred as a result of missed or late payments due. I infer that such charges were due to cash-flow difficulties which Mr. Scullion would not have faced had the flat been generating the expected rentals. On my reckoning, Mr. Scullion's total liability to Mortgages plc for such interest and charges during 2004 therefore amounted to £24,110.14.

56. For completeness I would add that the mortgage statement for 2004 also includes a "legal fee" of £7,658.75 which was charged on 11 November 2004. This is plainly not a routine charge, and I suspect that it might have something to do with the problems concerning the problems surrounding the registration of the title in relation to Flat 17. In the absence of evidence connecting it to the negligence of Colleys, I exclude it from the calculation of loss.

57. In addition to liabilities to Mortgages plc, Mr. Scullion incurred routine costs and expenses of the ground rent, service charges, a gas check and letting fees in relation to the flat in the total sum of £3,032.23.

58. The total amount for which Mr. Scullion became liable and which he paid in relation to routine outgoings in relation to the flat during 2004 was therefore £24,110.14 + £3,032.23 = £27,142.37. During the same period, Mr. Scullion received rent amounting in total to £6,450. In my judgment the amount which Mr. Scullion is entitled to recover by way of damages in respect of this period is the difference between the two figures, namely £20,692.37.

2005

59. Applying the same approach to the computation of damages as in respect of 2004, the total liabilities of Mr. Scullion to Mortgages plc in respect of interest and "monthly arrears administration charges" during 2005 amounted to £26,340.75. During 2005, Mr. Scullion was also charged a number of relatively small legal fees totalling £496.38. I am prepared to infer, and Mr. Leech did not dispute, that these items related to the fact that Mr. Scullion was in arrears with his mortgage payments as a result of the shortfall in rentals received. Mr. Scullion also incurred ground rent, service charges, letting and cleaning fees during this period of £2,317.15. Against these liabilities, he received rent of £6,600.

60. I therefore conclude that Mr. Scullion is entitled to recover damages in the amount of the difference between these liabilities and his rental income, namely £22,554.28.

2006

61. On the same basis as before, the total liabilities of Mr. Scullion to Mortgages plc incurred between 1 January 2006 and 1 June 2006, including various items of legal fees and a redemption fee amounted to £13,080.10. This sum takes into account an interest adjustment of £70.75 which was credited to Mr. Scullion, together with the refund of £2,136.78 in respect of an early repayment charge to which I referred in paragraph 8 above. As I have indicated, this refund did not appear on the statement upon which the parties had based their submissions, but did appear as a later credit on the most up-to-date mortgage statement with which I was provided after the conclusion of the oral hearing. To this figure should be added payments of ground rent and service charges totalling £1,221.20, giving a total of £14,301.30.

62. As no rental was received during this period, I consider that Mr. Scullion is entitled to recover this full amount of £14,301.30 as damages attributable to the shortcomings of the Valuation Report as regards rental income for this period.

Total recoverable losses for 2002 - 2006

63. Pulling together the amounts referred to above for the periods from October 2002 to 1 June 2006, Mr. Scullion is in my judgment entitled to recover damages attributable to the deficiencies in the Valuation Report as regards the anticipated rental income in the total sum of £72,234.54.

Legal Fees imposed by Mortgages plc

64. As I have indicated, following the conclusion of oral argument, and at my request, I was provided with an up-to-date mortgage statement by Mr. Scullion. It shows that since repayment of the proceeds from sale of the flat on 1 June 2006, and commencing with a charge of £4,530.81 on 28 July 2006, Mortgages plc has added a substantial series of legal fees to the outstanding balance of Mr. Scullion's mortgage. This has increased the amount owed by Mr. Scullion from £59,795.37 to £70,863.16 – an increase of some £11,067.79.

65. In general terms, it seems very likely that these legal fees, which are substantial, relate to the outstanding balance on Mr. Scullion's mortgage. However, as I have indicated, that shortfall has in part been caused by the fall in the market value of Flat 17 and in part due to the shortfall in the rentals received as against the liabilities incurred under the mortgage and in relation to the outgoings on the property. I have held that losses attributable to the fall in market value are not

recoverable, whereas the losses caused by the shortfall in rentals received are recoverable.

66. In these circumstances it seems to me that it would be wrong simply to assume that the whole or even some part of these legal fees should be regarded as attributable to the deficiency in the Valuation Report as regards rental values. It would be reasonably foreseeable that Mr. Scullion would suffer loss as a consequence of having to make good the shortfall between his rental income and expenditure whilst he owned the flat, and also that he might incur charges and costs to the mortgage company in dealing with cash-flow issues caused by that shortfall over the period of ownership. However, it does not follow, and I am not willing simply to assume, without evidence or argument, that it would be equally foreseeable that Mr. Scullion might continue to suffer further liabilities to the mortgage company in relation to legal costs after selling the property, or that those costs can properly be regarded as attributable to the deficiencies in Colleys' Valuation Report.

67. I should add that the legal fees charged since sale of the property were not referred to in the pleadings, and they were not included in the schedules of loss produced on behalf of Mr. Scullion for the trial or the subsequent hearing on damages. The periodic imposition and the amounts of such charges have however, obviously been known to, and available to, Mr. Scullion at all times. In addition to the points made above, there has to be some finality to litigation. In the absence of any proper explanation as to why details of these charges were not produced at any earlier time, I consider that it would be unfair to Colleys to permit Mr. Scullion to reserve the right to return to Court to claim these amounts, or to increase the amount of his claim by reference to these charges at this late stage.

Application of damages

68. Mr. Leech raised a further point concerning Mr. Scullion's intention to use any damages awarded to him to discharge the amounts due to Mortgages plc.

69. Mr. Leech's argument was that as any award of damages to Mr. Scullion would be based upon his unpaid liability to Mortgages plc, if Mr. Scullion was not prepared to undertake to use his damages to pay that debt to Mortgages plc, his damages should be reduced as a consequence. Mr. Leech observed that this was important to Colleys, because if Mr. Scullion did not use the damages awarded to him to discharge his debt to Mortgages plc, then even at this very late stage, Colleys might itself face a claim from Mortgages plc in respect of its loss.

70. In support of his argument, Mr. Leech referred to the decision of the House of Lords in Ruxley v. Forsyth [1996] AC 344 as referred to by the Court of Appeal in Latimer v. Carney [2006] EWCA Civ. 1417.

71. Ruxley establishes that in cases of defective performance of a contract, where damages are claimed on the basis of the cost of remedying a defect, but it is apparent that the cost of remedying the defect is out of all proportion to the benefit to be obtained, the appropriate measure of damages may be simply the diminution in value of the asset. In Ruxley, Lord Jauncey also appeared to accept the

proposition, derived from a dictum of Megarry V-C in Tito v. Waddell (No.2) [1977] Ch 106 at 332 that if it could be shown that a claimant had no intention of applying any damages towards remedying the defect, then he should not be able to recover the costs of doing work that would never be done.

72. In Ruxley and Latimer it was emphasised that these considerations related to quantification of damages and that a court is not ordinarily concerned as to what a claimant does with the damages that he is awarded: see e.g. per Lord Jauncey in Ruxley at page 357 and per Arden LJ in Latimer at [24].

73. Prior to the date upon which I was originally due to hand down this judgment, 6 September 2010, I had seen nothing to suggest that Mr. Scullion disputed that he owes a debt to Mortgages plc. The mortgage statement which had been produced following the hearing in May did not suggest that Mr. Scullion's debt had been waived or forgiven, there was no evidence that Mr. Scullion did not intend to pay Mortgages plc and Mr. Scullion's evidence at trial was simply that Mortgages plc was awaiting the outcome of these proceedings before deciding how to proceed.

74. It was, therefore, something of a surprise when I received Mr. Noble's skeleton argument for matters consequent upon the hand-down of the judgment which stated that his lay client, Mr. Scullion, had a "clear and strong defence to any claim by Mortgages plc", asserted that "any claim by Mortgages plc would be defeated by the defence of ex turpi causa" and alleged that "there are strong grounds for a counterclaim". On the face of it, this raised the possibility that Mr. Scullion denied any liability and did not intend to pay anything to Mortgages plc.

75. Having raised this matter with counsel, I deferred handing down my judgment in final form and heard further argument on the point on 6 September. At that hearing Mr. Noble indicated that he had prepared and filed his skeleton argument in haste and that it did not accurately reflect the true position between Mr. Scullion and Mortgages plc. After taking proper instructions, Mr. Noble accepted that Mr. Scullion did have a primary liability to repay Mortgages plc but said that Mr. Scullion was seeking to dispute the amount of that liability because of a number of matters, including, for example, the charge for the costs of registering the mortgage to which I have referred above.

76. Having heard Mr. Noble's submissions, it appeared that the matters in dispute between Mr. Scullion and Mortgages plc do not in fact include any of the items which I have ruled are part of the losses properly attributable to the negligence of Colleys. Mr. Leech therefore accepted that it was appropriate for me to deliver my judgment on the basis that Mr. Scullion did not dispute his liability to Mortgages plc for those liabilities which formed the basis of his award of damages against Colleys.

77. I asked for that position to be confirmed in writing in a form satisfactory to both parties, with the result that I received a letter from Mr. Scullion's solicitors dated 5 October 2010 which stated (in a form agreed between counsel) that,

> "The Claimant confirms that he does not dispute the validity of the mortgage granted to Mortgages plc or his liability for the principal sum and interest which remain due

> to Mortgages plc or that he was or is liable to Mortgages plc for all of the sums referred to in paragraphs 50 to 64 [above] with the exception of the sums referred to in paragraph 57 and the penultimate sentence of paragraph 59 [above]."

78. On that footing, I do not think that there is anything in Ruxley that requires me to treat the attributable losses based upon Mr. Scullion's liability to Mortgages plc as anything other than a real loss. Nor is there anything disproportionate or unreasonable about assessing damages based upon the amount required to discharge that debt.

79. Accordingly I do not see any grounds upon which to reduce the damages payable to Mr. Scullion on this basis.

80. Moreover, I think that in light of the comments in Ruxley and Latimer as the normal approach of the courts, Mr. Leech was plainly correct to accept in his written submissions that Mr. Scullion could not be compelled by the Court to use his damages in a particular way. That being so, I do not think that it would be right to extract an undertaking from Mr. Scullion under threat of reduction of his damages if such an undertaking were not given. Requiring the giving of such an undertaking in those circumstances would be tantamount to compulsion.

Contributory negligence

81. Mr. Leech submits that I should reduce the damages payable to Mr. Scullion on account of Mr. Scullion's own failure to take care to protect his own interests. Mr. Leech primarily relies upon Mr. Scullion's own evidence that he signed the Application Form to Mortgages plc without reading it and without checking whether the amount stated in it as the purchase price was correct: see paragraph [42] of my earlier judgment.

82. I accept that Mr. Scullion's attitude towards the completion of the Application Form was cavalier. However, I am far from convinced that even if he had read it and considered it more carefully, it would have made any difference. As I found in paragraph [119] of my earlier judgment, at the time Mr. Scullion signed the form, he had no more than an expectation that a discount might be forthcoming, and the Application Form did not include any place to note that a discount might potentially be available. Moreover, by the time that Mr. Scullion knew that there was to be a discount, Kings were acting for Mortgages plc and it was arguably reasonable for Mr. Scullion to assume that they would have told Mortgages plc of the reductions to the headline price stated in the contract: see paragraph [129] of my earlier judgment.

83. However, I do not need finally to decide that point, because in my view there is a simpler and more fundamental reason why it would not be appropriate to make a reduction on account of contributory negligence in this case.

84. The defence of contributory negligence is available whenever the claimant's own negligence contributes to the damage of which he complains. It is necessary, however, that the negligence on the part of the claimant must be a cause of the relevant damage. So, for example, a driver who is in a collision and who suffers injury from being thrown against the windscreen may have his damages reduced on account of his failure to wear a seat-belt. However, if he suffers injuries of a different nature, for example, burns when the collision causes an explosion, no reduction in his damages would be made because his failure to wear a seat-belt would have been irrelevant to the injuries in question: see e.g. *Clerk & Lindsell on Torts* (19th ed.) at paragraph 3-34.

85. In this case, because of the SAAMCO limitations on the scope of duty assumed by Colleys, together with my findings as to the true value of Flat 17 in 2002, I have found that the only losses for which Mr. Scullion is entitled to recover damages against Colleys are those that flow from the negligent overstatement of the anticipated rental which could be obtained by letting Flat 17. But there is no suggestion that Mr. Scullion did anything to cause or contribute to those losses. He made no statement in any application form concerning the anticipated rental from Flat 17, and in contrast to the open market valuation, where Colleys placed some weight upon the notified purchase price of £352,950 in arriving at their valuation, the anticipated rental figure of £2,000 pcm was entirely of Colleys' own making.

86. In these circumstances I do not think that any reduction to Mr. Scullion's damages is appropriate on account of contributory negligence.

Interest

87. Interest should be added to the damages that I have found payable to Mr. Scullion. The parties were agreed that simple interest should be awarded at a rate of 6% per annum. They also agreed that in order to simplify the computation of interest of the various amounts paid and received between October 2002 and June 2006, I should award interest at a rate of 3% on the net sums payable for the whole of that period, and then 6% to the date of judgment. I am entirely content to adopt that approach.

Costs

88. I heard argument on costs on 6 September 2010. Mr. Noble seeks payment of Mr. Scullion's costs in full on the basis that Mr. Scullion is the successful party. He submits that Mr. Scullion has been awarded substantial damages and that Colleys fought every point and made no offers to settle the case. Mr. Noble also draws attention to the fact that a very large proportion of the costs incurred in this case related to the main allegations of negligence by Colleys upon both of which Mr. Scullion succeeded, and to the allegations of *ex turpi causa* against Mr. Scullion, upon which he also succeeded.

89. Mr. Leech accepts that Mr. Scullion has been successful and that he is entitled to an award of costs, but he says that Mr. Scullion has not been wholly successful and hence that his costs ought to be proportionately reduced. Mr. Leech points out that Mr. Scullion failed to recover any damages in respect of the capital loss on the purchase of Flat 17, with the result that the damages awarded fall far short of the amount which he claimed. Mr. Leech therefore submits that I should only award Mr. Scullion 70% of his costs.

90. In Multiplex Constructions (UK) Limited v. Cleveland Bridge UK Limited (No.7) [2009] 1 Costs LR 55, Jackson J. reviewed a number of authorities on costs and at para. [72] derived the following principles which I gratefully adopt:

> "(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
>
> (ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.
>
> (iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
>
> (iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by Rule 44.3(7).
>
> (v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.
>
> (vi) In considering the circumstances of the case the judge will have regard not only to any Part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.
>
> (vii) If (a) one party makes an order offer under Part 36 or an admissible offer within Rule 44.3(4)(c) which is nearly but not quite sufficient, and (b) the other party rejects that offer outright without any attempt to negotiate, then it might be appropriate to penalise the second party in costs.
>
> (viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the

costs specific to the issues which he has won but also the common costs."

91. As I have said, there is no doubt (and Mr. Leech accepted) that Mr. Scullion is the successful party and that the general rule is that he is entitled to an order for payment of his costs. Moreover, if one considers the matters set out in CPR Rule 44.3(4) to determine whether a departure from the general rule is required, the first point is that Mr. Scullion did succeed in a significant part of his claim. Further, although Mr. Leech submitted that if it had not been for the capital loss claim, "We wouldn't be here", the fact is that Colleys made no offers to settle any part of Mr. Scullion's claim. In the absence of any such offers, the fact that Mr. Scullion obtained less than he claimed should not of itself lead to a conclusion that he should be denied a proportion of his costs.

92 As I have indicated, the main ground upon which Mr. Leech suggests that an issue-based approach should be adopted under Rule 44.3(4)(f) (which in turn would lead to a proportionate costs order in accordance with Rule 44.3(7)) is that Mr. Scullion failed to recover any damages in respect of the negligent capital valuation of Flat 17. However, I do not think that Mr. Scullion exaggerated his claim or acted unreasonably in seeking to recover damages in this regard within the meaning of Rules 44.3(5)(b)-(d). Nor did Colleys show that they had acted carefully in giving the capital valuation: I held that they acted without due care and to that extent Mr. Scullion succeeded on this issue.

93. The first reason why Mr. Scullion failed to recover substantial damages was because I found that the true market value of the flat on purchase was what Mr. Scullion paid for it, with the result that on application of the SAAMCO principles, he had no attributable capital loss. However, my finding as to the true market value of the property cannot be characterised as a success for Colleys or a defeat for Mr. Scullion, because I concluded that the true value fell mid-way between the two extremes advocated by Mr. Scullion and Colleys. The second reason that Mr. Scullion failed to recover substantial damages is that Mr. Leech won the legal argument for Colleys in relation to the application of the SAAMCO principles based upon my finding as to the true market value. However, that argument of law was relatively short and did not involve the expenditure of significant separate costs.

94. It is also not possible to suggest that the costs of production of the expert evidence or cross-examination of the experts at trial were limited to the issue of the capital value of Flat 17. The expert evidence also went to the steps which would have been taken by a careful valuer and the appropriate rental valuation, which were issues upon which Mr. Scullion was successful. I believe that it would be very difficult to separate out the costs which were solely referable to the issue of the true market value. Certainly I think they would be less than the 30% reduction that Mr. Leech seeks.

95. In these circumstances I do not think that justice or the circumstances of the case require me to depart from the general rule as to costs and I do not propose to make

any issue-based or proportionate costs order. Mr. Scullion should have his costs of the action to be assessed on the standard basis if not agreed.

96 I was given a schedule showing that Mr. Scullion's costs were in the region of £187,000, which included an uplift of 67% for counsel under a conditional fee agreement. Mr. Leech accepted that if an interim costs order was to be made, £100,000 would be an appropriate sum. I agree.

Permission to appeal

97. Mr. Leech seeks permission for Colleys to appeal to the Court of Appeal. Although he produced a draft notice of appeal which covered a very wide variety of points, Mr. Leech submitted that the main issues upon which Colleys have a real prospect of success are the legal issues of (i) whether they owed a duty of care in tort to Mr. Scullion at all, and (ii) if so, whether the scope of that duty extended to the losses in respect of the defective rental valuation for which I have held them liable.

98. Mr. Leech submitted that Smith v. Bush [1990] 2 AC 605 represented a high water mark in the imposition of duties of care in tort and that he wished to contend that the culture of the mortgage market and the role of valuers had changed significantly since that case was decided, so that the principles in the case should not be extended to what he described as commercial buy-to-let purchasers in the position of Mr. Scullion. Mr. Leech also submitted that in terms of the scope of any duty, a distinction could be drawn between a valuer's liability to a purchaser in respect of a capital valuation, and that in respect of a rental valuation where the valuer would have no control over rental receipts or their use. Mr. Leech suggested that these issues were of wider importance in the property market generally.

99. Mr. Noble opposed the grant of permission to appeal. He submitted that it was plain on the facts that Mr. Scullion was not in any sense a commercial purchaser and that Colleys plainly knew or ought to have known that he would be relying upon their expertise as professional valuers to decide whether to enter into the transaction. He also suggested that the fact that the losses caused by the deficient rental valuation might continue for a period was not a point of distinction, citing the decision in Hedley Byrne v. Heller [1964] AC 465.

100. I have rejected Mr. Leech's arguments for the reasons that I have set out, and I certainly do not think that it is correct to characterise Mr. Scullion as a commercial purchaser on the facts (see e.g. paragraph [88] of my earlier judgment). Nevertheless I consider that the two points of law identified in paragraph 97 above are matters of importance upon which Colleys have a real, as opposed to a fanciful, prospect of success on appeal, which is the test under CPR Rule 52.3(6). I therefore give permission to appeal limited to those two points.

101. I do not, however, propose to grant permission to appeal to Colleys more generally for the following reasons.

102. Although Mr. Leech sought permission to appeal on the factual issue of whether Colleys had breached their duties of care in respect of the capital value of Flat 17, I do not think that the criticisms which he made of my judgment in these respects have any foundation on the evidence and in some respects mischaracterised my reasoning. Moreover, and perhaps more importantly, I did not in any event award Mr. Scullion any damages in respect of the defective capital valuation, so that there will be no order against which he could appeal in this respect.

103. On the issue of the rental valuation which I held did sound in damages, Mr. Leech accepted that he could not challenge my finding that Colleys had failed to act with due skill and care. Mr. Leech similarly did not seek to suggest that my judgment was wrong in relation to the other issues such as reliance, contributory negligence or *ex turpi causa*. For my part, I do not in any event consider that Colleys have any real prospect of persuading the Court of Appeal to interfere with my decision on these essentially factual issues.

Conclusion

104. In the result, I order Colleys to pay damages for negligence to Mr. Scullion in the sum of £72,234.54 together with interest on the agreed basis as outlined above. I leave it to the parties to calculate the precise amount of interest payable at the date this Judgment is handed down in final form.

105. I also order Colleys to pay Mr. Scullion his costs of the action to be assessed on the standard basis if not agreed, and make an order for an interim payment on account of those costs of £100,000 to be paid within 14 days.

106. However, I grant permission to Colleys to appeal on the two issues which I have identified in paragraph 97 above, and in order to protect Colleys in the event that they decide to take up the permission to appeal and are successful, I grant a stay of my orders until after the time for the filing of a notice of appeal has expired, or until after final disposal of the appeal, if an appeal is pursued.

107. I ask counsel to agree and submit a draft order in appropriate terms.