Neutral Citation Number: [2018] EWHC 3262 (Ch)

Case No: HC-2017-001253

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

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

Date: 30/11/2018

Before:

MR JUSTICE MORGAN

- -

Between:

BRIAN McDONAGH	**Claimant**
- and –	
(1) BANK OF SCOTLAND PLC **(2) NIGEL CAMERON WHEELER** **(3) RICHARD JAMES STANLEY** **(4) JEMMA KATHLEEN Mc ANDREW**	**Defendants**

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John Virgo (instructed by **Blackstone Solicitors Limited**) for the **Claimant**
Derrick Dale QC and Neil Levy (instructed by **Foot Anstey LLP**) for the **First Defendant**
Siân Mirchandani (instructed by **Clyde & Co LLP**) for the **Second, Third and Fourth Defendants**

Hearing dates: 15-19, 22-26 and 31 October 2018

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Judgment Approved

MR JUSTICE MORGAN:

The case in outline

1. In 2007, the Claimant, Mr McDonagh, wished to buy an investment property known as Sony House, on a technology park near Liverpool and he wished to enter into a loan agreement with the First Defendant, the Bank of Scotland ("the bank"), which would provide him with £7.5 million to buy the property.

2. In July 2007, Mr McDonagh and the bank entered into a loan agreement. Mr McDonagh borrowed from the bank a sum (there is a dispute as to whether he borrowed euros or pounds) which allowed him to have £7.5 million to buy Sony House. He then bought Sony House which was at that time worth £9.9 million. The parties disagree as to the meaning of that loan agreement. If the court were to construe the loan agreement as Mr McDonagh contends, then the bank seeks to have it rectified so that the agreement has the effect contended for by it.

3. In February 2010, Mr McDonagh and the bank entered into a second loan agreement. There is no dispute as to the meaning of the second loan agreement but Mr McDonagh has put forward various challenges to the bank's ability to enforce the second loan agreement against him. One of those challenges involves an allegation that he entered into the second loan agreement by reason of the bank's duress.

4. In due course, after the credit crunch of 2008, the value of Sony House fell. There is a dispute as to the amount of the fall in value. On one view, by October 2011, the value of Sony House was about £4 million or possibly less. If Mr McDonagh had borrowed from the bank in euros and was obliged to repay in euros, Mr McDonagh had suffered another reversal in his fortunes in that the pound had weakened significantly against the euro after July 2007.

5. The bank called on Mr McDonagh to repay the loan but he did not repay it. The bank then appointed receivers. The receivers who were first appointed were replaced by the Second, Third and Fourth Defendants as receivers. Those receivers proceeded to sell Sony House. They did not market Sony House separately but they included it in a portfolio of 38 (later 35) properties which were sold together in October 2011 for £41 million. The receivers have said that the apportioned part of the portfolio price attributable to Sony House is £3,780,215.45. The bank has given Mr McDonagh credit for this sum.

6. Mr McDonagh has brought these proceedings against the bank and has alleged wrongdoing by the bank, both in contract and in tort. The bank has counterclaimed for the sum which is said to be due to it. Mr McDonagh has also sued the receivers (but not the bank) alleging that they sold Sony House at an undervalue.

7. The two claims by Mr McDonagh were made in the same set of proceedings and have been tried together, although there is not much overlap between them. In this judgment, I will first describe the position in relation to Sony House and I will then deal with the facts relevant to the claims as between Mr McDonagh and the bank and I will make my findings on them. I will then deal with Mr McDonagh's claims against the receivers.

Sony House

8. Sony House is a detached three-storey building on the Wavertree Technology Park, Stephenson Way, Liverpool. That Technology Park is 2 miles from the City centre and 1 mile from the M62 motorway. Sony House was built in 1994. It has been described as a purpose-built office headquarters building.

9. The relevant title in relation to Sony House consisted of two leasehold interests. Both leases were for a term of 250 years from 10 August 2000 at peppercorn rents. The first of these leases was registered under Title Number MS459908 and demised the main building at Sony House. The second of these leases was registered under Title Number MS459907 and demised land used as a car park and further land adjoining the car park. The original lessee under both leases was Grangefield Estates Ltd ("Grangefield") of which Mr McDonagh was a 50% shareholder. The terms of these two leases were assigned to Mr McDonagh in around July 2007. The two leases were subject to and had the benefit of two earlier occupational underleases which had been granted in 1995 and 1996, as referred to below.

10. By an underlease dated 20 March 1995 and made between the Urban Regeneration Agency and Sony Electronic Publishing Ltd, Sony House was demised for a term of twenty years from and including 1 March 1995 at an initial yearly rent (after the expiry of a period at a peppercorn rent) of £325,000 subject to upwards only review to market rent every five years during the term. The lease permitted the premises to be used for a use within Class B1 of the Town and Country Planning (Use Classes) Order 1987. The lease contained an option for the lessee to determine the lease at the end of the 10th and again at the end of the 15th year of the term.

11. By a further underlease dated 8 July 1996 and made between the Urban Regeneration Agency and Sony Electronic Publishing Ltd, an area of land adjoining the land demised by the underlease dated 20 March 1995 was demised at an initial rent (after the expiry of a period at a peppercorn rent) of £3,950 on essentially the same terms and conditions as those contained in the underlease of 20 March 1995, save that the rent payable under the underlease dated 8 July 1996 would be increased on each rent review by the same percentage increase as took effect on each rent review under the underlease of 20 March 1995.

12. Prior to 2006, the terms of the two underleases were assigned to Psygnosis Ltd. On 16 March 2006 Grangefield, Psygnosis Ltd and Nationwide Building Society entered into a deed of variation of the two underleases. The deed of variation referred to works involving the installation of an air conditioning system in Sony House, which work had been completed in May 2005. The deed provided that in consideration of Grangefield paying for or indemnifying Psygnosis Ltd against the cost of these works, the rents payable under the two underleases should be increased. As increased, the yearly rent payable under the underlease dated 20 March 1995 was £525,650 although the yearly rent payable was then reduced to £505,650 until 28 February 2010 and the yearly rent payable under the underlease dated 8 July 1996 was £6,137. The parties also agreed to remove the lessee's option to determine the terms of the underleases at the end of the 10th and 15th years of the terms. Finally, the deed of variation contained an unusual provision whereby the parties agreed that the lessor could at its option demand payment of the rents in euros instead of in pounds sterling and provided that the relevant exchange rate for this purpose would be calculated by reference to the average exchange rate prevailing during the first two months of the quarter immediately preceding the date on which the rent was due under the underleases.

13. The documents before me included a form which had been completed in order to register a charge over the leasehold titles of Grangefield. That form discloses that Grangefield had entered into three facility letters dated 20 February 2006 with IIB Bank Ltd, which was a bank with an address in Dublin and that, on 30 March 2006, Grangefield had charged its leasehold titles to IIB Bank Ltd to secure its indebtedness. This indebtedness was in euros and not in sterling.

14. In November 2007, Psygnosis Ltd assigned the terms of the two underleases to Sony Computer Entertainment Europe Ltd.

15. At all material times, Sony House was used for the development and testing of computer games and had been fitted out accordingly.

The first loan agreement

16. The first loan agreement was entered into by the bank and by Mr McDonagh on 3 July 2007. It contained the following material provisions:

> “1. THE LOAN
>
> 1.1. Amount
> Seven Million Five Hundred Pounds [sic] (£7,500,000) to be drawn down in Euros (the "term loan").
>
> 1.2. Purpose
> You may only use the term loan to assist with the purchase of [Sony House] (the “Property”).
>
> The term loan will be drawn down into your Euro account with us (to be opened) which will operate as the servicing account for the term loan.
>
> 1.3. Interest
>
> You will pay interest on the term loan at the annual rate equal to one point two per cent (1.2%) over the cost of funds incurred by us for making the term loan available, such interest being payable quarterly in arrear ...
> The relevant cost of funds will be set by us on or before the date of drawdown of the term loan and will be based on the Euro fixing rates provided by the British Bankers Association on the relevant date which shall be the date of drawdown or such earlier agreed date.
> …
> Interest will be debited to your servicing account quarterly in arrears unless that day is not a Business Day, in which case it will be applied on the next Business Day.
> …
> All sums payable under this letter, with the exception of the arrangement fee and the interest rate contract fee, shall be paid in Euros. If you fail to pay any amount due under the term loan when due, we may at any time purchase an equivalent amount of Euros as we consider necessary or desirable to cover the amount due and payable under the term loan at its prevailing spot rate of exchange and you shall indemnify us against the full cost to us (including all costs, charges and expenses) incurred by us in purchasing the said Euros.

Whenever the "Sterling equivalent" of the term loan requires to be calculated, it shall be calculated at our spot rate of exchange for Euros on the applicable date at such time as we may select.

The Default Rate of interest which will apply to the term loan is the annual rate of two point four per cent (2.4%) over the rate at which interest is paid on the term loan under this letter.

…

1.5. Repayment

The term loan will be repaid in one lump sum of Seven Million Five Hundred Pounds [sic] (£7,500,000) on the date being thirty six months from the date of drawdown or (if earlier) upon receipt of the proceeds of the Property. If for any reason the proceeds are less than the outstanding amount of the term loan a balancing payment will be debited to your servicing account on the date of the disposal of the Property or an Event of Default whichever is the earlier.

For the avoidance of doubt, you will apply the net sale proceeds of any disposal of all or any part of any real or heritable property owned by you and secured to us in permanent reduction of the term loan.

…

1.7. Fees and Expenses

In consideration of these facilities you will pay to us:

1.7.1. an arrangement fee of £48,750, …

1.7.2. on our demand and on a full indemnity basis all reasonable fees, costs and expenses or tax incurred by us in connection with this letter or any security for the term loan; and

1.7.3. our usual administration fees for the preparation or instruction, by us, of any item of security required under section 3.

Unless otherwise agreed between us, fees will be debited to your servicing account when due.

2. HEDGING

2.1 You, after consultation with us, shall enter into such interest rate protection agreements and foreign currency transactions (with Treasury in the form of the Treasury ISDA Documents) regarding its [sic] exposure to interest rates and/or foreign exchange rates as you and I [sic] may agree from time to time ...

…

4. FINANCIAL UNDERTAKINGS

4.1 Bank Interest Cover

The ratio of EBITD to bank interest will not be less than 1.10 : 1 which will be tested annually on the basis of the current financial year.

Bank Interest *is the aggregate amount of interest, commission and other recurring financial expenses attributable to your borrowings from us charged, accrued or capitalised for any specific period.*

EBITD *is, for any specified period, your trading profit before deduction of depreciation, bank interest and taxation but after the deduction of extraordinary and exceptional items.*

4.2 Security Cover

The realisation value of the Property in our favour will not be less than 125% of the amount of the borrowing outstanding from time to time which will be tested on an annual basis or as specifically agreed by us.

"Borrowings" *are your total borrowings outstanding with us.*

"Realisation Value" *means the estimated realisation price as determined in a manner and by a valuer acceptable to us.*

…

5. DEFINITIONS

…

“**"Treasury"** means HBOS Treasury Services PLC ... ”

17. The first loan agreement was subject to certain standard terms and conditions. These standard terms included provisions to the effect that a breach of a financial undertaking in the loan agreement was an event of default and in such an event, the bank could require immediate repayment of the loan and charge interest at the default rate.

18. On 17 July 2007, Mr McDonagh charged to the bank the two leasehold titles he held in relation to Sony House to secure the repayment of his indebtedness to the bank. The charge contained a provision which permitted the bank to appoint a receiver over the secured property at any time after it demanded repayment of the sums due to it. The charge also provided that any such receiver had all the powers given to a receiver by the Law of Property Act 1925 including a power to sell the secured property whether by way of auction or by private contract or by any other means.

The second loan agreement

19. Mr McDonagh and the bank entered into the second loan agreement on 11 February 2010. The loan agreement had the heading “PROPERTY INVESTMENT FACILITY

OF €11,071,501". The second loan agreement contained the following relevant provisions:

> "We are pleased to offer Brian McDonagh (the "Borrower") a term loan facility of up to €11,071,501 (the "Facility"). This offer is open for acceptance by the Borrower until 12 February 2010, when it will lapse. If accepted, this letter and its schedules will form the agreement between the Borrower and BoS for the Facility.
>
> …
>
> **1. Conditions precedent**
>
> The Facility will not be available until BoS has received, in form and substance satisfactory to it, the documents and evidence detailed in Schedule 1.
>
> **2. The Facility**
>
> **2.1 Purpose**
>
> The Borrower may only use the Facility to refinance existing facilities made available by BoS to the Borrower.
>
> **2.2 Drawdown**
>
> **2.2.1** Subject to clause 2.2.2 below, the Borrower may draw the Term Loan in one amount before 12 February 2010 by giving a Notice of Drawdown no later than 11 am on the proposed dated of drawdown (which must be a Business Day).
>
> **2.2.2** …
>
> **2.2.3** When drawn, the Term Loan may only be applied in repayment of the Borrower's existing term loan facility with BoS and the Borrower authorises BoS to apply the Term Loan for that purpose.
>
> **2.3** Repayment
>
> **2.3.1** The Term Loan shall (subject to the other provisions of this letter) be repaid in full by a single bullet repayment on 13 July 2010.
>
> …

> **5. Security**
>
> **5.1** The Borrower will, as security for the Term Loan, deliver or procure delivery of the Security Documents detailed in Schedule 1."

20. Schedule 1 to the second loan agreement contained a list of Conditions Precedent. Paragraph 1 of schedule 1 referred to the provision of a first and only charge over the "Properties". The Properties were defined as Sony House, Balcora House, Manchester and Flat 6, Sackville Place, Manchester.

21. Schedule 5 to the second loan agreement contained Financial Covenants. Paragraph 1 of schedule 5 provided for a loan to value ratio and a ratio for interest cover. The loan to value ratio was expressed as 0.8:1. This was the same ratio as expressed in the first loan agreement, save that it was there expressed as the reciprocal value to loan ratio of 1.25:1. Paragraph 2 of schedule 5 provided:

> "It is acknowledged that, as at the date of this letter, the financial covenants set out in paragraph 1 above are not being met. Accordingly, BoS agrees that the testing of the financial covenants will be suspended until the Final Repayment Date."

22. Schedule 8 to the second loan agreement was a Notice of Drawdown. This Notice was signed by Mr McDonagh on 11 February 2010. The Notice contained blank spaces in which were to be inserted the date of drawdown, the amount and payment instructions but these spaces were left blank.

The claim against the bank – the issues

23. Mr Dale QC on behalf of the bank set out the following issues which he said were raised by the pleadings:

    i) On its correct interpretation, did the first loan agreement provide for repayment of the first loan

        a) in a single lump sum of £7.5m, or

        b) in the outstanding balance in Euros or the Sterling equivalent?

    ii) If, on the correct interpretation of the first loan agreement, the first loan was repayable in a single lump sum of £7.5m, is there an estoppel by convention which would have prevented the claimant from denying that the first loan was repayable in the outstanding balance in Euros or the Sterling equivalent?

    iii) If on the correct interpretation of the first loan agreement the first loan was repayable in a single lump sum of £7.5m and there is no estoppel by convention:

        a) could the first loan agreement have been rectified to provide that the first loan was repayable in the amount of the outstanding balance in Euros or the Sterling equivalent?

b) should the first loan agreement be rectified in that way?

iv) Did the first defendant breach the terms of the first loan agreement or the banker-customer contract by wrongly treating the sum due under the first loan agreement as the outstanding balance in Euros or the Sterling equivalent?

v) Did the claimant enter into the second loan agreement as a result of illegitimate pressure by the first defendant such that the claimant is entitled to set the second loan agreement aside for economic duress?

vi) Did the claimant enter into the second loan agreement as a result of conduct by the first defendant amounting to the tort of intimidation?

vii) If the second loan agreement is set aside for duress:

a) what (if any) sum is to be paid by the claimant by way of counter-restitution; and/or

b) what (if any) sum is payable under the first loan agreement?

viii) If the second loan agreement should not be set aside for duress:

a) is the second loan agreement unenforceable for lack of consideration; and

b) if not, what (if any) sum is payable by the claimant to the first defendant under it?

ix) To what (if any) award of damages and interest is the claimant entitled for breach of contract, duress or intimidation by the first defendant?

24. Mr Virgo did not disagree with the list of issues prepared by Mr Dale. However, although it had not been pleaded, Mr Virgo sought to raise at the trial a further issue as to whether the second loan agreement had ever been implemented; he submitted in this respect that the second loan agreement had never come into effect.

The witnesses of fact in relation to the claim against the bank

25. As will be seen, the contemporaneous documents which are available contain very detailed information as to the dealings which Mr McDonagh had with the bank at all material times. In addition, I heard extensive oral evidence as to what those dealings consisted of.

26. Mr McDonagh gave evidence in support of his claims. His witness statement, which stood as his evidence in chief, was seven pages long which was remarkably brief given the number of issues of fact that arose or potentially arose in relation to his claims. Mr McDonagh was cross-examined in detail principally by reference to the contemporaneous documents. His evidence as to what had occurred and as to his state of mind was significantly at variance from the contemporaneous documents. Where his evidence differs from the facts as revealed by the contemporaneous documents I am satisfied that those documents are reliable and Mr McDonagh's evidence is not reliable. It is clear to me that Mr McDonagh has reconstructed the events which

occurred to produce an account which he considered would be more helpful to his case as compared with the actual events.

27. I wish to comment on the fact that Mr McDonagh was the only witness of fact in support of his claims. This was so notwithstanding the fact that at important stages in his dealings with the bank, he was assisted by a Mr Singh and later by a Mr Byrne. If Mr McDonagh's evidence had been correct, one would have expected that Mr Singh and Mr Byrne would have been able to corroborate his evidence in a number of respects but yet Mr Singh and Mr Byrne were not called to give evidence. Mr McDonagh was cross-examined as to why he had not called Mr Singh and Mr Byrne and he did not put forward any reason why they could not have been called if they had corroborated his evidence. In the absence of any worthwhile explanation as to why he did not call Mr Singh and Mr Byrne, it is open to me to draw the adverse inference that Mr Singh and Mr Byrne would not have supported Mr McDonagh's case. I do draw that adverse inference but, in the event, this is not a matter of any real importance as I would have reached the identical findings on all matters of disputed fact by relying upon the contemporaneous documents even if I had not drawn this adverse inference.

28. I heard oral evidence from a number of employees of the bank. These witnesses were Mr Morrison, Mr Cahill, Mr Hodson, Mr Murphy and Mr Leonard. I found them all to be honest witnesses who were doing their best to recall what had happened and what had been discussed at various stages. Their task was made the easier because most of the relevant events were evidenced by contemporaneous documents which were available. In so far as they gave evidence as to a conversation or a meeting of which no note has survived, I accept the evidence of these witnesses as reliable evidence of what happened and what was said. Mr Virgo on behalf of Mr McDonagh did not really suggest that I should reject the evidence of any of these witnesses. The nearest he came to any criticism of their evidence was to say that Mr Murphy, Mr Cahill and Mr Leonard "fought shy" of accepting that they had made a specific threat to Mr McDonagh. I do not accept that criticism. I consider that in this respect, the documents show what happened and the evidence of these witnesses was not at variance with the documents.

29. I also received witness statements from two witnesses who were not called. It was agreed by counsel that I could receive these witness statements as evidence without the need for the witnesses to be called for cross-examination. These two witnesses were Mr Maxwell and Mr Prichard. Mr Maxwell was the solicitor at Dundas & Wilson who assisted with the drafting of the first loan agreement. In his witness statement, he stated that he really had no independent recollection of the events surrounding the drafting of the first loan agreement. Mr Prichard's statement related to the amount which remained owing by Mr McDonagh to the bank and one other point which I need not specifically mention.

The facts which are admissible for the purpose of construing the first loan agreement

30. The evidence at the trial covered a large number of matters which preceded the entry into the first loan agreement. Some of those matters might be admissible as background which can be taken into account when I come to construe the first loan agreement. However, the evidence before me was not confined to those matters. Because there is a claim to rectification of the first loan agreement, I heard a great

deal of evidence, for example as to the state of mind of various persons, which is certainly not admissible as background material for the purpose of construing the first loan agreement.

31. I obviously need to construe the first loan agreement before I consider the claim to rectification. If I were at this stage in the judgment to set out a full account of the evidence which is relevant to rectification before I construed the first loan agreement, there would be a danger that I might be influenced on the question of construction by that evidence. In those circumstances, I will instead seek to identify what material is admissible as part of the background to the first loan agreement and which can be relied upon as a possible aid to its interpretation. This approach will minimise the risk that I will be influenced by inadmissible matters when I come to construe the first loan agreement.

32. It is clearly established that, in general, evidence of pre-contract negotiations between the parties to an agreement that is later entered into is not admissible as an aid to the construction of that agreement: see Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101. However, that general rule does not exclude evidence of what was said or done during pre-contract negotiations if that evidence is being used to establish that a fact which may be relevant as background was known to the parties: see Chartbrook per Lord Hoffmann at [42].

33. I consider that the admissible background material is, or includes, the following:

i) Mr McDonagh wished to receive the sum of £7.5 million to buy Sony House from Grangefield;

ii) Mr McDonagh wished to have "a euro loan"; on 26 April 2007, Mr McDonagh emailed Mr Singh, the broker acting for him in connection with his negotiations with the bank; Mr McDonagh stated that he did not want a sterling loan as he wished to avail himself of the lower rate of interest for a loan in euros; on 27 April 2007, Mr McDonagh sent a copy of this email to the bank; on 22 May 2007, Mr McDonagh emailed Mr Singh and asked: "Can I ask the question again as to why they cannot just offer me a euro loan of approx €11,571-00 M (£7.9M) secured on the Wavertree property and let me pay back €11,571-00M (£7.9M) at the end of the term"; on 22 May 2007, Mr Singh forwarded this email to the bank;

iii) Mr McDonagh's reason for wanting a loan in euros was that he wanted to pay the rate of interest appropriate for a loan in euros rather than the rate of interest appropriate for a loan in sterling; during the negotiations, Euribor interest was significantly lower than LIBOR interest; in June 2007, the average for Euribor was 4.148% and the average for LIBOR was 5.880%;

iv) Mr McDonagh was able to pay interest in euros because he could require the tenant of Sony House to pay its rent in euros; equally, he was able to pay interest in sterling because he could require the tenant of Sony House to pay its rent in sterling;

v) on 21 May 2007, the bank opened an account in euros for Mr McDonagh;

vi) Sony House was to be used as security for repayment of the loan; the value of Sony House would be expressed in sterling; because the first loan agreement was to contain loan to value covenants in the ordinary way, both parties addressed the question as to a possible currency risk if the security was valued in sterling and the loan was expressed in euros; it was recognised that the currency risk lay with Mr McDonagh and not with the bank; the bank asked Mr McDonagh to arrange, and to pay for, a hedge against this currency risk; Mr McDonagh did not wish to bear the cost of a currency hedge; Mr Singh, as Mr McDonagh's broker suggested that the amount of the loan be reduced in order to mitigate the currency risk; this suggestion was agreed;

vii) the reason that the first loan agreement referred to an amount in sterling and did not refer to an amount in euros was that the first loan agreement was entered into before the drawdown of the loan and it was appreciated that the amount of the loan would be expressed in euros by reference to the rate of exchange current at the date of drawdown and not the rate of exchange current at the date of the first loan agreement.

The construction of the first loan agreement

34. There was no dispute as to the legal principles to be applied for the purpose of construing the first loan agreement. The more recent statements of the Supreme Court on that subject include Arnold v Britton [2015] AC 1619 (in particular per Lord Neuberger PSC at [14]-[23]) and Wood v Capita Insurance Services Ltd [2017] AC 1173 (in particular per Lord Hodge JSC at [8]-[15]). Those passages are now well-known and I need not set them out in this judgment.

35. I will begin the process of interpretation of the first loan agreement by commenting on a number of features of that agreement.

36. Clause 1.1 refers to "Seven Million Five Hundred Pounds" which is a misstatement of the amount of £7,500,000; the word "thousand" is missing before the word "Pounds". That mistake is repeated in clause 1.5. The fact of a mistake shows some lack of care in drafting the agreement although this point is not to be over emphasised.

37. Clause 1.1 refers to a sterling amount but then goes on to state that the sterling amount is to be drawn down in euros. This suggests that the sum being advanced is a sum of euros. Clause 1.1 used a defined term, the "term loan". The ordinary meaning of the "term loan" is therefore a loan of a sum of euros.

38. Clause 1.2 provides that the term loan is to be used to assist with the purchase of Sony House. The parties knew that the price for Sony House was to be expressed in sterling and they would expect that the price would be paid in sterling.

39. Clause 1.2 states that the term loan would be drawn down into a euro account. This shows that the advance was of a sum to be expressed in euros. The euro account was to be the servicing account which shows that the balance of the account would be expressed in euros. Accordingly, that account would show that Mr McDonagh would owe to the bank an amount expressed in euros.

40. Clause 1.3 provided for the payment of interest by reference to the interest rate appropriate for a loan in euros. The reference to an interest rate for euros being provided by the British Bankers Association may well have been a mistake caused by a failure to delete that reference from a draft used for a different agreement. Interest was to be debited to a euro account which shows that the debt was to be expressed in euros.

41. Clause 1.3 contains an important provision that all sums payable by Mr McDonagh would be paid in euros. There were exceptions to this requirement for the arrangement fee and the interest rate contract fee which were provided for elsewhere in the agreement and which were to be paid in sterling. Clause 1.3 therefore shows that the debt was to be repaid in euros.

42. Clause 1.3 referred to the bank buying an equivalent number of euros to cover the amount due from Mr McDonagh. This shows that if Mr McDonagh did not repay the debt, the Bank would buy euros to pay itself the sum due in euros and Mr McDonagh would be obliged to indemnify the bank against the cost of doing so.

43. Clause 1.3 refers to the "Sterling equivalent" of the term loan which shows that the term loan was not itself in sterling.

44. Clause 1.5 provides for repayment of the term loan. Clause 1.5 refers to one lump sum of £7,500,000. If one reads clause 1.5 with clause 1.3, although the lump sum is expressed in clause 1.5 in sterling, the obligation to repay has to be performed by making a payment in euros.

45. Clause 1.5 contemplated that the proceeds of sale of Sony House might be less than the outstanding amount of the term loan in which case a balancing payment was to be made to the servicing account. As the term loan was expressed in euros and the servicing account would show a debt in euros, it must have been contemplated that the proceeds of sale of Sony House if received in sterling (as would be likely) would be converted in to euros and paid into the servicing account in euros.

46. Clause 1.6 provided for early repayment of all or part of the term loan. In accordance with clause 1.3 any such repayment had to be made in euros.

47. Clause 1.7 provided for fees to be debited to the servicing account. These fees were to be payable in euros except for the arrangement fee and the interest rate contract fee.

48. By clause 2.1, Mr McDonagh was to enter into interest rate protection agreements and foreign currency transactions. Clause 2.1 refers to "its" exposure to interest rates and/or foreign exchange rates. The use of "its" might be said to suggest that the exposure was on the part of the bank. However, the first loan agreement (as distinct from the separate interest rate swap) was not at a fixed rate of interest so that the exposure to fluctuating interest rates was Mr McDonagh's exposure. That suggests that "its" means "your" and the use of the word "its" was inappropriate, possibly caused by a failure to amend a draft from a different transaction. If that is right, then the exposure to foreign exchange rates was Mr McDonagh's exposure.

49. Clause 4.2 provided for a required value to loan ratio of 1.25 which was to be tested on an annual basis or otherwise as agreed. This ratio required a comparison between a

value which one would expect to be expressed in sterling with the amount of the term loan.

50. Having reviewed the terms of the first loan agreement, I consider that it is clear that the loan is of a sum in euros not a sum in sterling. Everything in the agreement points to that conclusion with the possible exception of clause 1.5 which, at any rate at first sight, refers to repayment of a sum expressed in sterling. However, clause 1.5 must be read with clause 1.3 which requires the sum due under clause 1.5 to be paid in euros.

51. The first loan agreement does not specify the sum in euros which is the subject of the loan. Instead clause 1.1 of the agreement contemplates that the amount of the euros which are loaned would be calculated at draw down. In the events which happened, the amount drawn down was €11,071,500 at an exchange rate of approximately 1.47 euros to the pound. Accordingly, the amount of the loan was €11,071,500.

52. I was taken to the mechanics of the draw down. I interpret those mechanics so that the bank loaned €11,071,500 to Mr McDonagh with which he bought £7.5 million at the exchange rate of 1.47 euros to the pound. That gave Mr McDonagh the sum he wished to end up with to buy Sony House. Mr McDonagh's case was that he borrowed £7.5 million from the bank and that he then bought €11,071,500 and having done so he then bought £7.5 million. That way of dealing with the matter would not make any sense. If Mr McDonagh wished to borrow £7.5 million to buy Sony House, it is not sensible for him to use the sterling sum to buy euros and then immediately convert them back to the original sum in sterling.

53. I have reached my conclusion that the bank loaned €11,071,500 to Mr McDonagh on the basis of the clear wording of the first loan agreement although that conclusion is entirely consistent with the background facts which are admissible as an aid to the construction of the agreement.

54. Having reached the conclusion that the bank loaned €11,071,500 to Mr McDonagh, the next questions are: what sum is Mr McDonagh obliged to repay to the bank and, in particular, how is clause 1.5 of the agreement to be interpreted? The bank submits that Mr McDonagh is obliged to repay to the bank the sum shown in the euro account at the relevant time. Mr McDonagh submits that he is not obliged to repay the sum shown in the euro account at the relevant time but he is obliged to pay £7.5 million. Mr McDonagh submits that the wording of clause 1.5 is clear and is not capable of being given any other meaning.

55. If Mr McDonagh's submissions were correct, the result would be an odd one. It would mean that he had an account with the bank which showed a debt of €11,071,500 but yet he was able to discharge that debt by paying the euro equivalent of £7.5 million to the bank, at a time when the exchange rate was considerably less than 1.47 euros to the pound. In fact, when the debt was repayable in 2010, the exchange rate was nearer to 1.10 euros to the pound. Taking the exchange rate of 1.10 as an example, on his case, Mr McDonagh would be obliged under clause 1.3 of the agreement to convert £7.5 million to euros which would give him €8,250,000 which he would remit to the bank which would, upon receipt, discharge the debt shown in the euro account of €11,071,500. Further, if the pound had strengthened during the term of the loan so that the exchange rate was 1.50 euros to the pound at the time for repayment, Mr McDonagh would be obliged under clause 1.3 of the agreement to convert £7.5

million to euros which would give him €11,250,000 which he would remit to the bank and the bank would keep the difference between that figure and €11,071,500 as a gain for itself. Further, although Mr McDonagh contends that he is able to clear the loan by using £7.5 million to buy euros at the prevailing rate of exchange and thereby repay the principal sum owing to the bank, he would have to pay interest in euros on a principal sum expressed in euros as €11,071,500. I consider that the result contended for by Mr McDonagh is so unusual that it is unlikely to have been the result intended by the parties.

56. No doubt if the agreement provided for the above result in clear and unmistakeable terms, then the court may be obliged to give effect to such terms. However, the unusual result contended for by Mr McDonagh is a reason to look closely at the language of the agreement.

57. Mr McDonagh naturally relies upon the words of clause 1.5. That wording does appear to provide strong support for his argument. However, Mr McDonagh's argument tends to stop at clause 1.5 and to assume that what is required of him is to pay a sum of £7.5 million to the bank. However, clause 1.5 must be read consistently with clause 1.3 which spells out that Mr McDonagh's obligation is to pay a sum of money in euros and this means that the repayment of the euro loan must be made in euros. This immediately gives rise to the question: what sum of euros is required to repay the loan? The agreement points in different ways on this. One way to read the agreement is to hold that in order to comply with clause 1.5, the obligation is to pay the number of euros which one can buy for £7.5 million at the prevailing rate of exchange at the date of repayment. The other way to read the agreement is that Mr McDonagh must repay the loan and the sum loaned is €11,071,500. Thus, although he is obliged to repay £7.5 million, the parties are proceeding on the basis that the number of euros represented by £7.5 million is calculated at the same exchange rate as was used for clause 1.1. No other reading of the agreement results in Mr McDonagh repaying the sum outstanding as due in the euro account, no more and no less.

58. This interpretation of the agreement is supported by the admissible background facts. The parties obviously saw that there was a currency risk (for somebody) involved with a security valued in sterling and a debt in euros. If Mr McDonagh is right, then the amount advanced was £7.5 million and he was obliged to repay £7.5 million. If that is right, then there was no currency risk. But the background documents make it very clear that both sides understood that there was a currency risk and, moreover, that it was Mr McDonagh's risk.

59. Mr Dale on behalf of the bank stresses that the result contended for by Mr McDonagh is uncommercial in the extreme. It would involve the bank lending a sum in euros but agreeing to take a fixed sum in sterling as full repayment of the loan. That would place the risk of a weakening of the pound on the bank. He submitted that no bank would agree to take on such a risk at any rate not as part of a loan transaction at the rates of interest in this case. I can immediately agree with this submission to the extent that if the loan of euros had been made by a bank in the euro zone, for example, a bank in the Republic of Ireland, such an arrangement would be extremely uncommercial. However, the force of Mr Dale's point in this respect is weakened somewhat in that one might be able to view the transaction in this case as one where the bank parted with £7.5 million and might therefore be prepared to accept

repayment of £7.5 million. Nonetheless, I consider that it would not be right to view the transaction that way. As I have explained, this was not a sterling loan so it was not a loan of £7.5 million. Mr McDonagh was getting the benefit of an interest rate appropriate for a euro loan. The fact that the loan was a euro loan was central to the transaction so that it would be misleading to regard the transaction as in substance a loan of sterling. Considered in that light, I agree with Mr Dale that the result contended for by Mr McDonagh is extremely uncommercial.

60. Having considered the wording of the agreement, the admissible background and the commercial consequences of the rival constructions, I reach the conclusion that I ought not to accept the construction of the agreement contended for by Mr McDonagh if there is an alternative interpretation which is reasonably available as the result of a recognised process of construction.

61. I consider that there is an alternative interpretation to that contended for by Mr McDonagh. Clause 1.5 is not to be read in isolation. It is to be read in the context of the agreement as a whole, including in particular clauses 1.1 and 1.3.

62. The figure of £7.5 million used in clause 1.5 is the same as the figure used in clause 1.1. Indeed, this is emphasised by the fact that clauses 1.1 and 1.5 contain the same error when attempting to put £7.5 million into words rather than figures. When £7.5 million is used in clause 1.1 it is referring to the amount of euros represented by that figure at the time of draw down. Clause 1.3 requires the figure in clause 1.5 to be paid in euros. Mr McDonagh cannot perform clause 1.5 by paying a sum in sterling. He necessarily has to convert sterling to euros for this purpose. That gives rise to this question: how many euros does Mr McDonagh have to pay? Is it the sum of euros which £7.5 million represented at the date of draw down (just as is the position with clause 1.1) or is it the sum of euros which £7.5 million buys at the date of repayment? The only answer to this question which involves Mr McDonagh repaying the debt, no more and no less, is if he pays in euros the sum which £7.5 million represented at the date of drawdown. This interpretation of the agreement fits with the other provisions of the agreement and also with the admissible background and with the commercial purpose of the transaction. I consider that it is an available interpretation for the agreement construed as a whole and it is the one I accept.

63. Mr Dale put forward a further interpretation of the agreement. He contended that clause 1.5 contained a clear mistake and it was also clear what correction ought to be made to it to cure the mistake. Clause 1.5 was said to be mistaken in suggesting that £7.5 million would repay the term loan. The suggested correction was simply to remove the reference to £7.5 million. Clause 1.5 would then be read as requiring repayment of the loan in one lump sum but no figure needed to be stated.

64. Mr Dale relied upon the principle of interpretation which allows a court to correct mistakes of expression in a document. He relied upon East v Pantiles (Pant Hire) Ltd (1981) 263 EG 61, KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336 and Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 per Lord Hoffmann at [22]-[25]. The submission was that clause 1.5 was intended to say that the loan had to be repaid in one lump sum at the time specified and the reference to a fixed sum in sterling was simply a mistake.

65. To remove words from a written contract and then to interpret the contract without those words is a radical step. For that reason, I prefer the approach I have explained above which is to retain the words in clause 1.5 which refer to £7.5 million but then to interpret those words in the light of clauses 1.1 and 1.3 so that the relevant exchange rate is the exchange rate at the date of drawdown. However, if that approach were judged to be unavailable, I would be prepared to accept the approach contended for by Mr Dale as another available method of construing the agreement and, to the extent needed, correcting an obvious mistake in expression.

Estoppel by convention

66. The bank submitted that if I were minded to construe the first loan agreement in favour of Mr McDonagh, then I should not do so because he was estopped by convention from putting forward that construction of the agreement. In view of my actual decision on construction, it is not necessary for me to deal with the arguments as to estoppel by convention. The bank further submitted that if I was against it on construction and on estoppel by convention, then I ought to rectify the first loan agreement on the ground of common mistake. Again, in view of my actual decision on construction, the bank does not need to assert a claim to rectification.

67. I have considered whether I ought to make findings as to estoppel by convention and rectification. Having considered the claim to rectification, I have concluded that the bank would have had a clear case for rectification if it had failed on its submissions as to construction. In the circumstances, I will set out my findings of fact and my reasoning as to rectification but I do not think that I need to consider the arguments as to estoppel by convention in addition.

The facts which are relevant to the claim to rectification of the first loan agreement

68. The principal employees of the bank who were concerned with the negotiations of the first loan agreement with Mr McDonagh and Mr Singh (the broker acting for Mr McDonagh) were Mr Morrison, Mr Hodson and Mr Cahill. All three of these employees gave evidence and were cross-examined.

69. Mr Morrison gave evidence that at all times he regarded the loan to Mr McDonagh as a euro loan which was to be drawn down in euros and repaid in euros or the sterling equivalent of the euro loan. He said that if the court construed the first loan agreement so that Mr McDonagh was entitled to repay the loan by paying the fixed sum in sterling of £7.5 million, then the wording of the document was wrong and did not reflect his intention. I accept Mr Morrison's evidence which is in accordance with the contemporaneous documents.

70. Mr Hodson and Mr Cahill gave evidence to essentially the same effect as Mr Morrison. Again, I accept their evidence which is in accordance with the contemporaneous documents.

71. Mr McDonagh gave evidence that he believed that he was borrowing £7.5 million, that the loan was a sterling loan and not a euro loan and that he was obliged to pay £7.5 million to pay off the loan. I do not accept that evidence. It is contradicted by the contemporaneous documents to which I refer below.

72. The contemporaneous documents make it clear that Mr McDonagh wanted a euro loan. He wanted a euro loan so that he could benefit from the interest rate appropriate for a euro loan which was lower than the interest rate appropriate for a sterling loan. The bank agreed to give Mr McDonagh a euro loan. At no time, did the parties agree to abandon the proposal for a euro loan and substitute a proposal for a sterling loan. At no stage did Mr McDonagh change his request to a request for a sterling loan. I do not need to list all of the contemporaneous documents which demonstrate these matters. However, I will refer to some of the documents which describe the negotiations between the parties as to the need for a foreign exchange or currency hedge.

73. On 22 May 2007, Mr Hyde of the bank emailed Mr Singh, acting on behalf of Mr McDonagh. Mr Hyde explained why the bank wanted to have a foreign exchange hedge. The explanation referred to the value of the security being in sterling and the liability to pay the debt being in euros. The proposed loan was to have a loan to value ratio. It was explained that any strengthening in the euro against the pound would potentially impact on the loan to value ratio. Mr Hyde specifically referred to Mr McDonagh's refinancing risk on the maturity of the loan.

74. Mr Singh passed Mr Hyde's email of 22 May 2007 on to Mr McDonagh who replied to Mr Singh. He noted that there was a substantial cost involved in hedging. He said:

> "Can I ask the question again as to why they cannot just offer me a euro loan of approx €11,571-00 M (£9.7M) secured on the Wavertree property and let me pay back the €11,571-00 M (£9.7M) at the end of the term. Surely the risk is minimal. In three years when the rent review is negotiated upwards only and is upwards only. (sic) The value of the property has increased year on year to the tune of £1M per annum. The Knight frank (sic) report is bullish enough to suggest that the £1M pa in (sic) conservative. This will value the property at £13M with a loan of 60%. Where is the risk? The exchange rate can move to parity and still no exposure from the bank. Furthermore, the approval is expected from sony (sic) on the extension which will trigger a further value increase and a renegotiated term of the lease on the entire. Another financial institution will consider a Euro facility."

75. Mr McDonagh's email of 22 May 2007 makes it clear that he knew that he was borrowing in euros and would have to repay in euros the amount he had borrowed in euros. This email was forwarded to the bank. Mr Morrison then replied to Mr Singh referring to the need for currency exposure hedging and stating that if Mr McDonagh borrowed in euros €11.571 million (in order to have £9.72 million available to him) he would owe €11.571 million. The question of hedging was discussed by Mr McDonagh and Mr Singh with representatives of the bank on 31 May 2007.

76. There were further exchanges which explored the question of hedging to deal with the fact that Mr McDonagh was expected to enter into a loan to value ratio covenant where the security was valued in sterling and the loan was in euros and also to deal with the need for Mr McDonagh to repay the loan in euros. These exchanges included:

i) email from Mr Hyde to Mr Singh of 1 June 2007 which, amongst other things, suggested that Mr McDonagh might put up a cash deposit of £346,000; this email was forwarded to Mr McDonagh;

ii) email from Mr Singh to the bank of 4 June 2007 after speaking to Mr McDonagh;

iii) email from Mr Hodson to Mr Singh of 7 June 2007; this email was copied to Mr McDonagh;

iv) email from Mr Hodson to Mr Singh of 20 June 2007;

v) email from Mr Hodson to Mr Cahill and Mr Morrison of 20 June 2007 reporting a suggestion from Mr Singh that instead of Mr McDonagh providing a cash deposit of £346,000, the debt be reduced from £7.92 million to £7.5 million and that Mr Singh was speaking to Mr McDonagh about this proposal;

vi) Mr Hodson gave evidence of his conversation with Mr Singh as reported in the email of 20 June 2007 to Mr Cahill and Mr Morrison; Mr Hodson said that the original intention to have a euro loan repayable in euros was not changed even though the amount in sterling available to Mr McDonagh from the euro loan was intended to be reduced from £7.92 million to £7.5 million; Mr Hodson said that in his conversation with Mr Singh he had referred to the bank having the right to call for additional security from Mr McDonagh if the exchange rate for sterling moved beyond €1.3706;

vii) Mr Hodson also gave evidence of a further conversation he had with Mr Singh, probably on 27 June 2007, when Mr Singh confirmed that his earlier suggestion to reduce the amount of the loan was acceptable to Mr McDonagh.

Rectification of the first loan agreement

77. There was no dispute about the law as to rectification for common mistake. The principles are shortly stated in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 per Lord Hoffmann at [48]. Before the court will rectify a contract, the party seeking rectification must show that:

i) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;

ii) there was an outward expression of accord;

iii) the intention continued at the time of the execution of the instrument sought to be rectified; and

iv) by mistake, the instrument did not reflect that common intention.

78. Assuming (contrary to my earlier finding) that the first loan agreement enabled Mr McDonagh to pay off the loan by paying the fixed sum of £7.5 million and based on my findings of fact, it is clear that all of the necessary ingredients for rectification for common mistake are established. At all times and at the date of execution of the loan agreement, the Bank and Mr McDonagh believed that the loan agreement required

repayment in euros and they intended that to be the result. There was an outward expression of their accord in the communications referred to above as to the currency hedge. If my earlier finding as to the construction of the loan agreement is wrong, then by mistake the agreement did not reflect the common intention.

79. As to the form of any rectification, the simplest way to correct the mistake is to remove the reference to £7.5 million from clause 1.5.

80. Assuming that the first loan agreement were construed in favour of Mr McDonagh (contrary to my actual finding), the bank still submits that it does not actually need to have rectification of the first loan agreement because the parties later entered into the second loan agreement which provides for the debt to be repaid in euros. However, if the bank is for whatever reason not able to rely on the second loan agreement then it would wish to have rectification of the first loan agreement. Mr McDonagh has submitted that the bank ought not to be granted rectification of the first loan agreement because it delayed in seeking rectification. The bank's answer is that it did not need to seek rectification of the first loan agreement until Mr McDonagh challenged the second loan agreement and when he did so, they promptly sought rectification of the first loan agreement. I accept the bank's case on this point.

81. Accordingly, I have now construed the first loan agreement in favour of the bank. On that basis, the claim to rectification does not arise and no order for rectification needs to be made. If I had construed the first loan agreement in favour of Mr McDonagh, then I would hold that the bank has established its entitlement to rectification. I will consider separately the position in relation to the second loan agreement and, depending upon my conclusions in that respect, they may provide a further reason why it is not necessary to make an order for rectification.

Issues as to the second loan agreement

82. The issues which I will now consider in relation to the second loan agreement are:

    i) did the bank provide consideration for the second loan agreement?

    ii) did Mr McDonagh enter into the second loan agreement by reason of the duress and intimidation of the bank?

The consideration for the second loan agreement

83. Mr McDonagh contends that the second loan agreement is not enforceable because the bank did not give consideration for that agreement. It was submitted that the bank did not advance any monies to Mr McDonagh pursuant to that agreement. Insofar as the bank would wish to rely on the suspension of covenant testing pursuant to paragraph 2 of schedule 5 to that agreement, Mr McDonagh contends that the bank had no intention of treating Mr McDonagh as being in default under the agreement prior to the expiry of the loan period. It was said that this meant that paragraph 2 of schedule 5 did not give Mr McDonagh anything over and above what he would receive in any event even without that paragraph.

84. I do not accept the submission that the bank did not give consideration for the second loan agreement. Before that agreement, Mr McDonagh was in default under the first

loan agreement, in particular, because the covenant as to the loan to value ratio had been breached. By paragraph 2 of schedule 5 to the second loan agreement, the bank agreed to suspend the testing of the covenant as to loan to value ratio. This meant that the bank bound itself not to treat Mr McDonagh as in default by reason of the breach of the covenant as to the loan to value ratio. I am prepared to accept that if the bank had not bound itself in that way, it would probably not have called in the loan under the first or second loan agreement. However, in law, Mr McDonagh gained something of value in that he had a binding commitment from the bank not to treat him as being in default in relation to the loan to value ratio instead of him being in a position where he had to rely upon the bank continuing, without commitment, not to call in the loan.

85. At the trial, Mr Virgo made two further points about the second loan agreement. These further points were not pleaded. The first point was that the second loan agreement was subject to a condition precedent which was never satisfied and it was contended that the result was that the second loan agreement never came into effect. The particular non-satisfaction of the condition precedent was that Mr McDonagh had never provided security over Balcora House and Flat 6, Sackville Street as required by paragraph 1 of schedule 1 to the agreement. Mr Dale submitted that if this point had been pleaded, the answer to it would have been that the condition precedent was exclusively for the benefit of the bank, that it could be waived by the bank and that it had been waived by the bank. I agree that the condition precedent was exclusively for the benefit of the bank and could be waived by it. It also seems likely that if this point had been pleaded and the bank had set out its case on waiver, that it would have established that the condition precedent had been waived. Mr Virgo did not apply to amend the pleadings to take this point about the condition precedent and so the point remained unpleaded. That is sufficient to dispose of the point although I add that on the material before me it looks like the bank's case on waiver would have succeeded.

86. Mr Virgo's second unpleaded point was that the second loan agreement had not been implemented. The point seemed to be that the second loan agreement provided for the bank to lend €11,071,501 to Mr McDonagh and for that sum to be drawn down by Mr McDonagh. Mr Virgo submitted that nothing ever happened under the second loan agreement. He seemed to suggest that what needed to happen was that the pre-existing loan account should record that the sum due under it was paid up and then a new loan account should be opened recording the new debt which would be equivalent to the pre-existing debt. Although this point was not pleaded, the answer to it would appear to be what the parties envisaged was to happen was that the pre-existing debt would remain owing but would be governed by the terms of the second loan agreement rather than being governed by the terms of the first loan agreement. In this way, the second loan agreement was implemented by the debt being left outstanding on the terms of the second loan agreement. Mr Virgo did not apply to amend the pleadings to take this point about implementation and so the point remained unpleaded. That is sufficient to dispose of the point although I add that on the material before me it looks like the bank's case in response would have succeeded.

Duress and intimidation

87. Mr Virgo submitted that Mr McDonagh only entered into the second loan agreement because of illegitimate pressure or duress practised upon him by the bank. It was submitted that Mr McDonagh was therefore entitled to apply to set aside the second loan agreement. Mr Virgo also submitted that the duress practised upon Mr

McDonagh constituted the tort of intimidation and that he was entitled to claim damages for the substantial losses he had suffered as a result of the intimidation. Mr Virgo's submissions were made on the basis that under the first loan agreement Mr McDonagh was entitled to pay off the loan by making a payment of £7.5 million whereas under the second loan agreement he was obliged to pay €11,071,501. Accordingly, on this case, Mr McDonagh was worse off under the second loan agreement. However, on my earlier findings, the debt under the two agreements was the same and the amount required to pay off the debt was also the same. Indeed, on my findings, the second loan agreement was beneficial to Mr McDonagh in that the bank agreed to suspend covenant testing until the end of the term of the loan. Although there were other terms of the second loan agreement which were more onerous to Mr McDonagh than the terms of the first loan agreement, these were the price for the suspension of covenant testing and no issue has been raised about the imposition of those terms on Mr McDonagh.

88. In these circumstances, the suggestion that Mr McDonagh was the subject of duress when he entered into the second loan agreement, in relation to the same debt and in a way which was beneficial to him appears hopeless. Further, as the debt under the two agreements is the same, there seems to be no point in Mr McDonagh seeking to set aside the second loan agreement but to remain liable under the first loan agreement. Further, if the debt under the two loan agreements was the same, it is difficult to see how the alleged intimidation could have caused Mr McDonagh any loss.

89. In these circumstances, I have considered whether there is any point in making findings in relation to the allegations of duress and intimidation. In the event, I have decided to deal with these claims. The parties may be assisted by knowing my assessment of the facts relied upon by Mr McDonagh in support of these claims. In the first instance, I will consider these claims on the basis of my earlier findings as to Mr McDonagh's liability under the first loan agreement. I will then attempt to address the claims of duress and intimidation on the assumption that Mr McDonagh was entitled to pay off the first loan agreement by making a payment of £7.5 million.

90. In his closing submissions, Mr Virgo identified a number of occasions where he said that the bank's conduct amounted to unlawful duress and intimidation. Mr Virgo began by referring to the letter written by Mr Murphy of the bank to Mr McDonagh on 29 April 2008. In that letter, Mr Murphy referred to the first loan agreement. He said that the amount of the loan was €11,071,500 and that the sterling equivalent of that sum was £8,734,911, given the weakening of the pound against the euro. Taking the value of Sony House at £9.9 million there was a breach of the value to loan ratio of 1.25:1 by £814,911. Mr Murphy referred to the covenant testing date of 13 July 2008, the first anniversary of the loan. He referred to various options open to Mr McDonagh such as placing cash on deposit, reducing the loan or providing supporting security. He also referred to interest costs of €166,903 and the quarter's rent from Sony House of €201,240.04 which gave interest rate cover of 120% which exceeded the permitted limit. Mr Murphy stated that he welcomed an opportunity to discuss matters with Mr McDonagh.

91. It is difficult to see anything objectionable in the letter of 28 April 2008. It is exactly the sort of letter which one would expect a bank to write on the subject of banking covenants. Based on my earlier findings as to the first loan agreement, what Mr Murphy said was accurate. Also, Mr Murphy expressed himself in a moderate way.

There was nothing in his language which was inappropriate. If Mr McDonagh was concerned about the contents of this letter, it was because the facts relied upon by Mr Murphy were worrying not because Mr Murphy was doing anything inappropriate.

92. When asked about this letter, Mr McDonagh gave evidence that he had complained to Mr Murphy that the bank was wrong about the loan. Mr McDonagh said that he pointed out that he only owed £7.5 million. Altogether, Mr McDonagh said that he pointed this out to the bank 50 to 60 times. I do not accept that evidence. Instead, I accept what Mr Murphy told me about that topic. He said that there was a point when Mr McDonagh did query with him whether the loan was £7.5 million and not a loan in euros. Mr Murphy thought that Mr McDonagh raised this point at a meeting and not in response to the letter of 29 April 2008. This point was raised by Mr McDonagh once or possibly twice. Mr Murphy thought that the point was just a "try-on" by Mr McDonagh. Mr Murphy explained to him that the loan was a euro loan and he may have reminded Mr McDonagh of the discussions the bank had with Mr Singh as to the need for a currency hedge. Mr McDonagh appeared to accept the explanation and he did not pursue the matter. Mr Murphy's evidence is consistent with the fact that there was no sign in the contemporaneous documents before the entry into the second loan agreement in February 2010 of Mr McDonagh suggesting that he did not owe €11,071,500. If Mr McDonagh had raised that point 50 to 60 times orally, it is surprising that he did not mention it once in writing. Further, if he had made that point so often, I consider that the bank would have noted it and would have reacted to it in a way which would have been recorded.

93. Mr Virgo also referred to the fact that the letter of 29 April 2008 referred to the interest payments reflecting the sums due under the interest rate swap. He then referred to the fact that some years later, as I understand it, the bank was required to accept that it had mis-sold the interest rate swap to Mr McDonagh and it repaid a sum to him. However, the nature of the mis-selling case was not investigated at the trial. I record that I was told that in 2012, the FSA investigated certain cases of interest rate swaps sold to small businesses and as a result the bank reviewed sales made by it to "non-sophisticated customers". Mr McDonagh's case was included in this review. On 1 April 2014, the bank wrote to Mr McDonagh and stated that there was insufficient evidence that there had been adequate disclosure to him in certain respects before the swap had been entered into and they offered to credit him with €767,670.64 by way of redress. Mr McDonagh accepted the redress which had been offered. Although those events ultimately occurred, at all times prior to the second loan agreement, both the bank and Mr McDonagh proceeded on the basis that the interest rate swap was contractually binding and had not been the subject of a complaint by him.

94. Mr Virgo then referred to a meeting between Mr McDonagh and Mr Murphy on 7 November 2008. Mr Murphy asked Mr McDonagh to provide sufficient security for the loan. Mr McDonagh agreed to provide a second charge over his house in Ireland. This appears to have been a recognition by Mr McDonagh that he had breached the loan to value ratio and he could properly be asked to provide further security.

95. The next communication relied upon was on 9 December 2008 when Mr Cahill of the bank sent to Mr McDonagh a copy of the statement of means which he had provided in 2007 and asked him to update it. Mr Cahill said that he would be grateful if he could receive it within 24 hours. Mr Cahill also sent the statement to Mr Singh with the same request. Mr Virgo criticised these requests as giving Mr McDonagh too short

a time to update the statement of means. The short period reflected the fact that there had been an event of default under the loan since July 2008 and nothing had happened to remedy that default and the bank was eager to see some progress being made by Mr McDonagh.

96. By 13 January 2009, Mr McDonagh had not provided the requested statement of means and Mr Cahill telephoned and emailed Mr Singh to ask him to contact Mr McDonagh.

97. In February 2009, the bank wanted Mr McDonagh to execute a second charge over his home in Ireland. No real progress was made in that respect. The solicitor acting for the bank expressed the view to the bank that the delay was due to Mr McDonagh rather than the first chargee. Mr Virgo relied on the fact that the bank's solicitor wrote to the bank stating that the aim of having the second charge executed in escrow at that point was "to keep the pressure on". In March 2009, Mr McDonagh said that his partner who lived with him in the property would not agree to be bound by the second charge.

98. On 9 March 2009, Mr Murphy wrote to Mr McDonagh stating that Mr McDonagh was in breach of his banking covenants and asking for his proposals as a matter of urgency. Although Mr Virgo cross-examined Mr Cahill and Mr Murphy about his letter and suggested that the bank was giving an "or else" ultimatum to Mr McDonagh, Mr Virgo did not specifically rely on this letter in his closing submissions.

99. Mr Murphy met Mr McDonagh on 25 March 2009 and discussed the possibility of the provision of additional security, in particular, over Balcora House, Manchester. Mr Murphy's note of the meeting stated that it was "a reasonable meeting" and that he had explained that the bank "could take control of the asset" i.e. Sony House, which Mr McDonagh wished to avoid. Mr Murphy agreed in his evidence that he probably would have said that the bank could appoint receivers but that he had not made a threat to that effect but pointed out that there was a risk that that could happen. Mr Murphy's note recorded that the bank had little option but to continue with the arrangements pending the rent review in relation to Sony House due in March 2010 and the expiry of the interest rate swap in July 2010.

100. Mr Murphy followed up the meeting of 25 March 2009 with an email the next day to Mr McDonagh. The email described the meeting as constructive and listed seven matters which were said to have been agreed. Mr Murphy said there was an urgent requirement to remedy the breach of the covenant as to the security. He also said that the bank and Mr McDonagh needed to work together and the bank would appreciate his cooperation. Mr McDonagh replied to this email on 30 March 2009 and disagreed with a number of the points in Mr Murphy's email.

101. Mr Murphy then telephoned Mr McDonagh on 31 March 2009. Mr McDonagh expressed the view that the value of Sony House had increased and, while Mr Murphy did not think that was the case, he was prepared to obtain an up to date valuation. They then discussed the availability of further security. Mr McDonagh wanted to be reassured that the bank would not take additional security and then immediately call in the loan and realise the security. Mr Murphy's note of the conversation stated that he repeated that the bank needed to see progress within a very short time. The note

refers to the discussion as "relatively heated". Mr Murphy accepted that he and Mr McDonagh had argued about some of the points recorded in the note. He also accepted that he might have said that if Mr McDonagh did not provide further security, the matter might be taken out of Mr Murphy's hand as relationship manager. Mr Murphy still hoped that the loan to value ratio would be improved if the pound strengthened against the euro.

102. On 7 April 2009, Mr Murphy had a further conversation with Mr McDonagh. Mr McDonagh was nervous that if he provided additional security, the bank would then call in the loan and realise the security. Mr Murphy replied that he needed to have additional security and then he would wish to restructure the loan.

103. In May 2009, Mr McDonagh was again asked by Mr Murphy for an updated statement of assets. A statement of assets was provided on 18 May 2009.

104. By July 2009, the internal thinking of the bank had reached the point where the loan was being classified as "High Risk" and the bank was considering a waiver of the loan to value and interest cover covenants. A draft internal report of 28 July 2009 stated that the bank had considered "taking possession" of the security but due to the difficulty of paying the interest; as a result of the adverse movement in the exchange rates and due to the cooperation of Mr McDonagh in meeting any shortfall, it was thought that the cost of doing so outweighed the benefits. These views were repeated in the final version of this report dated 18 August 2009. At some point after August 2009, the loan account was transferred to the Business Support Unit of the bank.

105. On 7 October 2009, Mr Murphy met Mr McDonagh. The next day, Mr Murphy emailed Mr McDonagh to confirm the way forward. He referred to the proposal to take a charge over Balcora House and Flat 6, Sackville Street. He referred to a cost of €430,000 to break the interest rate swap which he said was "clearly … not an option at that stage". Mr McDonagh replied to Mr Murphy stating that he would take the steps required by the bank.

106. On 17 November 2009, Mr Leonard of the Business Support Unit of the bank wrote to Mr McDonagh. He explained that he had replaced Mr Murphy as the bank representative dealing with Mr McDonagh. He stated that Mr Murphy would deal with the redocumentation of the facility and with the provision of additional security. Mr Leonard referred to an inquiry from Mr McDonagh about the prospect of refinancing the loan. Mr Leonard referred to certain terms for a refinance. He referred to the interest rate swap and stated that if it were broken before it expired in July 2010, the bank would have to pay a cost for early breakage of the swap.

107. In December 2009, the bank was in the course of preparing documents to set out the new terms for the loan to continue to July 2010. Mr Leonard spoke to Mr McDonagh as to his choice of solicitors in connection with agreeing the documents. Mr McDonagh said that he wanted to see the new documents before providing the further security. Mr Leonard stressed the need for him to provide that security.

108. On 24 December 2009, Mr Leonard sent to Mr McDonagh the draft documents setting out the new terms for the loan to continue to July 2010. Mr Leonard stated in a covering email that Mr McDonagh was in default and the bank was entitled to demand repayment of the loan but the bank was prepared to agree these revised terms.

He also said that if the revised terms were not agreed then the bank may have no other option than to demand repayment which if it were not forthcoming would allow the bank to exercise its rights under the various security documents. Those rights might include the appointment of a receiver over the security. Mr Leonard also pointed out that Mr McDonagh was personally liable for the full amount of the loan. Mr Leonard said that it was important for the bank to have additional security over Balcora House and Flat 6, Sackville Street. He concluded the email by stating:

> "I appreciate the above is couched in fairly stern terms, but you need to be fully aware of the position and the conditions of the Banks continued support, as well as the consequences of the current default position. I would, as with any legal document, advise you to seek independent legal advice on this matter."

109. On 6 January 2010, Mr McDonagh emailed Mr Leonard and asked him to talk to a Mr Derry Byrne, who was a friend of Mr McDonagh's and an ex-banker, in connection with the loan. Mr Byrne then contacted Mr Leonard. Mr Byrne told Mr Leonard that he (Mr Byrne) had extensive banking experience. Mr Leonard and Mr Byrne then discussed the proposed revision of the terms of the loan.

110. On 14 January 2010, Mr Byrne emailed Mr Leonard (with a copy to Mr McDonagh) to confirm that Mr McDonagh was willing to proceed with the revised terms until July 2010. He recorded Mr Leonard's agreement to meet again in May 2010 to discuss a further extension of the loan.

111. On 20 January 2010, Mr McDonagh instructed solicitors to act for him in connection with the revised terms for the loan and the provision of further security although it is most likely that the solicitors were only asked to deal with the conveyancing aspects of the transaction.

112. On 28 January 2010, Mr Leonard sent Mr McDonagh a further draft of the revised loan terms. He said that Mr McDonagh should seek independent legal advice if necessary.

113. On 8 February 2010, Mr McDonagh telephoned Mr Leonard and protested about one of the charges for the revised loan terms. This matter was discussed the next day when Mr Leonard met Mr Byrne. Mr Byrne prepared a note of this meeting. The note is dated 24 February 2010 and refers to Mr McDonagh being unhappy with an additional charge for the revised loan. The note states that it was agreed that the loan would be reviewed by the bank and restructured after discussions with the tenant of Sony House in June 2010. It was hoped that an increase in rental income and a reduction in interest rates would assist in making the facility "less penal" to Mr McDonagh than it currently was.

114. The bank and Mr McDonagh then entered into the second loan agreement.

115. There was no dispute as to the relevant legal principles as to economic duress. The legal principles were stated in <u>DSND Subsea Ltd v Petroleum Geo-Services</u> [2000] BLR 530 per Dyson J at [131] as follows:

> "The ingredients of actionable duress are that there must be pressure, (a) whose practical effect is that there is compulsion on, or a lack of practical choice for, the victim, (b) which is illegitimate, and (c) which is a significant cause inducing the claimant to enter into the contract: see *Universal Tanking of Monrovia v ITWF [1983] AC 336*, 400B–E, and *The Evia Luck [1992] 2 AC 152*, 165G. In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining."

116. The legal principles as to duress were discussed in detail by Leggatt J in Nehayan v Kent [2018] EWHC 333 (Comm) at [154]-[157]. The judge dealt with a number of points arising in relation to the relevant principles, including the circumstances in which a lawful demand could be regarded as offending basic minimum standards of acceptable behaviour, the circumstances in which it ought to be regarded as unjust to allow a party to enforce an agreement and the relevance of the question of whether a party had an alternative to submitting to pressure. In view of the length of the relevant passage in the judgment, I will not set it out but I will seek to apply the approach which is supported by that passage.

117. Mr Virgo submitted:

> "The short point is that Mr McDonagh was induced to sign the second loan agreement under threat that the Bank would otherwise call in the loan and appoint receivers before its expiry date in July 2010, when the Bank had every intention of taking no action until after expiry of the term. This entails two evidential issues: (1) Was receivership threated? (2) Was the Bank intent on taking no enforcement action until after expiry? …
>
> It is urged as "morally and socially unacceptable" for the Bank to seek an advantage from Mr McDonagh by maintaining a pretence that it would call in a loan prematurely and appoint receivers when it had no intention of so doing."

118. Based on my earlier findings of fact, I do not accept that the bank's relationship with Mr McDonagh can fairly be described as one where they made threats or maintained a pretence as to what they could do or might do. I consider that what is relevant in this context includes the following:

    i) Under the first loan agreement, Mr McDonagh had borrowed a large sum of money and had entered into certain terms and conditions of a usual kind;

ii) At the relevant time, Mr McDonagh was in default under the first loan agreement;

iii) The bank said to Mr McDonagh that he was in default;

iv) Mr McDonagh's default gave the bank certain powers and rights;

v) Mr McDonagh knew that the bank had those powers and rights;

vi) The bank waited for many months without exercising any of those powers and rights;

vii) The bank asked Mr McDonagh to provide further security for the loan;

viii) Mr McDonagh agreed to provide further security although he never in fact did so;

ix) Mr McDonagh did not protest at the bank's stance that he owed €11,071,500; he did contend that he only owed £7.5 million but the bank explained why he was wrong about that and Mr McDonagh accepted that explanation;

x) The bank proposed a restructuring of the loan on terms which included a term favourable to Mr McDonagh as to suspension of covenant testing;

xi) Mr McDonagh was advised to take legal advice on the new terms;

xii) Mr McDonagh sought the help of Mr Byrne in relation to the proposed new terms;

xiii) The bank explained to Mr McDonagh that if the new terms were not agreed, it would have to consider what to do and it could appoint a receiver in relation to Sony House;

xiv) The bank intended to allow the first loan to remain outstanding to July 2010 because it wanted to see what happened on the rent review in relation to Sony House in March 2010 and it did not wish Mr McDonagh to be liable for the fee for breaking the swap before July 2010;

xv) The bank did not pretend that it had a different intention; in fact, the bank specifically told Mr McDonagh on 7 October 2009 that breaking the swap was clearly not an option.

119. I consider that the bank did not do anything in the course of negotiating the second loan agreement that could properly be criticised by Mr McDonagh. Nothing it did was illegitimate or inequitable or unconscionable.

120. So far, I have considered matters on the basis of my earlier findings as to the sum due under the first loan agreement. I will now consider whether the bank would be open to criticism in relation to the second loan agreement if Mr McDonagh had been able to pay off the first loan agreement with a sum of £7.5 million. On that assumption, I would make the further finding that the bank at all times genuinely believed that the sum due under the second loan agreement was the same as the sum due under the first

loan agreement and that Mr McDonagh accepted that that was the case. In those assumed circumstances, I would not regard the bank's conduct of the negotiations with Mr McDonagh as involving any inequitable or unconscionable conduct or anything which would amount to duress. The most that could be said in the assumed circumstances was that the bank and Mr McDonagh had made a mistake about the first loan agreement.

121. For the reasons given above, the bank did not do anything which could be said to amount to the tort of intimidation.

The remainder of Mr McDonagh's claims

122. Mr McDonagh asserted that the bank had broken the terms of the first loan agreement by calling on him to repay the full amount of the loan in euros rather than repay the fixed sum of £7.5 million or the euro equivalent at the rate current at the date for repayment. Mr Virgo also submitted that the bank committed a breach of the first loan agreement by relying upon Mr McDonagh's non-payment of the debt when purporting to appoint receivers in relation Sony House.

123. In view of my conclusions as to Mr McDonagh's obligations under the first loan agreement and, further, in view of my conclusions as to the second loan agreement, the contention that the bank committed a breach of the first loan agreement fails. Further, Mr McDonagh's claim for damages for intimidation plainly fails on my findings of fact.

124. It is not appropriate to consider whether Mr McDonagh would have been entitled to any relief, in particular any damages, if Mr McDonagh had succeeded on liability in respect of his claims against the bank. I record, however, the general point that Mr McDonagh did not begin to call the evidence which he would have needed to have called to establish that the alleged wrongdoing by the bank had caused him to suffer any loss.

125. Accordingly, Mr McDonagh's claims against the bank fail and will be dismissed.

The bank's counterclaim

126. The bank has counterclaimed the sum due to it under the second loan agreement. On my earlier findings, that claim succeeds. I understand that there is no dispute about the amount of the sum due (on the basis of my earlier findings).

127. As will be seen, in later paragraphs of this judgment, I consider whether the bank is required to give to Mr McDonagh a credit for the proceeds of sale of Sony House (sold by the receivers) in a larger sum than the credit already given to Mr McDonagh. As will be seen, I have concluded that Mr McDonagh has not established an entitlement to a larger credit from the bank. It follows that there will be judgment for the bank against Mr McDonagh in respect of the sums due under the second loan agreement.

The claim against the receivers – the issues

128. Based on the pleadings, Ms Mirchandani prepared a list of the issues between Mr McDonagh and the receivers. Her list was as follows:

    i) Was the Property sold in October 2011 for £3,363,945 (as the Claimant contends) or £3,780,215.45 (as the Second to Fourth Defendants contend)?

    ii) Was the Property sold at a price below the best price reasonably obtainable, i.e. at an undervalue?

    iii) If so, what was the best price reasonably obtainable that the Property should have been sold for?

    iv) Did the Second to Fourth Defendants breach the duty to take proper care to obtain the best price reasonably obtainable for Sony House:

        a) because the Second to Fourth Defendants ought reasonably to have engaged expert valuers to advise them as to the market value of the Property?

        b) because the Second to Fourth Defendants ought reasonably to have obtained an additional valuation report of the Property, and not relied only upon the CBRE Report?

        c) because the Second to Fourth Defendants ought reasonably to have explored marketing the Property individually as well as part of a portfolio (if indeed they did not in fact do so)?

        d) because the Property was sold at a sale price that was such an undervalue (if indeed that was the case, as determined under issues ii and iii above), that it fell outside the bracket of reasonable sale prices that could have been obtained by receivers acting in accordance with their duties?

    v) If the Second to Fourth Defendants did breach their duties, in the respects outlined above at issue iv) (or any of them), did such breach(es) cause the Claimant to suffer any loss?

    vi) What is the extent of any loss thereby suffered by the Claimant?

    vii) Is the Claimant entitled to claim interest and, if so, for what period and at what rate?

129. Although the above statement of the issues between Mr McDonagh and the receivers is faithful to the pleadings, some of the issues identified above were not pursued by Mr McDonagh. In particular, he did not assert that there was a breach of duty as alleged in issue (iv)(a) or (iv)(b) above. Instead the whole focus of the criticism of the receivers shifted to a criticism of their decision to include Sony House in a portfolio sale. At times, it was submitted by Mr Virgo that it was simply not open to the receivers to include Sony House in a portfolio sale; he submitted that the receivers could only sell Sony House separately so that the inclusion of Sony House in a portfolio sale was not permissible. Ms Mirchandani submitted that that case was not open to Mr McDonagh on the pleadings particularly in view of a statement in Mr

McDonagh's Reply: "it is not alleged that the Property could not properly have been sold as part of a portfolio".

130. In his closing submissions, Mr Virgo contended that the receivers ought to have asked themselves whether the object of achieving the best price for Sony House was best served by selling it separately or by including it in a portfolio sale and he said that the receivers never asked themselves that question. He said that that was a breach of duty by the receivers. He submitted that the apportioned part of the proceeds of the portfolio sale put forward by the receivers (£3,780,215.45) was less than the market value of Sony House, if sold at the same time as the portfolio sale (October 2011), and that Mr McDonagh had accordingly suffered loss and damage.

131. The first of the issues identified above in relation to the claim against the receivers was whether Sony House was sold in October 2011 for £3,363,945 or for £3,780,215.45. The second of these figures is the figure which the receivers have said is the correctly apportioned part of the proceeds of the portfolio sale. Mr McDonagh has been given credit for this figure by the bank. It is plainly not in Mr McDonagh's interest for the amount of the credit to be reduced to £3,363,945 and I have no reason to think that that is what Mr McDonagh wants to achieve. I infer that the reason Mr McDonagh has maintained that the apportioned figure for Sony House ought to be £3,363,945 is to make his allegation of a sale at an undervalue look stronger. I consider that this suggested issue is in fact not an issue. If Mr McDonagh does not establish a breach of duty by the receivers, then no one suggests that the credit should be reduced to £3,363,945. If Mr McDonagh does establish a breach of duty by the receivers, and equitable compensation is calculated by reference to the market value of Sony House in October 2011, then the compensation will be based on the amount by which the market value of Sony House exceeded the credit of £3,780,215.45 which Mr McDonagh has received (although there may have to be adjustments as to the cost and time taken to achieve a separate sale of Sony House).

132. The non-issue as to the difference between £3,363,945 and £3,780,215.45 is different from a point which emerged during the trial. Mr Virgo sought to explore whether the apportionment to Sony House of the proceeds of the portfolio sale ought to have been higher than £3,780,215.45. That was not an issue raised by the pleadings and indeed appeared to be the opposite of the pleaded case which alleged that the correct apportionment was at a lower figure. Although the receivers are under a duty to account for the correctly apportioned part of the proceeds of the sale of the portfolio, Mr McDonagh had not claimed an account. Mr Virgo did not apply to amend the claim to add a claim to an account.

133. The question of the correct apportionment of the proceeds of sale of the portfolio was the subject of submissions in closing. Mr Virgo made only brief submissions as to what he said would have been the correct figure. Ms. Mirchandani addressed this topic in her closing submissions. It soon became clear that it was not a straightforward matter to carry out an account to identify the correct apportionment to Sony House of the proceeds of the portfolio sale. It is also clear to me that if Mr McDonagh had pleaded a claim to an account there would have been evidence directed to that question but that evidence was not prepared and not tested at the trial.

134. The result is that there is no claim to an account before me and so I will not discuss any further what might have been the result of an account if one had been taken.

135. Before addressing the issues which I do have to decide, I will summarise the law as to the general duties of a fixed charge receiver in relation to the exercise of a power of sale of the mortgaged property. I will then address any special considerations which might arise where the relevant charge relates to a single property but the receiver is appointed by the same mortgagee under a number of charges granted by other mortgagors in relation to other properties and the receiver is asked by the mortgagee to consider selling all of the properties together as a portfolio.

The duties of the receivers

136. The duties owed by a fixed charge receiver were considered in Silven Properties v Royal Bank of Scotland [2004] 1 WLR 997. In that case, the Court of Appeal first summarised the duty which a mortgagee owes to a mortgagor, particularly in relation to a sale by a mortgagee: see at [13] to [19]. The court then stated, at [23], that there were a number of respects in which the position of a receiver appointed by a mortgagee was very different from the position of the mortgagee. However, in relation to the exercise of a power of sale, it was said at [22] that:

> "There is binding authority for the proposition that (again in default of agreement to the contrary) in the exercise of the power of sale receivers owe the same equitable duty to the mortgagor and others interested in the equity of redemption as is owed by the mortgagee: they are both obliged to take care to obtain the best price reasonably obtainable: see, e.g. the *Cuckmere case [1971] Ch 949*, *Downsview Nominees Ltd v First City Corpn [1993] AC 295*, *Yorkshire Bank plc v Hall* [1999] 1 WLR 1713, 1728e–f, *Medforth v Blake [2000] Ch 86*, 98h-99a and *Raja v Austin Gray* [2003] 1 EGLR 91, 96, para 55."

137. In Silven, the court then discussed the significance of the fact that the usual position is that a receiver is expressly stated to be the agent of the mortgagor. The court said at [27]:

> "The peculiar incidents of the agency are significant. In particular:
>
> (1) the agency is one where the principal, the mortgagor, has no say in the appointment or identity of the receiver and is not entitled to give any instructions to the receiver or to dismiss the receiver. In the words of Rigby LJ in *Gaskell v Gosling [1896] 1 QB 669*, 692: "For valuable consideration he has committed the management of his property to an attorney whose appointment he cannot interfere with";
>
> (2) there is no contractual relationship or duty owed in tort by the receiver to the mortgagor: the relationship and duties owed by the receiver are equitable only: see Medforth v Blake [2000] Ch 86 and *Raja v Austin Gray* [2003] 1 EGLR 91;

> (3) the equitable duty is owed to the mortgagee as well as the mortgagor. The relationship created by the mortgage is tripartite involving the mortgagor, the mortgagee and the receiver;
>
> (4) the duty owed by the receiver (like the duty owed by a mortgagee) to the mortgagor is not owed to him individually but to him as one of the persons interested in the equity of redemption. The class character of the right is reflected in the class character of the relief to be granted in case of a breach of this duty. That relief is an order that the receiver account to the persons interested in the equity of redemption for what he would have held as receiver but for his default;
>
> (5) not merely does the receiver owe a duty of care to the mortgagee as well as the mortgagor, but his primary duty in exercising his powers of management is to try and bring about a situation in which the secured debt is repaid: see the *Medforth* case at p 86; and
>
> (6) the receiver is not managing the mortgagor's property for the benefit of the mortgagor, but the security, the property of the mortgagee, for the benefit of the mortgagee: see *In re B Johnson & Co (Builders) Ltd* [1955] Ch 634, 661, per Jenkins LJ cited with approval by Lord Templeman in *Downsview Nominees Ltd v First City Corpn Ltd [1993] AC 295*, 313b, and [1955] Ch 634, 646, per Evershed MR cited with approval by Sir Richard Scott V-C in the *Medforth* case [2000] Ch 86, 95h–96a. His powers of management are really ancillary to that duty: *Gomba Holdings UK Ltd v Homan* [1986] 1 WLR 1301, 1305, per Hoffmann J. ”

138. In Silven, at [28], the court referred to “the core duty” of the receiver to account to the mortgagor.

139. Silven was considered by Patten J in Bell v Long [2008] 2 BCLC 706. That was a case of an administrative receiver but the judge explained, at [13], that the authorities drew no distinction, as regards the exercise of the power of sale, between an LPA receiver and an administrative receiver. The judge then considered the earlier authorities as to the mortgagee’s ability to choose the timing and mode of a sale and he treated mortgagees and receivers in the same way in the following passage at [17]:

> “The obvious conflict between the interest of the mortgagee in an early sale and the desire of the mortgagor for a longer period of marketing and as a result a potentially larger return has been resolved in favour of the mortgagee. Consistently with this there must, in my judgment, be a degree of latitude given to mortgagees and receivers alike not only as to the timing of any sale but also as to the method of sale to be employed. Once the method of sale is chosen then the property has obviously to be properly marketed in whatever way is appropriate to that

> method of sale. But the extract from Salmon LJ's judgment makes it clear that the mortgagee can have regard to its own interests in deciding how to sell and that if it makes a genuine decision albeit one which resolves any doubts in its own favour then no breach of duty will have occurred. Inevitably decisions on how and when to sell will be complex and multi-faceted and references to the need to obtain the best price reasonably obtainable have to be read in this context."

140. When considering whether a mortgagee or a receiver has committed a breach of the equitable duty to take care to obtain the best price reasonably obtainable, the court must recognise that the mortgagee or receiver is involved in an exercise of informed judgment and if he goes about the exercise of his judgment in a reasonable way, he will not be held to be in breach of duty. An error of judgment, without more, is not negligence or a breach of the relevant duty in equity.

141. In Bell v Long, the administrative receiver was criticised for selling four properties owned by the company as a portfolio to one buyer rather than selling the properties separately. The judge examined the receiver's reasons for his decision and he concluded at [57]:

> "Whatever the weight of the arguments for and against recommending acceptance of the portfolio bid from [the buyer] I am satisfied that [the selling agent advising the receiver] made the decision himself based on his own re-assessment of the market and that the advice contained in his Second Report represented his genuine views of the most prudent course for the receivers to take. For an allegation that this advice was negligent to succeed it is not enough to produce evidence which shows with the benefit of hindsight that an alternative strategy could or would have produced a higher return. What has to be demonstrated is that no competent valuer standing in [the selling agent advising the receiver's] shoes at the time with the information which he had could reasonably have given the advice contained in his Second Report."

Any special considerations attributable to a portfolio sale?

142. Sony House was the only property included in the charge granted by Mr McDonagh to the bank. When the receivers exercised their power of sale, they did not sell Sony House separately but instead sold it as part of a portfolio comprising 35 properties. Mr McDonagh contends that if Sony House had been sold separately, the proceeds of the sale would have been significantly greater than the part of the proceeds from the sale of the portfolio which was apportioned by the receivers to Sony House. This contention requires me to consider what further legal principles should be applied to the receivers' decision in this case to sell Sony House as part of a portfolio rather than separately.

143. It follows from the above statements as to the general duties of a receiver that a receiver owes a duty in equity to the bank, and also a duty to the borrower, to take care to obtain the best price reasonably obtainable for the security. The conventional

way to go about performing that duty would be to sell the security separately. If a receiver takes all proper steps to market the security separately and the security were then sold in the open market, a receiver would have a very strong argument that the price achieved was the best price achievable. If that case were challenged by the borrower, the court would concentrate on the steps which the receiver took, or did not take, to expose the property to the market rather than upon opinion evidence as to the market value of the property: see the approach in Michael v Miller [2004] 2 EGLR 151 at [141]. Further, in such a case, there would be no need to apportion to the individual property the proceeds of the sale of a portfolio which included that property.

144. Although a separate sale of a security is the conventional way of selling it, a receiver might have the opportunity of selling the security together with other properties as part of a portfolio. That opportunity could arise where the receiver has been appointed by the same lender in relation to a number of properties. The lender might take the view that there would be advantages for the lender if a number of properties were sold together in a portfolio rather than sold separately. These advantages might include one or more of the following:

i) the proceeds of the sale of the portfolio might be expected to exceed the aggregate of the proceeds of sale of the individual properties if sold separately;

ii) the lender might be able to sell all the properties in the portfolio rather than being left with some unsold properties;

iii) the time taken to sell the properties as a portfolio might be shorter than in the case of conducting individual sales;

iv) the costs of selling the properties as a portfolio might be less than the cost of conducting individual sales.

145. I pointed out earlier that it has been held that in some circumstances, where there is a conflict of interest between a mortgagee and a mortgagor as to the timing of a sale by the mortgagee, the mortgagee is entitled to prefer his own interests to those of the mortgagee. Further, it has been held that a receiver faced with a similar conflict of interest between mortgagee and mortgagor is sometimes entitled to advance the interests of the mortgagee at the expense of the mortgagor. I therefore asked Ms Mirchandani whether it was being said that a receiver was entitled to disregard the interest of the mortgagor and decide to include the mortgaged property in a portfolio sale where that was what the mortgagee wanted the receiver to do. Ms Mirchandani accepted that the earlier cases about a conflict of interest between the parties should not be extended to cover this situation. This means that a receiver is not entitled to accept an instruction from the lender to include a mortgaged property in a portfolio sale unless the receiver is also acting in accordance with his duty to the mortgagor.

146. There might be cases where it is in the interests of a mortgagor to have the mortgaged property included in a portfolio sale rather than marketed and sold separately. The particular property might be one which it will be very difficult to sell separately but one which will sell much more readily as part of a portfolio. Further, the inclusion of the property in a portfolio might expose the property to a different type of purchaser and might lead to a better price for the property compared with the price achievable if

the property were sold separately. Yet further, the timing and the costs of the sale might be better for a portfolio sale as compared with an individual sale.

147. The above comments suggest that where a receiver has an opportunity to include a mortgaged property in a portfolio sale, it cannot be said that the receiver will be in breach of his duty to the mortgagor by considering whether to take advantage of that opportunity. It similarly cannot be said that the receiver will be in breach of duty by including the property in a portfolio sale where he is satisfied, acting reasonably, that the inclusion of the property in a portfolio sale will be likely to produce a better result for the mortgagor as compared with the property being sold separately.

148. Because the receiver's decision to include the property in a portfolio sale involves an exercise in judgment, an error of judgment, without more, would not be a breach of duty by the receiver.

149. I consider, however, that the receiver is not able to include a mortgaged property in a portfolio sale unless the receiver asks himself whether that course is likely to be in the best interests of the mortgagor of that property. It is not good enough for the receiver to want to include that property in the portfolio in order to help the mortgagee or even the owners of other properties where he has been appointed receiver. Further, the receiver must actually ask himself the relevant question. If he does not do so, then his decision not to conduct a conventional separate sale of the property where he has not formed the view that including the property in a portfolio is likely to be in the best interests of the mortgagor of that property will be a breach of duty.

150. The breach of duty referred to in the last paragraph may or may not result in a loss to the mortgagor. If I hold that there has been a breach of duty by reason of the receivers failing to ask themselves what was in the best interests of the borrower in respect of Sony House, I would then have to make a finding as to what would have been the most likely answer to such a question which would have been given by a competent receiver.

151. Even if the receiver did not apply his mind to the question whether it was in the best interests of the mortgagor to include the property in a portfolio sale, it might emerge that the correctly apportioned part of the proceeds of sale of the portfolio exceeded or equalled the price which would have been achieved on a separate sale of the property. In such a case, the mortgagor would have suffered no loss from the breach of duty. However, where the correctly apportioned part of the proceeds of the portfolio sale was less than the price which would have been achieved on a separate sale of the property then the mortgagor will have suffered a loss. In order to quantify the loss the court will have to assess the price which would have achieved on a separate sale of the property. For this purpose, the court will have to determine, based on valuation evidence, the most likely market value. That value is not to be equated to the lowest figure in a bracket of valuations which would have been non-negligent valuations: see Lion Nathan Ltd v C-C Bottlers Ltd [1996] 1 WLR 1438 at 1446H-1447F, South Australia Assets Management Corp v York Montague Ltd [1997] AC 191 at 221F-222A and Michael v Miller [2004] 2 EGLR 151 at [139].

152. If the property is included in a portfolio sale it will be necessary to determine what part of the proceeds of sale should be apportioned to the individual property. The receiver is an accounting party but if there is a dispute as to the correct apportionment

it is not for the receiver to impose his decision as to apportionment on the relevant parties unless that was agreed by those parties. If there is a dispute as to the correct apportionment, that dispute will have to be resolved by the court.

153. The result of a property being included in a portfolio sale does potentially create some disadvantages for a receiver. He will not have the benefit of the argument based on Michael v Miller that he tested the market for the individual property and the price agreed was the best that could be achieved in the open market. Further, there will be a need for an apportionment of the proceeds of sale of the portfolio which may well give rise to a dispute as to how that apportionment is to be carried out.

The witnesses

154. I heard evidence from the three receivers who are defendants to this claim. They are Mr Wheeler, Mr Stanley and Mrs McAndrew. When cross-examined, they gave their answers in a straightforward way, they engaged with the questions put to them and attempted to answer the questions properly. I was not asked to reject any of the evidence which they gave. I also heard evidence from Mr Kirk of the National Investment Team at Jones Lang LaSalle Limited, (hereafter "JLL"). He was a highly competent and well-informed marketing agent. He answered the questions put to him in cross-examination in a clear and convincing manner. I accept that each of these witnesses was giving evidence in a way which was intended to be accurate and truthful and I accept their evidence.

155. I also heard evidence from two chartered surveyors who were said to be "receivership experts". They were Mr Sanders, who was called by Mr McDonagh, and Mr Jennings, who was called by the defendant receivers. I will consider their evidence separately later in this judgment.

The basic facts as to the receivership and the sale

156. On 16 September 2010, the bank appointed Mr Natress and Mr Hyland, both of Knight Frank LLP, as receivers of Sony House. They remained receivers until 11 March 2011 when the Bank appointed Mr Wheeler, Mr Stanley and Mrs McAndrew of JLL as receivers in their place. Knight Frank continued to act as the managing agents in relation to Sony House. As no issue has arisen in relation to the period when Mr Natress and Mr Hyland were the receivers and the only claim arising out of either receivership is made against Mr Wheeler, Mr Stanley and Mrs McAndrew, I will refer to these three persons as "the receivers". Nothing turns on the terms on which the receivers were appointed on 11 March 2011. Although the receivers ultimately appointed on 11 March 2011 were involved in giving advice to the bank before 11 March 2011, it would seem that any claim against them of a breach of their duty as receivers must relate to the period from 11 March 2011. There is no claim against the bank in relation to anything which is said to be a breach by the receivers of their duty to Mr McDonagh. The bank does not allege that the receivers were in breach of any duty they owed to the bank.

157. Mr Wheeler was the Chairman of the Property and Asset Management team at JLL. The bank took advice from other persons at JLL in connection with the portfolio sale in this case. These persons were in the Real Estate Workout Group and the National Investment Team at JLL. The other two receivers, Mr Stanley and Mrs McAndrew,

were in the Real Estate Workout Group, Mr Stanley being the head of that group and Mrs McAndrew being a director of that group. The National Investment Team was also referred to as the Capital Markets Team and it was this group which handled the marketing of the portfolio in this case. Relevant members of that group were Mr Hynard, Mr Emburey, Mr Kirk and Ms Mills. Although all three of the receivers gave evidence, it was Mr Stanley who gave much the most detailed account of the relevant events. Mr Kirk gave a detailed account of the marketing process in relation to the portfolio.

158. I was provided with a large number of documents from JLL or from the receivers in relation to the portfolio sale. These documents relate to the period from October 2010 when the bank was seeking advice from JLL as to a possible portfolio sale, which was then described as Project Tyler. In the event, the project later changed its name to Project Flagstaff. It is clear that the relevant project was being considered at a fairly high level within the bank and at a high level within JLL. It is also clear that the bank and JLL gave a considerable amount of thought as to how to proceed with the intended portfolio sale.

159. The bank and the receivers took legal advice from Ashurst LLP in connection with various legal issues which might arise in relation to the portfolio sale. That advice has not been disclosed by the bank. The receivers also took separate legal advice, from DLA Piper LLP, on certain issues in relation to the portfolio sale and that advice has been disclosed. Some of the advice given by DLA Piper LLP was expressed in terms which stated that they agreed with the advice of Ashurst LLP but as the latter advice has not been disclosed, it is not possible to know the detail of the advice given on such a subject.

160. Prior to and in March 2011, Knight Frank, as the then receivers in relation to Sony House, had been in discussions with the sitting tenant of Sony House in an effort to agree upon the terms of an extended or a new lease of Sony House to the sitting tenant. Knight Frank wanted to agree terms with the sitting tenant as it was recognised that a new lease continuing past the term date of the existing lease (28 February 2015) would be likely to have a significant effect on the marketability and price of Sony House. On 22 March 2011, Knight Frank (then acting as managing agents) wrote to the bank to inform it that the sitting tenant had stated that it could not commit to any such arrangement as its current plans were not clear enough to enable them to do so. Knight Frank told the bank that this was very disappointing news. The bank passed this information on to the receivers.

161. In May 2011, JLL began to market a portfolio of 38 properties including Sony House. The portfolio was called the Flagstaff Portfolio. In the case of each property, the mortgagee was the bank which had appointed the same persons as receivers. The mortgagors of the 38 properties were various unconnected owners including, of course, Mr McDonagh in relation to Sony House.

162. On 9 June 2011, JLL received first round bids for the portfolio, ranging from £57.75 million to £48.5 million. On 17 June 2011, JLL received second round bids for the portfolio, ranging from £57 million to £52 million. Later in June 2011, three properties were removed from the portfolio because of concerns over the solvency of the lessee of those three properties and this led to revised bids of between £45.5 million and £47.22 million for a portfolio of 35 properties.

163. There were detailed final negotiations with one potential purchaser, Telereal Trillium ("Telereal"). On 26 July 2011, Telereal stated that it had received the results of building surveys for 15 properties (out of 25 properties being surveyed) and referred to "the extremely poor condition of some". On 25 August 2011, Telereal made a reduced offer of £43 million. On 19 September 2011, Telereal reduced its offer again to £41 million. On 22 September 2011, the JLL National Investment Team recommended selling the portfolio of 35 properties at a price of over £40 million. On 5 October 2011, the receivers agreed to sell the portfolio to Telereal for £41 million.

164. It was accepted on behalf of Mr McDonagh that the receivers and the bank, with the benefit of advice from others at JLL, considered in detail whether a portfolio sale was in the best interests of the bank. It was also accepted that the receivers and the bank considered with care which properties should be put into the portfolio to maximise the attraction of the portfolio as a whole to the market. It was further accepted that the receivers and the bank permissibly took the view that the overall result of a portfolio sale of 38 (later reduced to 35) properties would be better for the bank as compared with the overall result of 38 (or 35) individual sales of those properties. In particular, the receivers and the bank permissibly took the view that if one added up the total sale prices which might be achieved in relation to 38 (or 35) individual sales, the total would be likely to be less than the single price which might be achieved as the sale price of a portfolio of the same properties. It is also accepted that, given that what was being marketed and sold was a portfolio, the receivers did not commit any breach of duty in relation to the marketing of the portfolio nor in relation to the negotiation of the price for the portfolio.

165. I was given considerable detailed evidence as to the advice which was given as to a portfolio sale and as to the carrying out of the marketing and the negotiation of the sale which ultimately occurred. In view of the matters which are not now in dispute, I do not need to identify in great detail all of that advice and all of the steps taken towards a sale. Instead, I can confine myself to the evidence which directly relates to the specific allegations made by Mr McDonagh which I need to consider. I will next identify the case which I need to consider in this way.

The case I need to consider

166. Mr Virgo's attack on the conduct of the receivers in this case centred on the contention that for various reasons and in various ways they committed a breach of their duty to Mr McDonagh by placing Sony House in a portfolio which was then marketed and sold as a portfolio (where a part of the price achieved was apportioned to Sony House) rather than marketing Sony House on its own in a conventional way, testing the market accordingly, and selling for the best price that could reasonably be achieved in that way.

167. Some of Mr Virgo's submissions as to what was permissible in relation to Sony House went beyond the conclusions I have set out above as to what the receivers were entitled to do in relation to a possible portfolio sale. For example, if and in so far as Mr Virgo submitted that a receiver of an individual property which was the subject of a separate appointment of a receiver could not in any circumstances sell that property together with other properties belonging to different mortgagors, I have not accepted that submission. I have held that a receiver under an appointment in relation to one property who has an opportunity to place that property on the market as part of a

portfolio of properties to be sold as a portfolio may in law do so provided that he has formed a non-negligent view that proceeding in that way is likely to produce a better overall result for the mortgagor.

168. I will now set out in my own words what I understand to be the challenges to the conduct of the receivers which I still need to consider. The challenges are as follows:

i) the receivers wished to comply with the strongly expressed preferences of the bank to have a portfolio sale;

ii) the receivers had regard to the interests of the bank and concerned themselves with those interests rather than with the interests of individual borrowers, such as Mr McDonagh;

iii) the receivers took care to consider whether the overall result of a portfolio sale would be better for the bank than the overall result of individual sales but this was done to advance the interests of the bank;

iv) the receivers took care to consider which properties should be included in the portfolio but, again, this was done to advance the interests of the bank;

v) the receivers included properties in the portfolio which were unsaleable or would be difficult to sell and used the method of a portfolio sale to dispose of them; the receivers intended to apportion the portfolio price by reference to valuations which assumed actual sales of individual properties; it should have been foreseen that this would result in an adverse outcome for Sony House which was not unsaleable or even difficult to sell;

vi) on the contrary, Sony House was regarded as “bait” which would help the bank dispose of other properties which were unsaleable or would be difficult to sell;

vii) the inclusion of Sony House in the portfolio was throughout considered from the point of view of the bank rather than from that of Mr McDonagh;

viii) the large sums owed to the bank by the many mortgagors of the properties in the portfolio and the bank’s eagerness to sell, which would have been understood by potential purchasers, meant that the bank was not in a position to call off the sale if the price on offer was disappointing; this fact allowed purchasers to drive down the price it had to pay;

ix) the receivers did not consider what approach to marketing and sale would produce the best result for Sony House, considered separately;

x) the receivers did not try to market Sony House separately in a conventional way;

xi) the decision to pursue a portfolio sale meant that the receivers could not pursue any interest there might be in individual properties; a potential purchaser who wanted to buy an individual property, rather than the whole portfolio, would not be allowed to do so; he would not be allowed to “cherry pick”;

xii) the marketing which was carried out resulting in a portfolio sale does not show what the result would have been if Sony House had been marketed and sold separately;

xiii) the most likely purchaser for Sony House would have been a cash rich purchaser with a level of cash needed to buy Sony House which would obviously be much less than the price for the portfolio;

xiv) it was predictable that with a portfolio sale, a potential purchaser would in the final stages of negotiations "chip" away at the price previously offered by reference to physical or legal defects in individual properties and thereby produce a reduced final price; it was predictable that this process would operate to the disadvantage of individual properties, such as Sony House, which did not have such defects; however, the receivers did not take that into account when placing Sony House in a portfolio for marketing and sale;

xv) the receivers persisted in selling the portfolio of properties as a whole even when they were advised that the price for the portfolio would not be as good as the aggregate of the prices for individual sales;

xvi) the inclusion of Sony House in a portfolio sale compromised the receivers' ability to consider other options such as not selling Sony House, holding it until a new longer lease was agreed with the sitting tenant and then selling.

169. Ms Mirchandani pointed out in her closing submissions that Mr McDonagh's criticisms of the receivers' conduct of the sale of Sony House had changed significantly over time so that matters which were first advanced were not pursued and new allegations were made instead. Mr McDonagh's pleaded case in this respect was not very informative and Mr Sanders' expert evidence on Mr McDonagh's behalf was modified by Mr Sanders at a late stage in the trial. I agree with Mr Mirchandani that the conduct of the case on behalf of Mr McDonagh has made it very difficult for the receivers to know the case which they had to meet and for them to ensure that the court was provided with all of the relevant documents and oral evidence which would be material to the case on which Mr Virgo finally settled in his closing submissions.

170. Before counsel prepared their closing submissions, I expressly asked Mr Virgo and Ms Mirchandani to address the allegation that the receivers had not considered whether the inclusion of Sony House in the portfolio would be likely to produce a better result for Sony House than if it were sold separately in a conventional way. I also stated that if Ms Mirchandani wished to submit that that matter had been considered by the receivers, then I would wish to be taken to the specific evidence on which she relied for that submission. In her closing submissions, Ms Mirchandani did so submit and she prepared a bundle of the material on which she relied. That bundle contained documents that had not been in the trial bundle and Ms Mirchandani explained how that state of affairs had come about. In the event, Mr Virgo accepted that I should have regard to all such documents. In the next section of my judgment, I will consider the evidence in relation to the allegations made by Mr Virgo as to the conduct of the receivers.

The evidence relevant to the challenges as to the conduct of the receivers

171. I will now consider the evidence which is relevant to the challenges made as to the conduct of the receivers. I will begin by considering the evidence material to the allegation that the receivers did not ask themselves, specifically in relation to Sony House, whether there would be a better overall outcome for the borrower if Sony House was included in a portfolio sale with a part of the portfolio price being apportioned to Sony House as compared with Sony House being marketed and sold in a conventional way.

172. I will begin with the documents specifically relied upon by Ms Mirchandani. Very few of these throw any light on the question whether the receivers carried out the comparison which they ought to have carried out in the interests of Mr McDonagh. However, there are two documents which need to be considered at this point although they were not in Ms Mirchandani's bundle of documents.

173. The first such document is the letter of advice dated 2 March 2011 (in preparation for the receivers being appointed later on 11 March 2011) from the agency team at JLL to the receivers. This letter contains the following:

> "During the last months, we have been providing general advice as to the potential shape and content of properties which would create a portfolio that would be best received by the investment market. **One of the key criteria that you have asked us to consider is that in so packaging, none of the individual properties are discounted from their individual values**." [Emphasis added]

174. The second such document is the advice dated 29 March 2011 from DLA Piper to the receivers. These solicitors emphasised to the receivers that they ought not to go along with the pre-conceived strategy of a portfolio sale without themselves being satisfied that that was the right course. The solicitors' advice contains a number of references to the receivers obtaining the best value for the assets. Although it could be argued that the advice might have been focussing on the best price from the view point of the bank, the advice does not say that and taking the advice as a whole it certainly ought to have alerted the receivers to the requirement that they obtain the best price for the individual assets or else they would be subject to challenge by individual borrowers.

175. The letter of advice dated 2 March 2011 and the DLA Piper advice serve to indicate that the receivers were aware that they needed to consider the position of the individual borrowers who owned individual properties. The letter of 2 March 2011 also states in terms that one of the key criteria was that an individual property was not to end up being sold at a discounted value as compared with the value which could be achieved on a separate sale of that property.

176. In addition to these two documents, I next refer to the advice given by JLL to the bank by email of 29 March 2011. That advice spelt out in detail the benefits of a portfolio sale. The email contained an assessment of the market and referred to the funds which were available to investors to buy the sort of property which was to make up the portfolio in this case. That consideration would tend to produce the result that there would be a healthy level of demand for such property from purchasers who had ready funds with which to buy. The advice then compared the likely results of individual sales with the likely results of a portfolio sale. The benefits of a portfolio sale were

thought to include the advantages of the size of the transaction, the diversification of risk for the purchaser, a higher overall success rate as compared with individual sales and the time involved in the transaction. The advice concluded that with proper marketing and with the right portfolio there would be no discount to the aggregate of individual property sales and it was quite possible that a premium could be achieved.

177. The advice to the bank in the email of 29 March 2011 was the basis of the advice given by JLL to the receivers in a formal report in around May 2011 (although for some reason it is wrongly dated September 2010). This report is more detailed than the email of 29 March 2011 and indeed is more positive as to the possibility of a premium price on a portfolio sale as compared with the aggregate prices from individual sales. It had by then become JLL's "strong view and recommendation that aggregating at a portfolio level will achieve an overall pricing premium as set out below".

178. In connection with the advice of "no discount" but probably a "premium" on a portfolio sale, it may be relevant to mention at this point the submissions I received as to whether Sony House was "the jewel in the crown" or "the bait" in the portfolio which dragged up the price achieved for other much poorer properties or whether Sony House was below average in terms of attractiveness to the market. My conclusion based on the evidence of Mr Heyes and Mr Jennings, who were expert witnesses called by the receivers, is that Sony House would have been regarded as a property of average attraction. Those witnesses placed Sony House at somewhat below average, but I am inclined to think that when one balanced up its undoubted advantages and its equally undoubted disadvantages, that an average marking is more appropriate. This suggests that an expectation from a marketing agent that the portfolio would achieve a premium price would be likely to mean that the sum achieved for Sony House as an apportioned part of the portfolio price would be no less than and might well be higher than the price for Sony House if sold separately.

179. It is also relevant that the receivers obtained from CBRE detailed valuation reports on all of the properties to be included in the portfolio and they therefore had available a detailed commentary on the relevant valuation considerations referable to Sony House being sold separately in a conventional way. The CBRE reports discussed the various advantages and disadvantages of the property in appropriate detail, referred to relevant evidence as to rental value and as to capital value and helpfully listed the positive and negative valuation factors. Mr Stanley's evidence was that the receivers may have looked at any summary of the position contained in these reports but would have principally looked at the final valuation figure in the reports. This evidence applied to Sony House in the same way as it applied to all of the CBRE reports.

180. As to the oral evidence of the receivers, I will start with the evidence of Mr Stanley as, out of the three receivers, his evidence was much the most detailed. Mr Stanley provided a lengthy witness statement which he confirmed in his evidence in chief. Although lengthy, there is very little in the statement about how and when the receivers asked themselves whether it would be better for the borrower for Sony House to be included in a portfolio sale or sold separately. There are references in the witness statement to the receivers considering and keeping under review the question whether the overall result for all of the properties in the portfolio would be better if they were sold as a portfolio or sold separately. It is undoubtedly the case that the receivers did consider that question and decided to proceed with a portfolio sale. They

also kept that question under review during the process and decided to continue with a portfolio sale. It is not suggested that those decisions were inappropriate in response to the question which the receivers asked themselves. However, as I commented above, that is a different question from considering the position from the perspective of the borrower in relation to Sony House. Nonetheless, Mr Stanley's witness statement did say something about that further question.

181. Mr Stanley described the advice which the JLL National Investment Team had been asked to provide and he said that the scope of the advice that team was asked to give was confirmed in the letter dated 2 March 2011 to which I referred earlier. That is the letter which stated that "[o]ne of the key criteria that you have asked us to consider is that in so packaging, none of the individual properties are discounted from their individual values". In this way, Mr Stanley gave evidence that the receivers set this criterion as a key question when considering whether to proceed with a portfolio sale. Mr Stanley was not cross-examined on that part of his witness statement and he was not asked about the letter of 2 March 2011 and its reference to "one of the key criteria". I consider that if Mr Virgo was to try to persuade me that the receivers did not consider whether any one of the individual properties would sell at a discounted price by being put into a portfolio sale, he had to cross-examine Mr Stanley on that evidence but he did not do so.

182. In the course of his cross-examination, on Day 5 at page 170 of the transcript, Mr Stanley said:

> "The process was designed to extract maximum value for **each of the individual assets**, because that is clearly the object of any receiver, to extract maximum value, and clearly is to the benefit of the bank." [Emphasis added]

183. In his witness statement, Mr Wheeler dealt with the consideration which the receivers gave to the question whether the overall result of a portfolio sale would be likely to be better than the result of aggregating the prices obtained on individual sales. His statement does not, or any rate not clearly, deal with the question whether it was considered to be likely that the part of the portfolio price apportioned to Sony House would be higher than the price to be achieved on a separate sale of Sony House. Mr Wheeler was not asked about the letter of 2 March 2011 which referred to "one of the key criteria" to which I referred earlier. As regards the actual result of the portfolio sale, Mr Wheeler said that "there was no reason to think that the marketing and sale did not generate the best price reasonably obtainable for **each** of the assets in the portfolio" [Emphasis added]. He was not cross-examined about this evidence.

184. Mrs McAndrew confirmed the contents of her witness statement in which she stated that Mr Stanley's witness statement accurately recorded the decision-making process undertaken by the receivers. Mrs McAndrew was not asked about the letter of 2 March 2011 which referred to "one of the key criteria" to which I referred earlier. In her witness statement, Mrs McAndrew said that she was, and remained, of the view that "our approach to selling Sony House … was the most appropriate way to achieve the best sale price reasonably obtainable given the nature of the property, with its short unexpired lease, and the market conditions at the time, as set out in [Mr Stanley's] witness statement". She was not cross-examined about this evidence. Mrs McAndrew was asked about the selection of the properties which were to be valued

by CBRE at an earlier time than other properties. In that context, she was asked about a statement made by Mr McLaughlin of the bank which referred to some properties which could sell quickly. Ms McAndrew said that the receivers had not identified any of the properties which were put into the portfolio which could sell quickly. It was not put to her that she should have regarded Sony House as a property which could sell quickly. She also explained that the choice of properties for the portfolio was in order to diversify risk for the purchaser and it was not a case of putting "cherries" into the portfolio to help sell "the rubbish". It was not put to her that Sony House was a cherry or that it had been included in the portfolio to help sell other properties.

185. Mr Kirk, with his colleagues, was responsible for advising first the bank and then the receivers on the best approach to marketing and selling the properties which were in due course included in the portfolio sale. In his evidence, he described that advice in detail and he also described the marketing process and the negotiations which led to the sale of the portfolio to Telereal at £41 million. His evidence was very detailed and not all of it is material to the challenges to the conduct of the receivers which I am now considering. I can summarise the parts of his witness statement which are now of particular relevance in this way:

i) Mr Kirk was involved in the relevant advice given to the bank from November 2010;

ii) the properties which were eventually selected for this portfolio sale were a mix of secondary and tertiary properties and each of them was flawed in some way;

iii) in later 2010 and into 2011 the UK property market was in poor health; Mr Kirk gave very detailed evidence as to the causes of this state of affairs and the nature of the problem with the market;

iv) at that time, such buyers as might be in the market were risk averse;

v) Mr Kirk was of the view that selling the individual properties which were put into the portfolio would be very difficult and a number of them may have been impossible to sell in a reasonable time frame;

vi) the prospects of selling non-prime properties and the prices achieved would be improved if the properties were sold together as a portfolio; in particular, the portfolio could be pitched at a larger market of potential buyers;

vii) a portfolio would offer opportunities to buyers and enable them to spread risk;

viii) a portfolio would interest large-scale investors who would be unlikely to be interested in buying the individual properties;

ix) an offer for sale by receivers would be welcomed by buyers who would have the expectation that the receivers would not withdraw and lead to buyers incurring wasted expenditure on due diligence;

x) a major problem with Sony House was the length of the lease which was due to expire in 2015; therefore the income from the property was only secure for a

relatively short period; there was a risk of the sitting tenant vacating leading to a void period, and any re-letting being at a lower rent;

xi) the risks referred to above caused by the short lease of Sony House were particularly pronounced in view of the size of the building;

xii) Sony House was a secondary property, at best, and the risks connected with it had a negative effect on its market value;

xiii) in relation to Sony House, the risk created by the short lease was diluted by inclusion within the portfolio;

xiv) when, in March 2011, the discussions which Knight Frank had with the sitting tenant of Sony House had fallen through, this confirmed the view that Sony House should be included in the portfolio;

xv) in terms of potential purchasers, there was a "large amount of equity" raised by investors looking for a portfolio of distressed properties;

xvi) the portfolio was likely to attract considerable attention from purchasers who were frustrated by being unable to invest the funds which had been accumulated for investment;

xvii) Mr Kirk had assisted with the drafting of the letter of 2 March 2011 which referred to "one of the key criteria";

xviii) he had advised the receivers on the merits of a portfolio sale, that it would not lead to a discount in the price achieved (as compared with the aggregate of individual prices) but would be likely to achieve a premium;

xix) the marketing of the portfolio produced a high number of interested parties; there would not have been anything like the same level of interest if the properties had been sold individually.

186. It is useful at this point to refer to certain events which occurred in September and early October 2011 at the stage of the final negotiations with Telereal. In this context I will refer to the advice given by JLL to the receivers at this time. Mr Kirk was involved in giving such advice. The relevant events included the following:

i) on 5 September 2011, Mr Kirk emailed Mr Stanley to advise on the up to date position with the negotiations for the sale; in his email, Mr Kirk referred to the fact many of the properties in the portfolio were unsaleable in the then current market; he also stated that JLL was experiencing considerable outward movement in pricing for secondary and tertiary properties and this movement was likely to continue; he identified four properties where the perceived value had been significantly affected by matters which had emerged; Sony House was not one of these four properties;

ii) on 13 September 2011, Mr Kirk emailed Mr McLaughlin of the bank, copied to the receivers, commenting on further adverse movements in the market for secondary properties; he referred to "a flight to quality"; he referred to the

benefit of a portfolio sale being that poorer quality assets were disposed of rather than left unsold;

iii) on 19 September 2011, Mr Stanley reported that Telereal had had discussions with the sitting tenant of Sony House in an attempt to agree an extension to the lease but the discussions had not resulted in any progress; this led Telereal to review downwards the sum it had previously allocated to Sony House in its earlier bid;

iv) on 19 September 2011, Mr Kirk emailed Mr McLaughlin of the bank and the receivers stating that many of the properties were unsaleable; he said that many individual secondary assets in particular in the office sector were not selling due to a shift in the market; he said that "[t]he aggregated "value" of the individual sales may well sum to more than the sale of the whole" but he added that since the "values" had been analysed the marketed had deteriorated; I do not read this email as saying that a seller would achieve more by selling the properties individually rather than in a portfolio; the point Mr Kirk was making was that the valuations which had been carried out at an earlier point in time were not in line with what had since then happened in the deteriorating market;

v) Mr Kirk's email of 19 September 2011 commented on the possibility of selling individual properties; he said that that would be a costly process and be extremely protracted; he added that some of the properties in the portfolio would be unsellable;

vi) on 22 September 2011, Mr Emburey of JLL wrote a letter of advice to the receivers; he recommended that the receivers accept a bid of over £40 million for the portfolio and he set out his reasons for his recommendation; these included:

a) the rapidly falling market;

b) no prospect of recovery for 2 to 3 years as a minimum;

c) the values achievable in the market were well below the figures in formal valuation reports;

d) a number of the properties were unsellable; and

e) the fact that the aggregate of prices for individual sales was about £40.6 million;

vii) the letter of advice of 22 September 2011 also referred to a net present value analysis of the receipts over a period if individual properties were sold; using a cost of capital to the bank of 8% and assuming the prices achieved were in accordance with earlier valuations, the net present receipt was in line with the Telereal bid; however, this left out of account a number of items which were identified including management costs and additional capital expenditure on the properties.

187. Mr Kirk was cross-examined on some of the evidence contained in this witness statement. He was not cross-examined about the letter of 2 March 2011 which referred to "one of the key criteria", which he had explained was a letter where he had assisted with the drafting. When answering questions in cross-examination and re-examination he said:

i) Sony House was not used as "bait" to help sell other less saleable properties;

ii) if Sony House were marketed separately and a cash rich purchaser were interested in buying it, such a purchaser would expect a discount as compared with other purchasers;

iii) if Sony House had been marketed separately, it would have been marketed to a list of possible buyers many of whom were on the list of possible buyers to whom the portfolio was marketed;

iv) as compared with finding a buyer for the portfolio, it would be harder to find a buyer for Sony House if marketed separately; there was not really a market for short term income with an approaching liability;

v) when a portfolio is marketed, it often happens that an offer is made for an individual property in the portfolio; Mr Kirk described in detail what would happen if an offer were made for an individual property; the sellers would not disregard such an offer; no such offer was made for Sony House nor it appears for any of the individual properties in the portfolio, but that demonstrated the lack of a market for such properties;

vi) it would have been possible to market Sony House separately but it would have taken quite a while to find a buyer and a sale would have been at a lower price than that achieved on the portfolio sale.

188. Mr McDonagh and the receivers called witnesses who were described as "receivership experts". Mr McDonagh called Mr Sanders and the receivers called Mr Jennings. Mr Jennings was a very experienced fixed charge receiver and Mr Sanders was less experienced as a receiver. In the event, I have concluded that I do not need to set out the evidence given by these two witnesses. The supposed expert evidence either went to matters of law as to the duty of a receiver in certain circumstances, in particular, in relation to an opportunity to include a property in a portfolio sale, or as to matters of fact as to the decision-making process of the receivers in the present case. As regards matters of law, those are matters for the court and not for witnesses, even for someone who is an experienced receiver. As to the facts, I will base my findings on my assessment of the evidence and not on what these witnesses thought the facts might be, basing themselves on much less material than that which is before me. I question the appropriateness of the decision to call this evidence in the first place and of the decision to permit this evidence to be called. A possible exception to this comment is that during the trial, Mr Jennings and Mr Heyes (the valuation witness for the receivers) prepared an assessment of the rival advantages and disadvantages of the properties in the portfolio which was helpful to me in considering the extent to which Sony House was "the jewel in the crown" as contended by Mr Virgo or whether it was distinctly below average as suggested by Mr Heyes and Mr Jennings. As indicated earlier, I think that a fairer assessment would be

to regard Sony House as being no better and no worse than average in the overall table of properties.

Conclusions as to the challenges to the conduct of the receivers

189. I will make a number of general comments on the evidence before referring to specific matters. In principle, if a receiver were to do the comparison required in order to assess the best interests of the borrower in relation to Sony House, one might expect to see something which set out the detail of his reasoning. One would expect to see an assessment of the likely result on one basis and the likely result on another basis and the reasons for any differences. Indeed, given that the portfolio in this case initially included 38 properties, if the receivers had carried out this comparison for Sony House, one would have expected to see evidence that they carried out a similar comparison for every other property in the portfolio. I was not given any particular reason to think that the receivers' duties in relation to Sony House were different from their duties in relation to other properties which were included in the portfolio. In fact, I was not shown evidence which demonstrated that the receivers had carried out detailed appraisals of this kind.

190. It is also right that the evidence in the receivers' witness statements as to the relevant decision-making process was distinctly light. I bear in mind, however, that for most of the period of this litigation the criticisms which Mr McDonagh wanted to make of the conduct of the receivers were not clear and it was possibly only during the course of the trial that it emerged that the decision-making process might be a major point on which I would have to make findings. The evolution of the case against the receivers is also demonstrated by the fact that there was very little, or possibly no, cross-examination of the receivers as to the relevant part of their decision making. I have already commented that neither the receivers nor Mr Kirk were cross-examined about what seems to me to be an obviously important document, namely, the letter of advice of 2 March 2011 referring to "one of the key criteria". All in all, the investigation of what to my mind is a key matter was superficial. Nonetheless, since Mr Virgo did challenge the receivers on this ground in his closing submissions, I will make my findings based on the limited material which I have.

191. I bear in mind that the strategy of a portfolio sale was well advanced before the receivers were appointed on 11 March 2011. It seems that the strategy was conceived by the bank in conjunction with JLL. It is also clear that it had been discussed with JLL for some months before 11 March 2011 and that the bank was very keen to adopt that strategy. As to JLL, they regarded the instruction from the bank to implement the strategy as a very important instruction from an important client and they wished to provide a good service to that client.

192. I also bear in mind that there is clear evidence that the receivers did carry out a comparison between the overall result for the bank of a portfolio sale and the overall result for the bank of individual sales. For the purposes of that comparison, JLL and the receivers obtained advice from CBRE which consisted of individual valuations in accordance with the RICS Red Book for each of the properties to be included in the portfolio, including Sony House. However, I emphasise that this comparison is not the same comparison as I am now investigating as to the result for Mr McDonagh of Sony House being sold separately as compared with it being included in a portfolio sale. Accordingly, I need to consider whether at the relevant time, the receivers had clearly

distinguished in their minds between the comparison carried out to protect the interests of the bank and the comparison which needed to be carried out to protect the interests of Mr McDonagh.

193. My conclusion is that the receivers did carry out the comparison which was necessary in order to perform their duty to Mr McDonagh. For this purpose, I rely heavily on the letter of 2 March 2011 which referred to "one of the key criteria". Further, Mr Stanley said that this was part of the scope of the review carried out by the JLL National Investment Team and that evidence was not cross-examined. I also consider that this finding is compatible with all of the evidence which I have set out above and there is nothing in that evidence which contradicts that finding and, in particular, nothing in that evidence which would allow me to reject the evidence of Mr Stanley which was never challenged in this respect.

194. This finding disposes of many of the criticisms made by Mr Virgo that the receivers had regard to the interests of the bank and ignored the interests of Mr McDonagh. The receivers were obliged to have regard to the interests of the bank and I find that, in addition, they properly assessed the likely impact of a portfolio sale on Mr McDonagh. I also find in the light of the advice in the DLA Piper report and the other evidence mentioned above that the receivers formed their own view as to whether to commence and continue with the marketing of a portfolio rather than the marketing of the individual properties.

195. I accept Mr Kirk's evidence that Sony House was not included in the portfolio as bait to help sell unsaleable properties. I do not accept that Sony House was the jewel in the crown. My assessment is that the balance of advantage and disadvantage in relation to Sony House placed it in an average position in the list of properties. There was one particular disadvantage with Sony House, particularly in a weak market, and that was the short remaining term of the lease. It was recognised by the receivers and indeed by Telereal that Sony House could be made more attractive if the lease could be extended with the agreement of the sitting tenant, but attempts to produce that result failed. Hence the defect in the investment remained.

196. It is clear that some of the properties in the portfolio would be difficult to sell if sold separately. I find that it is more likely than not that Sony House was one of the properties which would have been difficult to sell. I do not think that the price achieved for Sony House (based on the correct apportionment of the portfolio price) would be less than that which might have been achieved if Sony House had been marketed and sold separately. Further, I think that the period from the appointment of the receivers in March 2011 to the sale of Sony House in early October 2011 was more likely than not a significantly shorter period than the period that would have been needed to sell Sony House separately. In that context, it must be remembered that "the clock was ticking" in relation to Sony House as every month that went by was a month nearer to the end of the term and that fact was likely to make Sony House more difficult to sell and to reduce its value further.

197. I do not accept the criticism that, as compared with a separate sale of Sony House, the portfolio sale would have allowed purchasers to think that the bank was over eager to sell and the properties could be bought at a further discount on that account. In either case, any such sale would have been a sale by receivers appointed by a bank. Mr Kirk explained why a sale by receivers allowed the purchasers to have certainty that a sale

could be agreed and the property would not be withdrawn and that was perceived to be a helpful fact. As against this criticism of a portfolio sale, which I do not accept, is the very positive fact that a portfolio sale allowed the properties to be exposed to a much wider market of buyers and, in particular, buyers with the ready means to buy who had to some extent been waiting for such an opportunity to become available.

198. It is true that Sony House was not marketed separately but it was agreed that it would not be appropriate to conduct two marketing campaigns at the same time. Further, I accept the evidence of Mr Kirk that in other market circumstances, the marketing of a portfolio can often produce offers for individual properties. No such offer was made for Sony House even though the list of purchasers to whom the portfolio was marketed included many of the people to whom the separate marketing of Sony House would have been sent. I also accept that if an offer had been made for Sony House it would have been taken advantage of, but no such offer was ever made.

199. As to the fact that Telereal sought to "chip" away at its initial bid to end up with a reduced agreed price, that was not something which the receivers had failed to appreciate at the time they made their decision to market a portfolio for properties. It was always appreciated that that would be a likely part of the process of negotiations. The fact that Telereal made real progress in that respect ending with a reduced price was a reflection of the market forces current at the relevant time.

200. As to the allegation that the receivers persisted with a portfolio sale when they were advised that the aggregate of the prices for individual sales would produce a better result, that allegation is based on a misreading of the advice given by Mr Kirk in September 2011. I have set out above my own reading of that advice. Even if the receivers had been advised, which they were not, that they might achieve a higher price for Sony House if it were marketed separately as compared with the apportioned part of the portfolio price, there would have been strong objections to removing Sony House from the portfolio and beginning in or after September 2011 upon the separate marketing of Sony House. I accept the evidence of Mr Kirk that it would have taken a long time to sell Sony House and during that time the clock was ticking, the term of the lease getting shorter and the value falling.

201. As to the allegation that the receivers could have considered other options such as not selling Sony House, I find in accordance with the established legal principles that it was open to the receivers to decide upon the time at which they wished to sell Sony House. They had permissible reasons for wishing to sell it when they did. In any case, attempts to persuade the sitting tenant to agree an extended lease had failed in March 2011 and it was clear that there was little prospect of any such agreement being reached until much nearer the term date of February 2015.

202. Having made my findings and recorded my conclusions on the various specific challenges made to the conduct of the receivers, my overall conclusion is that Mr McDonagh has failed to establish that the receivers committed any breach of the duty they owed to him. It follows that his claim against the receivers will be dismissed.

203. It follows that Mr McDonagh was entitled to receive the properly apportioned part of the net proceeds from the portfolio price of £41 million. The receivers have accounted to Mr McDonagh in that the bank has given him credit for the figure arrived at on an apportionment carried out by the receivers. If Mr McDonagh had claimed an account

against the receivers, he would not have been bound by the apportionment arrived at by the receivers and he would potentially be entitled to a credit for any different figure found on the taking of an account. However, Mr McDonagh has not claimed an account in these proceedings and I will not therefore investigate what sum might have been appropriate on the taking of such an account. It is also irrelevant for the court to determine what would have been the result if Sony House had been marketed and sold separately. That would have been relevant if the receivers had committed a breach of the duty owed to Mr McDonagh and he was entitled to equitable compensation for such breach, but he has not established that there was a breach of duty.

Other matters

204. If I had held that the receivers had not properly considered the matter, I would then need to make a finding as to the most likely conclusion which would be reached by a competent receiver who asked himself the question whether it was in the best interests of Mr McDonagh to include Sony House in the proposed portfolio sale or to exclude it from the portfolio with a view to selling it separately. I consider that a competent receiver who had the opportunity to include Sony House in the proposed portfolio sale in this case would probably have reached the conclusion that it was in the best interests of Mr McDonagh to include Sony House in that portfolio sale.

205. Although it is not material to the outcome of this claim I wish to comment briefly on the valuation evidence which was put before me. I heard from three valuers, Mr Dyson called on behalf of Mr McDonagh, Mr Hamilton called on behalf of the bank and Mr Heyes called on behalf of the receivers. These witnesses expressed the following opinions as to the value of Sony House in October 2011:

i) Mr Dyson - £8,125,000, later increased to £8,240,000;

ii) Mr Hamilton - £4,450,000;

iii) Mr Heyes - £3,780,000.

206. The valuation evidence of Mr Dyson and Mr Heyes was relied upon in relation to Mr McDonagh's claim for equitable compensation against the receivers. The bank did not take up any position in relation to that claim. The reason why the bank called Mr Hamilton to give valuation evidence was that such evidence might have been relevant to a claim which Mr McDonagh had made against the bank for damages. I have already held that Mr McDonagh had no valid claim against the bank for damages and I did not consider that matter any further.

207. In view of my earlier findings, I do not need to determine what the market value of Sony House was in October 2011 and I will not do so. However, I wish to make some brief comments on the evidence which I heard. I will certainly not mention all of the many points which were considered in relation to this evidence in the course of the trial.

208. Mr Dyson arrived at his valuation of £8,125,000 by taking an annual rental value of £525,650 and a yield of 6.47% (15.45 YP). He proceeded on the basis that the rent of £525,650 would be received in perpetuity. He ignored the fact that the occupational lease would end on 28 February 2015 or alternatively he assumed that the sitting

tenant would renew on that date (so that there would be no void period before a re-letting) at the identical rent and without any rent free period. As to his choice of yield, he explained that he based that on the results of auction sales at around the relevant time where the properties being sold were bank premises let on leases to banks on various high streets around the country.

209. I completely reject Mr Dyson's evidence. His assumption that the rent of £525,650 would continue in perpetuity and there should be no reflection of the risk that the tenant would not renew and no reflection of the likelihood that the rent achieved on a new letting, or even a re-letting to the sitting tenant, would be at a lower level and following a rent-free period, is simply not tenable. I cannot understand how a competent valuer could express those opinions. As to the yield, the type of investment being sold at auction at the yields Mr Dyson relied upon is so fundamentally different from the investment involved in Sony House as to be completely inappropriate. I cannot see how a competent valuer could express the opinion which Mr Dyson expressed. Mr Dyson's approach to valuation was unprofessional and uninformed. He did not refer to any comparables for his rental valuation nor any comparables as to his capital valuations apart from the obviously inappropriate auction sales. His evidence was worthless to me.

210. The evidence of both Mr Hamilton and Mr Heyes was entirely different from that of Mr Dyson. Both of these valuers produced well considered and properly researched valuations. Both of them provided extensive evidence as to relevant comparables to support their rental and their capital valuations. Both of them gave their evidence in an impressive manner which inspired confidence. Plainly their figures are different although the difference is not that large. In October 2011, the market was very volatile and it was particularly difficult to express an entirely confident view as to what would be achieved if a particular property were exposed to the market for sale.

211. An important difference between Mr Hamilton and Mr Heyes related to the net initial yield they chose. Mr Hamilton chose 11.30% and Mr Heyes chose 13.30%. These differences reflected their views as to how the market was deteriorating throughout 2011 and what precise point it had reached by early October 2011. Mr Heyes formed the more adverse assessment and thought that the worsening of the market was clear by early October 2011 whereas Mr Hamilton thought that that was not so clear by that time.

212. As it is not necessary for me to choose between Mr Hamilton and Mr Heyes, particularly in relation to the choice of yield, I will not do so. I will say however that there are reasons to think that Mr Hamilton might not have been pessimistic enough and that Mr Heyes was a little bit too pessimistic. If I gave effect to reasoning of that kind, and it were appropriate to arrive at a single figure for value rather than a bracket, then the resulting single figure value would be in between the views of these two valuers. I consider that is sufficient to indicate what the market value of Sony House was in October 2011 assuming that it was actually sold in the market at that time. I can also express the view that if Sony House had been put on the market in around May 2011, it is unlikely that it would have been sold as early as October 2011.

213. The figure which might emerge in the way described above could be a little bit above the figure for which Mr McDonagh has been given credit. As to that, I have not carried out any assessment of whether the apportionment carried out by the receivers

was correct. Further, it is clear from the evidence that market forces throughout 2011 were producing results from transactions which were significantly lower than earlier valuation opinions which had been expressed.