Neutral Citation Number: [2020] EWHC 716 (QB)

Case No: QB - 2018 - 000888

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
GENERAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2020

Before :

The Hon. Mrs Justice Tipples DBE

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Between :

(1) TARAY INVESTMENTS LIMITED
(2) BELLEVUE HOMES LIMITED

Claimants

- and -

GATELEY HERITAGE LLP **Defendant**

- -

- -

Mr James Newman (instructed by **Irwin Mitchell LLP**) for **the Claimants**
Mr Charles Phipps (instructed by **Berrymans Lace Mawer LLP**) for **the Defendant**

Hearing dates: 9, 10, 11, 12, 13 March 2020

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Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Friday 27th March 2020.

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THE HONOURABLE MRS JUSTICE TIPPLES DBE

The Hon. Mrs Justice Tipples DBE:

Introduction

1. This is a claim in professional negligence against Gateley Heritage LLP, a firm of solicitors ("**the Defendant**"), which arises out of a failed property transaction. In November 2012 the Claimants, Taray Investment Limited ("**Taray**") and Bellevue Homes Limited ("**Bellevue**"), entered into a joint venture to purchase Clare Parsonage, 130 Rotherhithe New Road, London, SE16 4AP ("**the Rotherhithe Site**"), which they considered to be a valuable development opportunity. However, their desire to do so fell apart in May 2013 when it was discovered that, in preparing the report on title for Taray (and subsequently relied on by Bellevue), the Defendant had failed to spot that part of the Rotherhithe Site encroached on the footway and, in order for any development to proceed, this issue had to be resolved, ultimately by obtaining a stopping up order.

2. The Claimants maintain that, as a result of the Defendant's negligence, they lost the opportunity to purchase and develop the Rotherhithe Site and claim damages of over £600,000 against the Defendant. The Defendant admits breach of duty of care, but deny the Claimants' loss of opportunity claim. The Defendant says that, if the correct information and advice had been provided in the report on title in the first place, the Claimants would never have taken steps to proceed with the transaction. This is because, amongst other things, the Claimants did not have the financial resources to do so.

3. The Claimants' claim gives rise to the following issues, which were agreed between the parties at the start of the trial:

    1) In failing to advise as to the existence of a discrepancy between the Highway Authority Search Plan and HM Land Registry Index Map Plan ("**the discrepancy**"), when was the Defendant first in breach of its duty of care to: (a) Taray; and (b) Bellevue?

    2) What course of events would have followed if the Defendant, in accordance with the duty of care which it owed to each of them, had brought the existence of the discrepancy to the attention of: (a) Taray; and (b) Bellevue?

    3) If the Defendant had advised the Claimants appropriately, would the Claimants have taken the steps necessary to acquire and develop the Rotherhithe Site?

    4) If the Claimants had taken the steps necessary to acquire and develop the Rotherhithe Site, was there a real and substantial chance (and, if so, what chance) that the Claimants would have succeeded in acquiring and developing the Rotherhithe Site in all the circumstances, including in particular the contingencies represented by: (i) the involvement of, or decisions by, the Vendor; (ii) the involvement of, or decisions by, Titlestone Property Finance Limited ("**Titlestone**"); or (iii) the financial status or capability of the Claimants?

    5) If the Claimants would have succeeded in acquiring and developing the Rotherhithe Site, what further discount from the Claimants' damages is appropriate to allow for general development risk?

6) Over what period and at what rate should any interest be awarded?

4. There is no issue between the parties as to the relevant law and the issues have been formulated by reference to the well-known case of *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, CA, which was upheld in *Perry v Raleys Solicitors* [2019] 2 WLR 636, SC. There is a recent and helpful illustration of the application of these principles in *Moda International Brands Ltd v Gateley LLP* [2019] PNLR 27, Freedman J.

5. The conclusion I have reached is that:

    1) The Defendant was first in breach of its duty of care to Taray on 16 October 2012 and to Bellevue on 4 January 2013.

    2) The Claimants would not have incurred any costs in relation to obtaining a stopping up order, and not have proceeded with the transaction to purchase the Rotherhithe Site. This means that the answer to questions (3) and (4) is "No" and issues (5) and (6) do not arise.

6. The Claimants' claim is therefore dismissed.

7. I shall deal first of all with the evidence that I heard and then turn to my findings of fact.

Evidence

Witnesses of fact

8. I heard evidence from four witnesses. Mr Alexander Ealey ("**Mr Ealey**"), a director of Bellevue, and Mr Lawrence Coppen ("**Mr Coppen**"), a director of Taray, gave evidence for the Claimants. Mr Ealey and Mr Coppen were at all times acting for Bellevue and Taray respectively in relation to the facts that give rise to this dispute. The Claimants also called Ms Katherine Asquith-Stacey, a member of Trilandium LLP ("**Trilandium**"). Mr Raymond Simpson ("**Mr Simpson**") gave evidence for the Defendant. He is a partner and solicitor at the Defendant. The evidence in chief of all of these witnesses was contained in witness statements, which they were then cross-examined on. The Claimants also relied on the witness statement of Mr Robert Orr, the CEO of Titlestone at the relevant time ("**Mr Orr**"), the content of which was agreed between the parties.

9. The factual findings the court is required to make in this case, together with my assessment of what would have happened if the Claimants had been informed of the discrepancy, relate to events which took place over 7 years ago. In these circumstances:

    1) The most important clues in relation to what did or did not happen, and what would have happened, are in the contemporaneous emails and other documents.

    2) It is necessary to consider whether the witnesses can actually remember what happened 7 years ago and, to the extent they can recall what happened, whether that recollection is, or is likely to be, true.

3) I have to form a view as to the credibility of the witnesses, and decide which of the evidence I have heard is, after such a long passage of time, actually reliable and most likely to be true.

10. I did not find Mr Coppen to be a satisfactory witness. In particular, the evidence he gave about DJH Cap Limited agreeing to make a loan of £600,000 to Taray was untrue. This means that I am unable to accept Mr Coppen's evidence unless it is supported by other independent evidence. Ms Asquith-Stacey is a good friend of Mr Coppen and, in my view, she was seeking to assist Mr Coppen, rather than the court, in her evidence. I deal further with her evidence at paragraphs 37 to 42 below.

11. It is clear that Mr Ealey felt very aggrieved as a result of Mr Simpson's mistake in failing to identify the discrepancy, as he considered the Rotherhithe Site to be a real opportunity for Bellevue. This meant that, during the course of his evidence, Mr Ealey had a tendency to argue his case, rather than focus on answering what Bellevue would have done if Mr Simpson's error had been known at the outset. In terms of contemporaneous documents, the best guide as to what steps Bellevue would have taken is in the financial information available, and also the vendor's solicitors' file. I am unable to accept Mr Ealey's evidence, if it was inconsistent with this evidence or any other contemporaneous documents.

12. Mr Simpson was a careful and measured witness and I am quite satisfied he gave truthful answers to the questions he was asked. I accept his evidence.

Expert evidence

13. The parties adduced evidence from the following six expert witnesses: (1) Ms Faye Allen and Mr Michael Ulyatt, quantity surveyors for the Claimants and the Defendant respectively; (2) Mr James Hewetson and Mr Malcolm Kempton, valuation experts for the Claimants and the Defendant respectively; and (3) Mr David Griffiths and Mr John Bridge, funding experts for the Claimants and the Defendant respectively. Both the quantity surveyors and the valuation experts agreed figures between them and the parties agreed that it was unnecessary or disproportionate to adduce oral evidence from any of them.

14. As for the relevant figures: (1) the expert quantity surveyors agreed that £778,633.28 represented a reasonable estimate of the development cost; and (2) the expert valuers agreed that, based on a gross development value of £2,485,000, the projected profit of the development as at 30 June 2014 was estimated at £822,305.

15. However, issues remained between the parties' funding experts as to the Claimants' financial status or capability. Mr Bridge and Mr Griffiths therefore gave oral evidence at trial, and were cross-examined. Nevertheless, in the light of the conclusions I have reached on the facts there is no need for me to decide whether I prefer the evidence of Mr Griffiths or Mr Bridge. In any event, there was very little between them and, in my view, they were both trying to assist the court in the evidence they gave.

Findings of fact

The Rotherhithe Site and the parties

16. The Rotherhithe Site was, until 2014, freehold land owned by the South London Church Fund and Southwark Diocesan Board of Finance ("**the Church**"). The Rotherhithe Site was registered at HM Land Registry with two titles, LN136517 and 377770. In or about 2010 the Church, through Father Nicholls and the Parochial Church Council of St Mary Rotherhithe ("**the PCC**"), applied for planning permission to redevelop the Rotherhithe Site by demolishing the existing building and erecting a four-storey building comprising 7 new residential units, parking for 4 cars and 8 cycles. Planning permission was granted by Southwark Council ("**Southwark**") on 30 March 2012.

17. Shortly thereafter the PCC proceeded to look for a purchaser of the Rotherhithe Site and instructed Biscoe Craig Hall as their selling agents and Winckworth Sherwood as their solicitors. The matter was mainly dealt with by Mr Adam Harvey at Biscoe Craig Hall and Mr Matthew Chinery at Winckworth Sherwood. In this judgment shall refer to the Church and the PCC as "**the vendor**". I should also mention that there was a tenant in occupation of the Rotherhithe Site, and the vendor was required to give two months' notice to the tenant in order to obtain vacant possession of the premises.

18. Mr Coppen is a finance broker who does property deals and is involved in raising finance for such transactions. In 2012 he had no experience of building or property development. The Rotherhithe Site was, as he saw it, an opportunity for him, through Taray, to move into property development with Taray providing the finance. However, Taray could only do so, if Mr Coppen could find someone with building and development expertise to enter into a joint venture or partnership with him.

19. As matters turned out, that person was Mr Ealey. Mr Ealey had development expertise based on sites he, as a director of Bellevue, had developed in Croydon, Warlingham and Southborough. Mr Ealey was also a director of Comis Construction Limited ("**Comis**") and has a Diploma in Surveying. Mr Ealey saw the Rotherhithe Site as a real opportunity to expand Bellevue's horizons as a property developer and realise his own ambitions as a developer. Further, the contemporaneous documents show that Mr Ealey is well-organised and capable of sorting issues out, as and when they arise. Mr O'Leary of MacKenzie Byrne, the broker who introduced Bellevue to Titlestone, described Mr Ealey as "well polished" who "would make a good long term client".

Offer to purchase and proof of funds

20. On 1 June 2012 Mr Coppen made an offer on the Rotherhithe Site. The offer was sent to the vendor's agent in these terms: "Please accept this email as confirmation of my offer of £600,000 … subject to planning and confirmation of contract, freehold and clear title. I have enclosed my lawyers details for service of contracts once the latter has been confirmed". Mr Harvey was told that "proof of funds will follow next week". The lawyer referred to was Mr Simpson, who Mr Coppen had known since 2011. Mr Simpson specialised in advising and acting for clients in commercial property development and investment and, at the time, had over 20 years' experience in this area.

21. On 11 June 2012 the Defendant retained Taray to act for it in relation to the purchase of the Rotherhithe Site.

22. On 5 July 2012 the vendor's agent told Mr Coppen that the vendor had agreed to accept his offer, subject only to contract. He asked Mr Coppen to provide his proof of funding, and then said he would take steps so that the vendor's solicitors could be instructed in the near future.

23. The very same day Mr Coppen provided the vendor with evidence of funding in the form of a letter dated 5 July 2012 from Mr Steve Long, a Business Development Manager at Lloyds TSB|Commercial, to the vendor's agent. The letter is headed "Our Client: DJH Cap Limited" and Mr Long states "I can confirm that the above business have funds in excess of £600,000 (six hundred thousand pounds sterling) and are making these funds available to Taray Investments".

24. Mr David Hill ("**Mr Hill**"), who is a business contact of Mr Coppen, is the sole director of DJH Cap Limited. In his witness statement Mr Coppen said that he spoke to Mr Hill when he was initially looking at the Rotherhithe Site and Mr Hill was willing to invest in the property himself. As to the contents of the letter, Mr Coppen's witness statement said: "I required proof of available funds from DJ (sic) Cap Limited confirming that the funds were available in the company's account and that they were available to [Taray] to utilise". In cross-examination Mr Coppen was asked how the letter came about. He said that he telephoned Mr Hill and he agreed to lend him £600,000 at a rate of 1% per month, for an initial period of 12 months (although it could be extended), without any security. Mr Coppen said that Mr Hill or DJH Cap Limited was prepared to do so on his "trust" and that the letter was evidence of the agreement he had with Mr Hill to provide funding for the purchase of the Rotherhithe Site.

25. The Defendant's case is that Mr Coppen's claim that he had access to funds from DJH Cap Limited is untrue, that the letter of 5 July 2012 was misleading, and misled the vendor in relation to Taray's ability to fund the purchase of the Rotherhithe Site.

26. The documentary evidence which is available shows that DJH Cap Limited is a company with an issued share capital of 100 ordinary shares of £1 each. For the year ending 31 May 2012 it was a dormant company and was entitled to exemption from audit under section 480 of the Companies Act 2006 ("**the 2006 Act**"). For the year ending 31 May 2013 the company was entitled to exemption as a small company under section 477 of the 2006 Act. Further, the accounts show no economic activity at all for this company in the period 1 June 2012 to 31 May 2013. Likewise, Taray was a dormant company for the period 1 February 2012 to 31 January 2013.

27. The letter of 5 July 2012 was obtained to prove to the vendor that Taray had the money to purchase the Rotherhithe Site, and the vendor took its contents at face value. However, the letter does not provide any evidence that DJH Cap Limited agreed to lend £600,000 to Taray on the terms described by Mr Coppen. Further, the representation in the letter that DJH Cap Limited had funds in excess of £600,000 at Lloyds TSB, or indeed anywhere else, which could be made available to Taray is unsupported by DJH Cap Limited's accounts.

28. I do not accept Mr Coppen's evidence that £600,000 was available to Taray from DJH Cap Limited. This evidence was, in my view, incredible in the light of DJH Cap Limited's

accounts and without any corroboration from Mr Hill. Further, if, as Mr Coppen alleges, he had funding of £600,000 from DJH Cap Limited, then it would have been unnecessary to seek funding to purchase (as opposed to develop) the Rotherhithe Site from a third party, as the purchase costs would already have been provided for.

Contract and report on title

29. It was not until 23 August 2012 that Mr Simpson received the opening contract papers from the vendor's solicitors in relation to the Rotherhithe Site. Once he had these documents, Mr Simpson told Mr Coppen that he had put in hand the usual conveyancing searches and would report in more detail in due course. Mr Simpson also sent Mr Coppen some questions from the vendor. Mr Coppen responded on 24 August 2012 telling Mr Simpson, amongst other things, that he would be developing the Rotherhithe Site with a Mr John Johnson ("**Mr Johnson**") and selling the completed units to end users.

30. On 3 October 2012 Mr Simpson emailed Mr Coppen telling him that all searches had been carried out and that limited matters were outstanding, including the receipt of copies of the approved plans referred to in the planning consent, and the replies to requisitions. On 9 October 2012 the Defendant sent Taray an invoice for £1,565 in respect of disbursements. However, Taray did not pay this bill as the same amount, with the same invoice number, was demanded again on 18 February 2013.

31. On 16 October 2012 Mr Simpson sent Mr Coppen the Defendant's report on title in respect of the Rotherhithe Site. There is no dispute that, in this report, Mr Simpson failed to identify the discrepancy between the land registry plan and the highways plan, which showed that part of the footway encroached on the Rotherhithe Site. Further, there is no dispute that, once the discrepancy had been bottomed out, the only way to resolve it, so the permitted development could be carried out at the Rotherhithe Site, was by obtaining a stopping up order. The stopping up order was needed to extinguish the highway rights over the footway, so that the permitted development could proceed on the footway at the very eastern end of the Rotherhithe Site. The Defendant admits that it was in breach of its duty of care to Taray on 16 October 2012 and, by the end of the trial, Mr Newman as Taray's Counsel did not suggest that it should be an earlier date than this.

32. On 25 October 2012 the vendor's solicitors sent the Defendant a draft contract for sale of the Rotherhithe Site.

Taray's approaches for funding: Mr Johnson, Mr Kelly and Ms Asquith-Stacey

33. The fact that the vendor was not particularly speedy at progressing the sale at this time suited Mr Coppen. This was because, at the same time, he was trying to find someone to enter into a joint venture with Taray in relation to the purchase of the Rotherhithe Site.

34. Between June and October 2012 the first two people Mr Coppen contacted were Mr Johnson, and then Mr John Kelly ("**Mr Kelly**"). However, on 23 November 2012 Mr Coppen informed the Defendant that Mr Kelly, whom he described as "his financial backer", had pulled out of the transaction and had been replaced by Mr Ealey. This information is recorded on an attendance note on the Defendant's file.

35. Before I turn to Mr Ealey's involvement, I need to deal with the approaches Mr Coppen had made to Mr Johnson, Mr Kelly and Ms Asquith-Stacey.

36. I do not accept Mr Coppen's evidence that he approached first Mr Kelly, and then Mr Johnson, to enter into a joint venture as this is at odds with the contemporaneous documents. It was the other way around. However, I do not think very much turns on this. More importantly, there is no documentary evidence to show that Mr Coppen's discussions with Mr Johnson or Mr Kelly went beyond initial telephone calls. Therefore any approach he had made to Mr Johnson and Mr Kelly in relation to a joint venture on the Rotherhithe Site was at a very early stage before it fell through.

37. Ms Asquith-Stacey's evidence was that she was approached by Mr Coppen in November 2012. She is a member of, and the managing partner of, Trilandium, an LLP trading as a construction business with "specialist knowledge in residential development". The other member of Trilandium is Mr Russell Baker ("**Mr Baker**").

38. In 2012 Ms Asquith-Stacey had known Mr Coppen for about two years through her brokering and finance connections. She did not know Mr Ealey. In November 2012 Mr Coppen was still casting around for a joint venture partner. In these circumstances, it seems to me, and I find, the reason that Mr Coppen contacted Ms Asquith-Stacey was to ask whether she, or Trilandium, was prepared to enter into a joint venture in relation to the purchase of the Rotherhithe Site.

39. I do not accept Mr Coppen's evidence that he approached Ms Asquith-Stacey for a loan of £166,000 or that she, or Trilandium, agreed to make funds available to Taray. I also do not accept Ms Asquith-Stacey's evidence that the reason Mr Coppen approached her in November 2012 was to lend Taray the balance of the purchase price, namely £166,000 (which is the figure set out in her witness statement), or to provide up to £200,000 for the venture (which is what she said in cross-examination). Apart from anything else, the fact £166,000 was the balance of the purchase price only became clear when Titlestone made its offer of finance, which was in January 2013, and Mr Coppen was not looking to borrow up to £200,000 in November 2012.

40. Further, the two bank statements Ms Asquith-Stacey produced for Trilandium from 22 to 23 November 2012 and 8 to 10 January 2013 do not assist in showing whether Trilandium could actually afford to make the loan she described. This is because these bank statements are simply snap-shots of the funds in Trilandium's business current account on the dates in question, and do not take any account of Trilandium's liabilities.

41. The other reason I do not accept Ms Asquith-Stacey's evidence is that it is inconsistent with the financial position of Trilandium set out in its accounts. Trilandium's accounts for the year ended 31 March 2013 showed that it had net assets of £98,219, with current assets of £298,448 and creditors falling due within one year of £216,239. These accounts were signed by Mr Baker, as a designated member of Trilandium. There was no evidence from Mr Baker and, given the financial position of Trilandium as at 31 March 2013, I do not accept that Mr Baker would have agreed that Trilandium should advance funds in excess of its net assets to Taray for the purpose of purchasing the Rotherhithe Site.

42. Finally, in so far as Ms Asquith-Stacey suggested in her oral evidence that she could have lent the money from her personal funds, there is no documentary evidence to support this, and I do not accept that she would or could have done so.

Mr Ealey and Bellevue

43. Mr Ealey met Mr Coppen in 2009 when Mr Ealey was trying to build a data centre in Cambridgeshire. They were introduced through a mutual acquaintance and initially discussed financing the data centre. Thereafter they would discuss development opportunities from time to time.

44. Mr Ealey's evidence was that Mr Coppen approached him in relation to the joint venture in late October or early November 2012. Mr Ealey said that he thought that his previous development experience was valuable to Mr Coppen in terms of taking the deal in relation to the Rotherhithe Site forward. Mr Ealey considered the purchase of the Rotherhithe Site to be a good deal as it made a margin on costs of over 20%. His evidence was that, as an industry standard, this was worthwhile notwithstanding the risks of development.

45. At the time Mr Ealey did not know that Mr Coppen had, before approaching him, been in touch with Mr Johnson, Mr Kelly and Ms Asquith-Stacey. Further, it appears that Mr Ealey was not overly concerned about Mr Coppen or Taray's financial position. In cross-examination, Mr Ealey said that "How [Mr Coppen] got his funding was irrelevant to me. That he had it was the key part to me … If [Mr Coppen] says he is going to do something, he is normally a man of his word". It was on that basis that Mr Ealey proceeded to deal with Mr Coppen and Taray, and Bellevue entered into the Joint Venture Agreement as set out below.

46. Mr Ealey worked at a firm called Equity Real Estate until about 2008, where he was involved in property development as a land buyer or director. From October 2012 he has owned a construction company, Comis, with his father, Mr Christopher Ealey, who is an architect. Mr Christopher Ealey is the other director of Bellevue. In 2012 Comis was developing two houses and that was its only activity.

47. Bellevue took an option on a site in Croydon in 2006, in respect of which planning permission was obtained and the site was then sold to a third party. Bellevue also had an option on a site in Warlingham, which it also obtained planning permission for. However, Bellevue was unable to obtain finance to develop this site as a result of the 2008 financial crisis.

48. In 2011 Mr Ealey moved Bellevue into construction and it purchased a site in Southborough for the development of three houses, which were built "in-house" and sold by Bellevue in 2012. This development gave rise to a profit of £90,000, which represented a substantial part of the funds in Bellevue's bank account in 2012. Mr Ealey also said that in January 2013 Comis repaid a loan of £20,000 to Bellevue, which was then held in a savings account.

49. Mr Ealey's evidence was that Bellevue were on the verge of purchasing a site to develop and build two houses in East Grinstead, when he was approached by Mr Coppen in relation to the Rotherhithe Site. Bellevue chose to purchase the Rotherhithe Site over the development opportunity in East Grinstead, as the Rotherhithe Site was going to make Bellevue more of a profit.

50. In terms of Bellevue's financial position, its accounts for the year ended 30 April 2012 showed that it had net assets of £27,159, with current assets of £130,783 and creditors due within one year of £105,916. The position a year later, on 30 April 2013, was that Bellevue's annual accounts recorded net assets of £49,690, with current assets of £145,658 (cash at bank and in hand) and creditors due within one year of £98,092. Mr Ealey also produced a bank statement for Bellevue which showed that, on 30 November 2012, it had £190,179.82 in its bank account at the NatWest. Mr Ealey's personal financial position at or about this time was that he owned Hawthorn Cottage, Southborough and 93 Cecil Road, Rochester. The net equity in these two properties was £73,000. He had £20,000 in his personal account (which were, as I understand it, the funds repaid by Bellevue to Comis (paragraph 48 above)), and debts of £3,750.

Joint Venture Agreement: Taray and Bellevue

51. On 24 November 2012, Mr Ealey on behalf of Bellevue and Mr Coppen on behalf of Taray entered into a Joint Venture Agreement ("**the JVA**"), the purpose of which was to purchase, develop and sell all the units and freehold at the Rotherhithe Site. The terms of the JVA included the following: (i) the joint venture would conduct business under the name of Bellevue; (ii) the term of the joint venture would be until the sale of the last unit and freehold of the Rotherhithe Site; (iii) the capital of the joint venture would consist of £250,000, with a contribution of £180,000 from Bellevue and a contribution of £70,000 from Taray; (iv) the profits and losses of the joint venture were to be shared between Bellevue and Taray in proportion to their respective capital contributions; (v) Mr Ealey would have the "sole discretion, management and entire control of the conduct of the business of the Joint Venture as the Venture Manager".

52. In relation to the provision of capital, the JVA provided that "these funds shall be deposited in the companies' respective Banks Plc and shall be disbursed only upon the signatures of all the Joint Venturers, when required". However, neither Taray nor Bellevue deposited the agreed funds, or indeed any funds, with their respective banks as capital for the joint venture. The most obvious reason for this is that neither Taray nor Bellevue had the funds available in order to deposit the agreed amounts. This, it seems to me, is clear from the financial information available in relation to each of these companies.

53. In any event, now that Taray had entered into the JVA with Bellevue the deal in relation to the Rotherhithe Site could proceed. On the evidence it is quite clear that Taray would not have proceeded on its own with this deal, and it could only do so pursuant to a joint venture or partnership agreement with a third party with building and property development expertise.

54. The terms of the JVA suited both parties as Mr Ealey, through Bellevue, wanted to take the leading role in relation to the development of the Rotherhithe Site, and Mr Coppen was very happy for this to occur. Therefore, once Mr Ealey became involved, he took the project over from Mr Coppen. Mr Ealey became the main point of contact with the Defendant and also the vendor's agent, and up-dated Mr Coppen on important matters, as and when necessary.

November 2012 to April 2013

55. On 27 November 2012 Mr Simpson informed Mr Coppen that "the Rotherhithe contract is just about there. When you are able to let me know the identity of the new purchaser I can send it out for signature". On 18 December 2012 Mr Ealey told Mr Simpson that Bellevue would be the purchaser of the Rotherhithe Site and that his estimated exchange date was January 2013, which would give Bellevue sufficient time to put the financing in place.

56. Mr Simpson completed a new client form for Bellevue on 3 January 2013. On 4 January 2013 he asked Mr Ealey whether he held a copy of the report on title that he had previously prepared for Mr Coppen. Mr Ealey had already received this document from Mr Coppen, although Mr Simpson did not know this. The Defendant accepts that from this date, when it offered the report on title to Bellevue, it owed a duty of care to Bellevue in respect of it. As a result the Defendant cannot have been in breach of its duty of care to Bellevue any earlier than 4 January 2013. I agree with this, which is four days earlier than the date relied on in the Amended Particulars of Claim. However, it was only on 15 January 2013 that the Defendant was retained by Bellevue, when fees of £3,200 plus VAT were agreed.

57. In the meantime on 3 December 2012 Bellevue engaged the broker, MacKenzie Byrne, to act for it in sourcing "residential development finance" for the Rotherhithe Site. Bellevue paid MacKenzie Byrne an engagement fee of £1,000, and agreed to pay a success fee of 1% of the funds secured by Mackenzie Byrne for Bellevue (which ended up being £13,250). On 17 December 2012 Titlestone provided "indicative terms" of lending, indicating that it would be prepared to lend Bellevue £1,325,000 to purchase and develop the Rotherhithe Site. On 14 January 2013 Mr Ealey provided Titlestone with a "Personal Asset and Liability Statement" in respect of his assets and liabilities, and his father's assets. Mr Ealey did not tell Titlestone that he was party to the JVA with Taray, or that Mr Coppen was involved. He said this was because he had "a large part of the capital" and it made things "easier".

58. By a letter dated 21 January 2013 Titlestone offered a loan facility of £1,325,000 to Bellevue in relation to the purchase and development of the Rotherhithe Site ("**the Facility Letter**"). The amount of the loan was made up as follows, namely to provide:

    1) £434,000 towards the acquisition of the Rotherhithe Site;

    2) £676,000 towards the building works, exclusive of professional costs and fees;

    3) £130,000 towards the interest payments on the loan facility;

    4) £10,000 towards the arrangement fee;

    5) £65,000 towards the professional fees which would become payable in connection with the building works; and

    6) £10,000 towards marketing costs which become payable in connection with the Rotherhithe Site.

59. The loan facility was subject to a number of conditions, including the following:

1) drawdown was to take place no later than 3 months from the date of the Facility Letter, ie 21 April 2013;

2) Titlestone required a first legal charge over the Rotherhithe Site to be given by Bellevue;

3) interest accrued daily on the total balance outstanding under the loan facility at the rate of 12% per annum;

4) Titlestone required payment of an arrangement fee of £19,875. £9,875 of this fee had to be paid on acceptance of the offer, and £10,000 was to be charged on first drawdown; and

5) Titlestone also required amongst other things (a) a written report on title on the Rotherhithe Site from its own solicitors; (b) a detailed valuation report on the Rotherhithe Site addressed to it; (c) a report on the proposed development from its project monitoring surveyors, which was to include their initial opinion of the amount to required to complete the development works; (d) a ground condition report on the Rotherhithe Site.

60. On 22 January 2013 Mr Simpson informed the vendor's solicitors that Bellevue should be in a position to exchange by 10 February 2013, and would be looking to complete either 6 weeks thereafter, or upon vacant possession being obtained. He also told the vendor's solicitors that the funding arrangements for the purchase of the Rotherhithe Site had been approved. There was no objection from the vendor to this revised timetable for exchange and completion.

61. On 29 January 2013 Bellevue accepted the offer contained in the Facility Letter. On doing so Bellevue paid Titlestone part of the agreed arrangement fee, namely £9,875.

62. On 6 February 2013 Mr Ealey contacted Mr Simpson to explain there was a problem with exchange arising out of the ground condition report, which Titlestone required. His email to Mr Simpson said this:

> "Also would you be able to send an email to the seller's solicitor explaining that I have been in contact with the agent as I need to complete a ground investigation report. Unfortunately when we tried to drill down we could only go as far as 2.5m as there is concrete at this level. As such I am trying to get an excavator to site and then see how deep the concrete is. As such I will not be able to exchange before this point as I simply do not know the current state of play. I have booked an excavator for Monday and another attempt at drilling to test the soil conditions (a condition of funding) will be completed on Tuesday. Once I have the results of this (a week or so later) I will be able to continue with the purchase, but until then I am not… I have spent considerable sums to date on both fees and the drilling company's charge. I hope this will prove that I am still certain of purchasing the property but it will take longer than initially expected."

63. By 26 February 2013 the ground investigations identified a "metallic anomaly 6 metres down", which was initially thought to be an unexploded bomb. Mr Ealey spoke to the vendor's agent about getting the vendor "to pay or take money off the purchase price". He told Mr Simpson that "[the vendor] like the second option but I want something that ties

them into doing this if I do go ahead with the tests and extraction if it is a bomb". However, the vendor's solicitors took a different approach and, on 6 March 2013, said their proposal was that contracts for sale were exchanged, and Bellevue "give permission for (some of) the deposit monies to be used to defray the below expenses". The vendor then backed down on this suggestion and by 10 April 2013 the bomb survey had been completed and the vendor had paid the cost of doing so. However, Bellevue paid the costs of the soil survey and was invoiced over £7,300 in respect of this.

64. In the end, although the Rotherhithe Site had been bombed in the Second World War, the metal object turned out to be a metal bucket. Having sorted this problem out, Mr Ealey was aware that the vendor was able "to exchange as quickly as possible" and suggested to Mr Simpson exchange before 22 April 2013, with completion 2 months thereafter, which would allow the tenant time to vacate. Mr Ealey also wanted to know how to get more time on Titlestone's offer of a loan facility, which was due to expire on 21 April 2013, and said "I hope this is easy to do as we are still excited and committed to the project".

65. On 10 April 2013 Titlestone extended the drawdown date in the Facility Letter to 1 July 2013.

66. On 12 April 2013 the parties' solicitors exchanged emails confirming that the transaction was proceeding again, and Mr Simpson was asked to provide the vendor's solicitors with a likely timetable for exchange. This was not chased up by the vendor's solicitors and, by the end of April, no revised date for exchange of contracts had been set.

Identification of the discrepancy

67. Titlestone's solicitors were DAC Beachcroft LLP ("**DAC Beachcroft**"). On 12 April 2013 Mr Simpson sent his report on title to DAC Beachcroft. On 1 May 2013 Mr Peter Williams of DAC Beachcroft emailed Mr Simpson and, under the heading "Development", said this: "I note that the forecourt is adopted footway. Presumably as this is to form part of the development a stopping up order will be required?".

68. On 3 May 2013, shortly after Mr Ealey became aware of this issue, he contacted Mr Roger Taylor at Southwark to find out whether a stopping up order was required and, if so, to seek guidance on how to obtain one.

69. On 7 May 2013 Mr Simpson responded to Mr Williams' email as follows: "It is not believed that a stopping up order is required and no mention of the same was made during the planning process. Should one prove to be necessary then my client will of course obtain it….". However, Mr Williams was not convinced and responded on 8 May 2013 stating that, at the very least, Titlestone would need comfort that a stopping up order can be obtained "without risk".

70. The same day Mr Simpson emailed the vendor's solicitors saying that he believed "at long last we are on the threshold of exchange with regard to this matter". He then raised a number of points, including: "It does seem that part of the consented development will cover part of the adopted footway. This is not mentioned in either the Planning Committee Reports or in the planning consent itself. Do your clients or their planning professionals have any further information on this point and specifically whether a stopping up order may be required?". The vendor's solicitors immediately responded, saying they would check. Mr

Simpson regarded this as a "fairly friendly" response and, at the same time, told Mr Ealey that what was needed was a response from the local Highways Authority in order to find out whether a stopping up order was necessary.

71. On 9 May 2013 Mr Ealey informed the vendor's agent of the problem and said "believe me when I say I am so very frustrated with this and am really pushing it as fast as I can, including meeting with highways to try and speed things up". The vendor's agent, Mr Harvey, responded as follows: "I will let our client know and do my best to keep them on board and patient for an exchange early next week. I would dearly like to avoid remarketing but even if the parish were to instruct me to do so I would recommend that they do not withdraw the contract with Taray. In that way I trust you would be able to exchange before any potential new interest developed. Hopefully the problem will not arise in the first place".

72. On 10 May 2013 Southwark confirmed that a stopping up order was required in order to carry out the permitted development of the Rotherhithe Site.

Events after 10 May 2013

73. On 13 May 2013, Ms Zoe Walker, Mr Simpson's colleague at the Defendant, provided him with the following advice in relation to the procedure to the stopping up order:

> "As the Site is within the area of the London Borough of Southwark an application to stop up the highway pursuant to s247 of the Town and Country Planning Act 1990 (as planning permission has already been granted) should be made to the London Borough rather than the Secretary of State. The procedure for dealing with the application is substantively the same save for the involvement of the Mayor. The procedure is as follows:-
>
> 1. The application is made to the London Borough.
>
> 2. The Borough publish and advertise (both in the press and by a site notice) the draft Order.
>
> 3. Any person can object to the making of the Order within 28 days following its publication.
>
> 4. If any objections to the order are received and not withdrawn the Mayor of London must be notified. In the case where the objections have not been made by a Local Authority or statutory undertaker or transporter a local inquiry need only be held if the Mayor requires it. In all other cases of outstanding objections the Council must hold a local inquiry into the stopping up.
>
> 5. If no objections are received (or they are all withdrawn) the Order is confirmed.
>
> 6. If a local inquiry is held the Borough must obtain the Mayor's consent before making the Order.
>
> As such it can take between 3 and 12 months to obtain a stopping up order, depending on whether any objections are received. Subsequent to this the Order may be challenged in the High Court for a further period of 6 weeks."

74. This advice was forwarded by Mr Simpson to Mr Ealey the same day. Mr Simpson explained to Mr Ealey that "the timescale is very much predicated as to whether any objections are received". Mr Simpson also said that he had contacted the vendor's solicitors "to confirm that we can move to early exchange but conditional upon obtaining a satisfactory stopping-up order". Mr Simpson was, it appears, trying to keep the transaction on track by making an approach on this basis to the vendor's solicitors, as Mr Ealey did not give him any instructions to make this particular suggestion. On 15 May 2013 Mr Simpson confirmed to the vendor's solicitors that a stopping up order was required.

75. By 16 May 2013 the Claimants' deal to purchase the Rotherhithe Site had fallen through. This is recorded in Mr Ealey's email to Mr Simpson saying: "I spoke to [the vendor's agent] yesterday who told me they would be re-marketing the site on Monday and will not enter into any conditional contracts. As such it seems to me that this sale is no longer going to go forward".

76. Mr Ealey then set out his frustration and continued:

> "I cannot see why this wasn't picked up earlier when looking through the legal documents, as a major point and one that required attention when the Report on Title was given. Certainly things could have been structured differently and the money spent would not have been lost. Furthermore when I called you [about] this issue in April I was told that it was not a problem and that we would just set the site hoarding down accordingly. Obviously this was not the case and I have now lost over £30,000 in costs for something that may have been able to be sorted out months ago. Is there any way of rectifying this situation?".

77. Mr Simpson responded to Mr Ealey on 17 May 2013, and told him that he had spoken to the vendor's solicitors the day beforehand. The vendor's solicitors had told Mr Simpson that they were going to recommend to their client that "they enter into a conditional contract with us on the basis that the footpath issue is one that requires to be dealt with by anyone wishing to implement the existing consent." Mr Simpson then provided Mr Ealey with the following advice: "In my opinion the best solution is to proceed to an exchange of contracts conditional upon the obtaining of a satisfactory Stopping-Up Order or (if feasible) upon obtaining a satisfactory variation to the approved planning drawings to remove the area in question from the equation".

78. The parties to this transaction to purchase the Rotherhithe Site, and the professionals advising them, had always had good working relationship. There had been no difficulty in extending the timetable for exchange of contracts, and the problem in relation to the metal object had been resolved without difficulty in February 2013. The issue with the stopping up order was, in my view, as much a problem for the vendor, as the Claimants. It is therefore somewhat stark that, given the good relationship between the parties, the deal fell apart so quickly on 16 May 2013.

79. The reason for this is, however, recorded in the contemporaneous documents, and is set out in Mr Coppen's letter to the Defendant dated 5 July 2013, complaining about the Defendant's conduct in relation to the transaction. Mr Coppen said this (with the critical passage underlined):

> "Due to the requirement of a "Stopping Up Order" which was brought to my attention and [Mr Ealey's] by the lenders['] bank who have now told [Mr Ealey] that they cannot offer an open ended arrangement for finance which [Mr Ealey] explained to [the vendor's agent] who was marketing the property and after several discussions they have now sold the development to another parties [sic] as the church [the vendor] (his client) would not enter into a conditional contract without a 10% deposit which [Mr Ealey] would not agree to as that would mean that his money could be tied up for up to 12 months and there was no guarantee that a "Stopping Up Order" would be granted" (underlining added).

80. Mr Coppen's evidence was that he got this information from Mr Ealey, and I accept that evidence. I do not accept Mr Ealey's oral evidence that Mr Coppen wrote this letter without speaking to Mr Ealey first. Indeed, in his witness statement Mr Ealey said

> "conditional exchange of contracts were discussed and I did investigate this point with the [vendor's agent] however this was never really a viable option for [Bellevue]… The risk to [Bellevue] was that if we had successfully agreed a conditional exchange of contract [Bellevue] would have been required to put down a £60,000 deposit without any guarantee of finance at the end of it. If we were unable to complete the purchase of the [Rotherhithe Site] in accordance with the conditions attached to exchange I would have lost a sizeable deposit. I also did not know what the market was going to do and if there were to be any external influences, such as another financial crash etc … I was not keen on entering into conditional exchange for all these reasons …".

81. Further, the vendor's proposed approach (as recorded in Mr Coppen's letter of 5 July 2013) makes perfect sense in the circumstances. The vendor wanted to sell the Rotherhithe Site and almost a year had gone by since it had accepted Mr Coppen's offer to sell the property to Taray. The vendor would have understood that the stopping up order presented a problem in relation to the Rotherhithe Site and, from a conveyancing perspective, the obvious solution was the exchange of conditional contracts, conditional upon obtaining the necessary stopping up order so that the development could proceed in accordance with the planning permission obtained in spring 2012. Then, in the event it was not possible to obtain a stopping up order, the purchaser could rescind the contract, and the deposit would be returned in full to the purchaser. It seems that Mr Ealey had misunderstood what would happen to the deposit paid by Bellevue in these circumstances, as there was no reason to the think that Bellevue would lose the deposit. However, if paid, a £60,000 deposit would be tied up throughout the process for obtaining the stopping up order (which he was advised could be up to 12 months). Mr Ealey accepted this in cross-examination. I find that was his real concern, as Bellevue did not have enough money, or working capital, to proceed on this basis.

82. On 24 May 2013 Titlestone's solicitors, DAC Beachcroft, asked for an update. Mr Simpson responded stating that he was awaiting confirmation from the vendor's solicitors that exchange could be conditional upon obtaining a satisfactory stopping up order. Titlestone's solicitors chased for an update on 13 June 2013, and were told by Mr Simpson there was no further news.

83. On 25 June 2013 Titlestone emailed Mr Ealey in the following terms:

> "You recently spoke to us regarding the issue with the stopping up order and requested if we would provide a facility which would be subject to it being granted. Unfortunately, due to the open-ended nature of this issue, we are unable to provide such a facility. We therefore regret to inform you that unless the facility is drawn by the 1st July the current arrangement will lapse. Should the stopping order be agreed you will have to apply to us again for funding which will be subject to our credit approval and due diligence processes."

84. Titlestone's offer lapsed on 1 July 2013.

85. On 15 July 2013 the Defendant's senior partner, Mr John Ward, responded to Mr Coppen's letter of complaint dated 5 July 2013, and said this

> "We should have identified the discrepancy between the Highways map and Title plan in the report on Title [Mr Simpson] prepared in October 2012. However, we are not aware that the development has been sold on to another party. What is also not clear is what would have happened had we brought the discrepancy to your and Mr Ealey's attention. Planning consent had already been granted and it would have been (and still is) a quick and inexpensive procedure to obtain either the necessary stopping up order to permit development on the adopted footway or to amend the plans so that the development does not build over the pathway. I add that the extent of the adopted pavement must also have been self-evident from your inspection of the premises. We do not accept therefore that we can be responsible for any alleged loss and/or wasted fees."

86. This was the Defendant's response to Mr Coppen's complaint. For that reason, it seems to me, it puts forward the most positive case in relation to the stopping up order, namely that it was a "quick and inexpensive procedure". The Claimants had already been advised the procedure could take 3 to 12 months, and that was set out in Ms Walker's email of 13 May 2013, which had been sent to them at the time (see paragraph 73 above).

87. On 24 July 2012 the vendor's solicitors informed Mr Simpson that the Rotherhithe Site had been re-advertised, and the vendor had accepted an offer from another purchaser for the sale of the property. Mr Simpson was therefore asked to arrange for the return of the issued contractual papers.

88. Mr Newman conceded in his closing submissions that the Claimants' case did not include any complaints about the Defendant's conduct after 1 May 2013.

The stopping up order and sale of the Rotherhithe Site

89. What then happened was that the vendor took, and paid for, all the necessary steps to obtain a stopping up order and, on 4 February 2014, exchanged contracts on the Rotherhithe Site with IPE Capital Limited ("**IPE**"). The purchase price was £785,000, IPE paid a deposit of £35,000 and the contract was conditional upon (a) the vendor obtaining vacant possession of the property; and (b) a stopping up order being made by Southwark in respect of the part of the Rotherhithe site on the footway. The contract provided that if condition (b) was not satisfied before 31 January 2015, defined as "the Long-Stop date", IPE could rescind the contract by written notice to the vendor, and the deposit would be returned immediately to IPE.

90. The sequence of events which led to the making of the stopping up order was as follows. On 18 June 2013 the vendor submitted its application for a stopping up order to Southwark. On 21 June 2013 the vendor's agent sent Southwark a cheque for £4,500 to pay Southwark's costs in processing the application for the stopping up order. Southwark's legal department were instructed on 27 June 2013. On 5 August 2013 Southwark wrote to the vendor, asking for an undertaking to pay Southwark's legal fees in respect of the application. On 7 August 2013 an undertaking was provided to pay legal fees of £4,500. On 15 August 2013 the draft stopping up order and notice were advertised in the London Gazette. The objection period expired on 16 September 2013. On 2 September 2013 Southern Gas Networks ("**Southern Gas**") objected to the stopping up order. On 3 December 2013 the vendor wrote to Southern Gas requesting details of the cost of diverting the apparatus in order to remove its objection to the stopping up order. Southern Gas responded on 3 January 2014 and estimated the cost of the necessary works was £16,000 plus VAT. Further information was requested by the vendor and on 15 January 2014, Southern Gas responded with a further estimate of £19,209.66 (including VAT) which was agreed. The vendor paid Southern Gas this amount on 4 February 2014 and the stopping up order was granted on 25 March 2014.

91. Therefore, from start to finish, it took the vendor just over 9 months to obtain the stopping up order at a cost of over £28,000. The Claimants say that there was delay on the part of the vendor in this process and, if the vendor had acted promptly at each stage, the time period could have been reduced to 4.5 months. This means, the Claimants say, that if the application for a stopping up order had been made in October 2012, it could potentially have been granted in February 2013.

The Claimants' alleged loss of opportunity

The Claimants' case

92. The Claimants' pleaded case is:

> "[41.] But for the Defendant's negligence, had the Claimants been informed of the Discrepancy in the Report on Title in October 2012, the Claimants would have had sufficient time to regularise the position by, amongst other options, obtaining a stopping up order prior to the proposed date for exchange of contracts, namely 17 May 2013, or by structuring the transaction to minimise the risk exposure to the Claimants to the possibility that upon the application for a stopping up order being made it would not be granted by negotiating with the Vendor (1) an exclusivity agreement or (2) an option agreement, or alternatively they would have been able to satisfy Titlestone that an application for a stopping up order had been submitted and that it was likely to be granted, as indeed it was.
>
> [42.] By only informing the Claimants on 1 May 2013 of the Discrepancy, the Claimants had insufficient time to arrange the stopping up order or take any other action prior to the proposed date for exchange of contracts.
>
> [43.] Further, without a stopping up order in place, or without the application for a stopping [up] order being submitted, prior to exchange of contracts, Titlestone Property Lending would not consent to the Site Advance drawdown and without the funding

provided by Titlestone the Claimants were not in a financial position to purchase the property.

[44.] As a result of the above the Claimants lost the opportunity of purchasing and developing the Property."

93. On 18 October 2018 the Defendant made a request for further information of paragraph 41 of the Amended Particulars of Claim. The Claimants' response was that:

    1) It was the Claimants' case that Taray would have applied for a stopping up order in or around October 2012 if the Defendant had advised it of the need for such an order.

    2) Mr Ealey was advised on 13 May 2013 by email that it would have taken between 3 to 12 months to obtain a stopping up order. This advice was further clarified by a senior partner of the Defendant by letter dated 25 July 2013. Mr Coppen was advised that in the Defendant's opinion and experience, the process of obtaining a suitable stopping up order would be a "relatively straightforward matter", it would be obtained within three months, the process was relatively straightforward, and that the total fees would be in the region of £1,500 to £2,000. The First Claimant would have funded the application using personal finance.

94. The Claimants' position at trial was that, if Mr Simpson had identified the discrepancy in the report on title on 16 October 2012, then Taray would have started the process of applying for a stopping up order in October 2012. Mr Coppen said that, in order to do so, he would have sought assistance from the Defendant, or made enquiries of Southwark. Mr Coppen also said that it was likely that he would have approached the vendor's agent to discuss the matter and "considered whether we could agree some form of exclusivity agreement or option agreement with them whilst the matter of the [stopping up order] application was dealt with". Mr Coppen said that such an agreement would have protected his position in relation to the purchase of the Rotherhithe Site, and any sums he had invested in relation to the application for a stopping up order.

95. As for Bellevue, Mr Ealey's evidence was that, if Mr Coppen had not started the process, then he would have ensured that the vendor was aware of the need for a stopping up order, and he would have started the application process in November or December 2012. Mr Ealey explained in his witness statement he would have spoken to the vendor, so that they:

    "then could have put in place an exclusivity agreement detailing that the vendor agreed exclusively to sell [the Rotherhithe Site] to [the Claimants], whilst we resolved the issue of the application for the [stopping up order]. Being aware of the need for the [stopping up order] earlier on in the conveyancing process would have set out the parameters of the matter in an entirely different way. An exclusivity agreement would have been my preferred method of proceeding … An alternative method to secure the purchase of [the Rotherhithe Site] would have been the use of an option agreement. Such an agreement would have given us the option to purchase the site within a pre-determined amount of time. For example, I could have arranged the right for [Bellevue] and [Taray] to purchase the site within an 18-month period with extension clauses within an option agreement, and within that period I would have attempted to obtain the [stopping up order]. Had the [stopping up order] application been unsuccessful within the agreed time period set out in the option agreement, I would not have been obliged to purchase

> the site… I have used both options [ie an exclusivity agreement and an option agreement] effectively in development matters and neither would have required [Bellevue] or [Taray] putting any money down; the risk to us would therefore have been minimal."

96. In addition to this, the Claimants say that:

    1) They had ample time to sort out the stopping up order before May 2013 as the vendor "was not commercially minded and the negotiations that there were, were not hard fought".

    2) They had enough money to pay for the various steps associated with obtaining the stopping up order, and they would have paid for each of these steps.

    3) They would have been able to obtain funding to purchase and develop the Rotherhithe Site from Titlestone, and the vendor would have granted them any extensions of time necessary to do so.

97. In support of (2) and (3) above, Mr Newman, in his closing submissions handed me a one-page document, summarising the evidence relied upon by the Claimants to show that "finances were available" to them:

    1) Up-Front costs: (i) Deposit: £60,000; (ii) Balance of the purchase price (£540,000[1] - £434,000): £106,000; (iii) Titlestone's administration fee: £9,875; (iv) Titlestone's acceptance fee: £7,000; (v) Titlestone's legal fees: £6,000. Total: £188,875.

    2) Assets/Funds available from Ms Asquith-Stacey, Bellevue, Mr Ealey & Mr Christopher Ealey: (i) Ms Asquith-Stacey (who the Claimants described as a persuasive and compelling witness): £166,000; (ii) Bellevue: £190,000 (November 2012)/£145,000 (April 2013); (iii) Mr Ealey & Mr Christopher Ealey: "potential equity" of £648,000. The total of (i) and (ii): £311,000.

    3) £311,000 (2) - £188,875 (1) = £122,125.

    4) Stopping up order costs: (i) Defendant's costs: £2,000; (ii) Southwark's legal costs and application fee: £9,000; (iii) Southern Gas' costs: £19,975. Total: £30,975.

    5) £122,125 (3) - £30,975 (4) = £91,150.

    6) The Claimants maintain that the balance of £91,150 could then be used for contingencies, which would include (i) £52,000 identified by Mr Bridge, the Defendant's expert witness; and (ii) £13,250 in respect of the broker's fee.

The course of events if the discrepancy had been identified

98. Taray, through Mr Coppen, found the Rotherhithe Site in June 2012 and made a successful offer to purchase it. Taray first instructed the Defendant to act for it in relation to the transaction. However, aside from taking those initial steps, Taray was unable to proceed

[1] No SDLT was payable in respect of the purchase, as it appears an exemption applied as the Rotherhithe Site was located in a disadvantaged area. There was no issue about this at trial.

any further with the purchase of the Rotherhithe Site on its own. It could only do so by entering into a joint venture, or partnership, with another person with development expertise. This was accepted by both Mr Coppen and Mr Ealey in cross-examination. Therefore, Taray could not have done anything to sort out the issue in relation to the discrepancy until after it had entered into the JVA with Bellevue.

99. In these circumstances Mr Newman realistically focussed on what would have happened once Bellevue became involved, and what would have happened if Mr Ealey had known the true position in relation to the discrepancy. The earliest date on which Mr Ealey would have found this out was in November 2012 and, in any event on 4 January 2013 (being the date the Defendant concedes it was in breach of its duty of care to Bellevue). I turn to this next.

100. Mr Newman submitted that, if the Claimants had known the true position in or before January 2013, then:

1) There was plenty of goodwill between the parties, and their respective professional advisers, to the transaction. That meant it would have been possible to negotiate a solution to the problem presented by the need for a stopping up so that the development could proceed at the Rotherhithe Site in accordance with the planning permission obtained.

2) The Claimants were in the "driving seat" in relation to the transaction, and there was sufficient evidence before the court to show that the parties would have been able to negotiate an appropriate solution, such as an exclusivity agreement, or an option agreement, or as Mr Ealey described it a "no-money down" conditional exchange of contracts.

3) There were, he said, a number of options that the Claimants could have pursued with the vendor. He said that Bellevue would have paid for all the steps associated with obtaining the stopping up order, and Mr Ealey knew how to get the deal "across the line".

101. In relation to the contingencies associated with whether the Claimants would have entered into the contract to purchase the Rotherhithe Site from the vendor, Mr Newman made two particular submissions:

1) There was no difficulty negotiating with the vendor. He pointed, in particular, to how the problems which had arisen with the soil survey had been sorted out in February and March 2013. He also suggested that the vendor was not a commercial organisation and, as a result, they were somewhat easier to negotiate with. This meant, he said, that there would have been no difficulty negotiating a deal with the vendor to secure the Rotherhithe Site for the Claimants, or to get more time to do so in order to sort the stopping up order out.
2) The reality of the situation was that the Claimants had the necessary financial status, and ability to purchase the Rotherhithe Site. Indeed, Mr Newman pointed out that Mr Simpson had never questioned whether the Claimants had the financial ability to purchase the Rotherhithe Site, and had proceeded on the basis that there was no issue about this at all.

102. I am unable to accept the Claimants' submissions. This is because the steps they say would have been taken, are not what would have happened. For my part, I consider the Claimants' case to be unrealistic and, on the evidence adduced at trial, it does not get anywhere close to establishing:

    1) on the balance of probabilities that they would have taken the steps necessary to acquire and develop the Rotherhithe Site; and

    2) if they had done so, there was a real and substantial chance that the Claimants would have succeeded in acquiring and developing the Rotherhithe Site in all the circumstances.

103. First, in cross-examination Mr Ealey was asked whether, if he did not have an option agreement or an exclusivity agreement, he would have been willing to spend £4,500 on paying Southwark the application fee a stopping up order. Mr Ealey's response was "If we had no option agreement, no exclusivity agreement, no conditional contract, would I have spent money on something where I did not have the end tied down? No. Nobody would". It is clear from this answer that Bellevue would not have spent any money on proceeding with the application for a stopping up order without some form of commitment from the vendor to sell the Rotherhithe Site to it.

104. Mr Ealey's evidence was that this could have been achieved by an option agreement, an exclusivity agreement, or a "no money down" conditional exchange. I do not accept this evidence. Rather, I accept the evidence of Mr Simpson which was that no well-advised vendor would have entered into any such arrangement with Bellevue. In this case there is no doubt that the vendor was properly and professionally advised by Winckworth Sherwood in relation to the transaction. The vendor, although it is not a commercial organisation, wanted to sell the Rotherhithe Site and, in order to do so, it needed to be sure that Bellevue was committed to the purchase of the Rotherhithe Site. The obvious way to achieve this was the exchange of conditional contracts, which is what the vendor's agent suggested in May 2013, and it was on this basis that the vendor proceeded to sell the Rotherhithe Site to IPE in February 2014.

105. I do not accept Mr Ealey's evidence that he could have "tied the vendor down" with either an option agreement or exclusivity agreement, such that Bellevue would then have started spending money on the procedure to obtain a stopping up order. I accept Mr Simpson's evidence that Bellevue would have been unable to enter into such a deal with the vendor, as the vendor's solicitors, and indeed the vendor's agent, would not have advised the vendor that that was a sensible way forward and, as a result, the vendor would not have agreed to it. Rather, the advice the vendor's solicitors would have provided (as indeed they did provide to the vendor in May 2013), would have been to proceed by way of conditional exchange of contracts, and the vendor would have acted in accordance with this advice.

106. This conclusion is supported by the contemporaneous documents, which show that, once the discrepancy had emerged as a problem, the vendor would, on the advice of its solicitors and agents, have entered into a conditional contract to sell the Rotherhithe Site to Bellevue. This is clear from Mr Simpson's conversation with the vendor's solicitors on or about 17 May 2013 (para. 77 above) and from Mr Coppen's letter to the Defendant dated 5 July 2013 (para. 79 above). However, Bellevue would not enter into any such agreement with the

vendor, as Mr Ealey would not pay the deposit requested of £60,000. It was at that point, and for that reason, that the deal with Bellevue fell apart on 16 May 2013.

107. Second, if Mr Ealey had been informed of the discrepancy on or before 4 January 2013, then Mr Ealey accepted in cross-examination that it would have taken Mr Simpson about 2 weeks to contact the vendor's solicitors and Southwark in order to get to the bottom of the situation and identify whether a stopping up order was required to sort the problem out. Then, having found out that a stopping up order was required, by 18 January 2013 Mr Ealey would have been given the very same advice set out in Ms Walker's email dated 13 May 2013. That email set out the procedure for obtaining a stopping up order, and stated that it could take between 3 and 12 months to obtain. Further, Mr Simpson would at the same time have found out, and informed Mr Ealey, that the cost of the application was £4,500, and Southwark also required an undertaking in respect of their fees of £4,500. Therefore, if the Defendant had told the Claimants that the cost of obtaining a stopping up order was £1,500-£2,000 they would have been put right at this stage.

108. In cross-examination Mr Ealey accepted that, at that point, he would have informed Titlestone of the position. He also agreed that, on being told of the position, Titlestone would have responded in the terms they did on 25 June 2013, namely they would not have provided a loan facility given the "open-ended nature of this issue". Rather, they would have told Bellevue to come back, once the problem had been sorted out.

109. Further, by 18 January 2013, Bellevue had not accepted the offer contained in the Facility Letter. Mr Ealey did not do so until 29 January 2013. This meant that, by this point in time, Bellevue had not incurred the following costs totalling £23,125 which were payable on the acceptance of Titlestone's offer, namely (a) Titlestone's arrangement fee of £9,875; (b) MacKenzie Byrne's fee of £13,250. The only costs incurred by the Claimants at that stage were the broker's engagement fee of £1,000 and an invoice from the Defendant in respect of disbursements for £1,565.

110. In these circumstances, I do not believe Mr Ealey when he said in evidence that Bellevue would then have paid £4,500 to Southwark in respect of the application fee to apply for the stopping up order. This is because, at that time, Bellevue would not have had any funding, the vendor would not have agreed to any sort of deal on the terms proposed by Mr Ealey, and the vendor would not have been "tied down" (as Mr Ealey would have liked) before Bellevue spent any money in respect of the stopping up order.

111. Rather, what would have happened is that Mr Ealey and Bellevue would not have proceeded with JVA to purchase the Rotherhithe Site. This is because Bellevue would have lost very little in terms of time and money at stage and, on looking at its financial position at the time, together with that of Mr Ealey, I am quite satisfied that the Claimants would not have proceeded to spend money on the procedure to obtain a stopping up order, when the outcome was uncertain, the vendor was not "tied down", and there was no financing in place from Titlestone, or indeed anyone else. For the same reasons, I do not believe Mr Ealey's evidence that Bellevue would have paid £4,500 in respect of Southwark's legal costs in respect of the application, or that Bellevue would then have paid £19,209.66 in respect of Southern Gas' costs, in order to remove its objection to the stopping up order.

Conclusion

112. Therefore, even if the Claimants had known of the discrepancy on or after 16 October 2012, I do not accept the evidence of Mr Coppen or Mr Ealey that they would have taken the steps necessary to acquire, and thereafter develop, the Rotherhithe Site from the vendor. Further, the prospect of the Claimants succeeding in acquiring and developing the Rotherhithe Site was fanciful in the circumstances and their claim against the Defendant fails.