Neutral Citation Number: [2020] EWHC 88 (Ch)

Case No: CH-2017-002318

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

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

Judgment handed down at:
Royal Courts of Justice,
Strand, London WC2A 2LL

Date: 27/01/2020

Before :

THE HON MR JUSTICE KERR

- -

Between :

OLIVER DEAN MORLEY t/a MORLEY ESTATES	**Claimant**
- and -	
THE ROYAL BANK OF SCOTLAND plc	**Defendant**

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- -

Hugh Sims QC and John Virgo (instructed by **Cooke Young & Keidan LLP**) for the **Claimant**
Paul Sinclair QC and Natasha Bennett (instructed by **Addleshaw Goddard LLP**) for the **Defendant**

Hearing dates: 28, 30-31 October 2019, 4-15 November 2019

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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.

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The Hon Mr Justice Kerr :

Introduction

1. The claimant commercial property developer claims damages against the defendant bank (the bank, or RBS) arising from the loss in 2010 of part of the claimant's portfolio of commercial properties in northern England, which were charged to the bank in 2006 to secure a £75 million loan. The claimant was unable to repay the debt in full when the loan facility expired in late 2009. By then the value of the portfolio had dropped sharply in turbulent times.

2. The claims are brought in tort and contract. The claimant says the bank breached its duty to exercise reasonable skill and care in the provision of banking services; and that it tortiously intimidated him and subjected him to economic duress by threatening to appoint a receiver who would arrange for the entire portfolio to be transferred in a "pre-pack" sale to the bank's subsidiary, West Register (Property Investments) Limited (West Register).

3. In August 2010, the claimant entered into written agreements with the bank enabling him to salvage a proportion – less than half in value – of the portfolio, for which he paid the bank £20.5 million. The rest of the portfolio was transferred to West Register. The claimant says those agreements (the disputed agreements) can be rescinded on the ground of economic duress. He claims damages of tens of millions of pounds, in tort or in lieu of rescission.

4. The bank denies the claims in their entirety. It argues that the claimant breached the loan agreement in various ways, including by allowing his indebtedness to exceed the permitted level measured by reference to the market value of the secured properties (the "loan to value" covenant). The loan was not enforceable against the claimant personally, only against the properties. Their value fell far below the amount the claimant owed.

5. Thereafter, the bank says, it negotiated to minimise its losses by lawfully proceeding towards enforcing its security. Since the value of the security was substantially less than it was owed, the bank offered to accept less than the full debt in return for release of its security but the claimant failed to produce the sum of just over £70 million the bank required to redeem the portfolio in full.

6. Instead, the bank says, the claimant freely agreed to transfer part of the portfolio to West Register and to acquire the rest of it for £20.5 million, without any wrongdoing. Even if, contrary to the bank's case, it wronged the claimant in any way, it says he cannot prove that any loss was caused by any wrongdoing. The bank says it, not the claimant, is the loser, for it lent £75 million and got back much less.

7. Finally, the bank says that the disputed agreements cannot be rescinded; the claimant has affirmed them. Nor, the bank submits, can damages be awarded in lieu of rescission as a matter of law.

The Facts

8. The claimant's method was to acquire commercial properties with borrowed money, improve them and let them to business tenants, using the rental income to service interest on debt. He had banked with RBS from 1999 to 2005, when he moved to Barclays Bank plc. In 2006, he was wooed back to RBS's Liverpool office by Mr Craig Sneddon, who resumed his role as the claimant's relationship manager. They got on well. Mr Sneddon admired the high occupancy levels the claimant achieved.

9. On 18 December 2006, the parties executed a loan facility agreement (the loan agreement) enabling the claimant to borrow up to £75 million, to refinance the property portfolio, add new properties to it and provide a "bonus payment" to the claimant for his personal use. Both parties were pleased to renew the relationship in this way. The bank put out a press release to mark the occasion. The loan agreement included the following relevant provisions.

10. The term of the agreement was three years. The claimant had to repay the loan in full three years from the first drawdown (clause 5.1). Interest was payable at 1 per cent per annum above the bank's base rate, which then stood at 5 per cent, making interest payable at 6 per cent (clause 3.1). If an "Event of Default" occurred and was not put right, the bank could charge a "default" rate which would be 3 per cent over its base rate (clause 3.3).

11. The claimant had to provide financial statements and quarterly management accounts to the bank relating to the property portfolio (clause 9.3). The rental income had to be "mandated to the Bank" (clause 9.9). The claimant had to ensure that "an interest rate hedging instrument(s) acceptable to the Bank … is entered into and maintained" (clause 9.11).

12. By clause 10, the loan was to be secured by legal charges over the 21 properties then in the portfolio, without personal recourse to the claimant. The bank's recourse was limited to the net proceeds of sale of the portfolio, any liability under the hedging instrument, interest payments and rental income. The bank could not sue the claimant personally for repayment of the loan.

13. Various "Events of Default" were listed in clause 11. They included an interest cover ratio (ICR) requirement: rental income must not be less than 1.3 times interest payable, rising to 1.4 after the first year; and a "loan to value" (LTV) covenant: the amount owing must not be more than 75 per cent of the value of the bank's security, increasing to 80 per cent at certain times. The bank could call in the whole amount owing if an event of default occurred.

14. On 21 December 2006, the claimant entered into a "base rate collar" hedging agreement (the collar), earning the bank some £75,000. This was done through Mr Matthew McConville, who worked for the claimant. The notional amount was £49 million. The period was three years from 31 December 2006. Such hedging instruments were quite common at the time, but no longer are because customers fare badly when (as later happened) interest rates dropped.

15. The detailed terms of the collar are complex and do not matter, though they later generated a dispute. The bank's pleadings include a counterclaim for rectification of

the collar, but that was not pursued at trial. The claimant's liability to the bank would increase or decrease, depending on the movement of interest rates generally. The effect was described thus in a later email (of 8 October 2008) by Mr Tony Bescoby, who sold it to Mr McConville:

> "£49m notional. They have bought a cap at 6.00%. They have sold a floor at 4.83%. If average base rate fixes below 4.83% they will pay the floor rate plus the difference between floor rate and average base rate."

16. About £45 million of the loan monies were used to pay off indebtedness to Barclays Bank plc and the Bank of Ireland. About £10 million was intended for acquisition and development of new properties. Mr Morley personally received some £15 to £20 million for his own use. He was then 35 years old and single. He had worked hard to build up his business and he wanted to enjoy this new, albeit borrowed, personal wealth.

17. Over the following months, he made various purchases, not all owned outright. He invested in a mining enterprise in South Africa. He bought land in the south of France and built a luxury villa there. He bought a yacht and sailed it in the Mediterranean. He maintained residences in the north of England and London. He bought a jet, with a mortgage, and some fast cars.

18. Mr McConville ran the detailed work of the business but Mr Morley kept in touch and liaised with him and Mr Sneddon. In early January 2007, professional valuers valued the 21 properties in the portfolio at £98.45 million. Mr McConville proposed to Mr Sneddon the acquisition of four new properties. Mr Sneddon wrote in April 2007 that the bank remained committed to helping the claimant and his team to meet its business objectives.

19. However, he raised concerns about the cashflow position. The bank's internal reporting system generated "excess referral" reports during the first half of 2007, indicating that the claimant's account with the bank was overdrawn. During the second half of 2007 the bank was recording breaches of the ICR and LTV covenants. Mr Sneddon warned in June 2007 that new business activity would have to be funded from other sources.

20. In July 2007, Mr Sneddon warned that interest payments were falling short of the ICR required level. He proposed waiving the breach of the ICR covenant in return for £10,000 and extending by six months the period for compliance with it. He proposed a £600,000 bridging loan to assist cashflow. Then at the start of October 2007, Mr Matthew Jones, at RBS in Manchester, took over from Mr Sneddon as the claimant's relationship manager.

21. On 10 October 2007, the valuers revalued the 21 properties at £95.77 million, down slightly from the January 2007 valuation. Mr Jones reported internally on or about 18 October that according to the claimant part of the problem was the collar, which due to recent interest rate rises totalling 0.75 per cent, to 5.75 per cent, had added some £180,000 a year to his liability for interest payments.

22. Mr Jones explained to his credit committee that this lack of covenant compliance was preventing further loan drawdowns, leading to "the self-evolving problem with capex having to be put on hold". That in turn was delaying receipt of fresh income into the

portfolio. Mr Jones acknowledged that the collar had "proved inappropriate for their business model."

23. With Mr Jones in place, the bank took a tougher line than in Mr Sneddon's time, as shown in the former's email of 24 October 2007. The bank was no longer prepared to issue "formal waivers" of breaches of covenant in return for payments of £10,000. Mr Jones charged an ad hoc "fee" of £50,000, outside the terms of the loan agreement, for "ongoing support", i.e. in effect as its price for not calling in the loan in response to the breaches.

24. Mr Jones sought information about the position of the portfolio from Mr McConville. It was not fully forthcoming though Mr McConville sent some (not wholly accurate) information in January 2008. The interest payment position was not improving significantly. It was clear that the existing arrangements were not working. Mr Jones consulted his credit committee and on 30 January 2008 emailed Mr Morley and Mr McConville, proposing a restructuring on the following lines.

25. First, the loan facility, then almost entirely drawn down, would be replaced by a £75 million "investment facility". Interest would be payable at 1 per cent over the London Interbank Offered Rate (LIBOR) rather than 1 per cent over base rate. The LTV covenant would be 76 per cent, reducing to 75 per cent on completion of two new developments (Drury Point and Old Boston Trading Estate). The ICR covenant would remain the same but with an extension of time for the increase from 1.3 to 1.4 per cent.

26. Next, the collar would be replaced by a new hedging instrument, a "fixed rate swap" in respect of 100 per cent of the facility, i.e. a notional £75 million, rather than the existing collar covering only a notional £49 million, i.e. 65 per cent of the loan facility. The swap would last for a minimum of two years. The "break costs" of terminating the collar would be "rolled into the new Swap transaction".

27. Separately, a £5.375 million "development facility" would be made available in respect of the two new developments. This, Mr Jones explained, amounted to 70 per cent of the construction and acquisition costs (£7.678 million) of the two new developments. There would be controls and monitoring and valuation processes to keep an eye on costs and the gross development value (GDV) of the properties, with a "loan to GDV covenant" of 60 per cent. Interest would be at 1.25 per cent over the bank's base rate.

28. Mr McConville was reluctant to agree to arrangements he thought would benefit the bank more than the claimant, particularly the change to a LIBOR-based interest rate for the investment facility. However, he needed funding for the two new developments. He felt he had to negotiate. The pressure increased when the bank returned to the practice of charging a "fee" of £5,000 per day in February 2008 because of overdue interest payments.

29. The discussions continued through the first half of 2008. On 22 April, Mr McConville countered with a variation of the bank's proposal, though accepting the principle of separating the investment facility from the development facility. He wanted the hedging instrument to remain at 65 per cent of the investment facility. He accepted the interest rate of 1 per cent over LIBOR. He proposed different terms for the development facility.

30. By the start of July 2008, agreement had not been reached. Mr Jones met Mr McConville on 2 July. Mr McConville had obtained certain funding which had enabled the claimant to become "covenant compliant" again. Mr McConville's view, as he put it in his witness statement, was that the bank should "leave us in peace and let us get on with our business".

31. The bank, however, was not content to do that and on 23 July 2008 wrote formally, threatening to "accelerate the facility", i.e. call in the loan based on past breaches of covenant. The bank was prepared to waive those breaches provided the claimant signed a "supplemental agreement" representing the replacement business terms the bank wished the claimant to accept in place of the existing arrangements.

32. The bank considered whether to impose the 3 per cent over base default interest rate, in response to the breaches of covenant. To do so would, Mr Jones noted, "infuriate" the claimant. On the other hand, while relations had deteriorated, the claimant's business had, in the view of a senior credit manager, Mr Peter Blaney, continued to increase its income and improve its interest cover; the "covenant breaches along the way" could be attributed "predominantly … to a poor hedging strategy".

33. On 30 July 2008, the claimant's solicitors wrote a formal letter of claim threatening to seek an injunction unless the bank withdrew its demands and its threat to call in the loan. An undertaking was sought by 4pm on 1 August 2008. The solicitors' argument was that the past breaches of covenant had been remedied and the contract affirmed by further drawdowns after they had occurred. The past breaches could therefore not justify calling in the loan.

34. A stand-off developed. The bank held back from calling in the loan. There was a meeting on 2 September 2008 and another offer and counter-offer. In robust email exchanges during September 2008, the claimant became personally involved in the negotiations. The tone became more strained and both sides saw the relationship ending once the current facility expired in December 2009; though the claimant at one point suggested extending it by 14 months to March 2011.

35. These exchanges occurred against the backdrop of a volatile and rapidly deteriorating economic climate in the world of banking and finance generally. The collapse of the Lehman Brothers bank in the United States occurred in mid-September 2008, the day the claimant emailed Mr Jones warning that injunction proceedings were "ready and prepared", protesting that his business did not deserve "this constant amount of harassment from their bank" and complaining of "an unjustified attack on one of your success story accounts".

36. In October 2008, Mr McConville asserted that the claimant was "covenant compliant", would see through the rest of the loan facility period and then refinance with a different lender when the loan agreement expired. The bank was concerned that the loan was not good business because of the low interest rate of 1 per cent over the bank's base rate.

37. In October 2008 it was considering seeking updated valuations to "force a breach of covenant", as Mr Blaney put it in an internal email. A regional director, Mr Andrew Mitchell, suggested the bank could make do with charging the default interest rate. In

early October, Mr Bescoby pointed to a fall in base rate to 4.5 per cent, which would increase the claimant's interest costs yet further.

38. In December 2008, Mr Mitchell suggested the claimant might agree to a rate of 2 per cent over LIBOR. The year ended without agreement. The next year began with a revaluation of the property portfolio. According to the valuers, it was now worth only £58.6 million, while the £75 million principal amount owing under the loan agreement was over 125 per cent of that figure. The final valuation, in January 2009, was a bit higher, at £59.4195 million.

39. The claimant suggested to the bank that he could trade out of the difficulties. He met Mr Jones with Mr McConville in about early February 2009. In a more conciliatory vein, he wrote a long and detailed letter to Mr Jones on 11 February, though it was not sent until later that month, in an attempt to rescue the relationship. He emphasised the positive aspects of the business.

40. His proposals for reducing the LTV position to a more acceptable level were based on a proposed participation arrangement whereby the bank would share in improved future asset value, receiving 20 per cent of the "surplus" on a sale or refinance of the portfolio at an appropriate time. He set out a table showing his forecast of predicted future debt against the future value of the portfolio and yields from the properties.

41. His prediction was that the value of the portfolio would be restored to over £77 million by February 2011 and would by then have overtaken the amount of debt owing, predicted at just over £75 million. He proposed "operational savings"; he pointed to past cash injections and anticipated further future ones. He asked, in effect, for more time and for the bank to show forbearance and faith in his ability to recover and trade his way out of the position.

42. On 13 February 2009, the bank notified the claimant of the breach of the LTV covenant consequent on the January 2009 valuation. On 20 February, the bank served a further notice exercising its right to charge interest at the default rate of 3 per cent over its base rate. The claimant wrote back the same day complaining of the bank's "aggressive stance" and that the decision to charge default interest was "creating a situation of mistrust and unease".

43. In the same letter, he reminded the bank that the loan agreement did not allow recourse to him personally and that while he had been considering injecting £900,000 into the business he was concerned that if he did so, it might simply be taken by the bank in part satisfaction of the debt, in the course of a receivership. Unless agreement were reached, the claimant might decide, rather, that he and his management team should relinquish management of the portfolio, leaving the bank to its losses.

44. The bank began to consider internally whether it should transfer the handling of the claimant's account to its then Global Restructuring Group (GRG), whose role was, broadly, to deal with customers whose businesses were ailing. At this time, GRG took on a "shadow" role in observing the various stages in the evolution of relations between the claimant and the bank; but GRG was not in direct contact with the claimant until later that year.

45. Then in late February 2009, the claimant enlisted the aid of Mr Bob Dyson, a respected figure in the property world, then the north west regional chairman of Jones Lang Lasalle, the well known property management company. Mr Dyson became an advocate to the bank of the claimant's cause and a negotiator on his behalf. Both the claimant and the bank hoped his involvement could help improve the chances of a resolution.

46. A dispute then arose in March 2009 over whether the bank was wrongly calculating the interest payments due in respect of the collar. The claimant asserted through his solicitors that an overpayment of just over £289,000 was due from the bank. Pre-litigation correspondence was exchanged. With the dispute unresolved and no agreement in sight, a meeting took place on 16 April with the claimant, Mr Dyson and Mr Jones present.

47. The tone was positive. Agreement in principle was reached that there should be a new three year £75 million loan facility, with interest payments linked to LIBOR and "property participation agreements" (PPAs) in respect of all properties and assets within the portfolio. There was no agreement on how the break of costs of the collar, estimated by the bank at over £2 million, should be "absorbed" into the new loan facility.

48. After consulting internally with Mr Bescoby in relation to the break costs of the collar, and more broadly with Mr Toni Smith of GRG, on 10 June 2009 Mr Jones sent to the claimant, Mr McConville and Mr Dyson the bank's proposed "indicative terms". The amount to be loaned was £76.84 million in a single advance, of which £2.084 million represented the break costs in respect of the collar. The term would be three years, with interest at 2 per cent over LIBOR.

49. The security would be a legal charge over the properties in the portfolio, now 22 in number. A new hedging instrument, acceptable to the bank, at 100 per cent of the amount loaned would be required, as well as PPAs which would deliver to the bank, on expiry, portfolio sale or refinance, 20 per cent of the uplift in value from £59.4195 million or, if higher, the sum of £1 million.

50. Conditions precedent were included, notably the mandating of all rental income to the bank and the provision of annual accounts and quarterly management information about the properties. The maximum LTV was to be 130 per cent, only 1 per cent higher than the then LTV position which stood at around 129 per cent. It was therefore necessary for the value of the properties to rise and not fall. The ICR covenant was to be at 1.5 per cent; rental income had to exceed interest payments by at least half.

51. After some queries were raised by the claimant, Mr Dyson and Mr Jones met on 17 June 2009 and Mr Dyson wrote the next day, responding on the claimant's behalf. He accepted much of the proposal but described it as "singularly too penal" to fulfil both parties' objectives. He sought a reduction in the break costs to £1.6 million, taking account of compromise over the disputed element. He rejected the PPAs as "the killer": they would demoralise the borrower as he would have to increase the value of the portfolio by £21.5 million to repay the debt and pay the bank its share under the PPAs before adding anything to his own equity.

52. Mr Smith of GRG began to consider seriously the possibility of West Register acquiring the whole portfolio in a "pre-pack" receivership. West Register was the bank's

subsidiary vehicle for acquiring secured assets by way of enforcing the security. The claimant was told on 10 July 2009 that GRG was reviewing the file. Mr Smith asked solicitors to quote for a check on the security documentation. GRG ceased its shadow role and from 30 July 2009 took over the handling of the relationship with the claimant.

53. The bank's understanding was that if it were to enforce its security by appointing a receiver to sell the properties on the open market, there would have to be a separate property sale transaction to enforce each legal charge over each individual property. However, the transaction costs of multiple receivership sales could be avoided if the claimant were, instead, to agree to a wholesale collective transfer of part or all of the portfolio to West Register.

54. Mr Smith and others were therefore conscious that there would be a considerable saving in transaction costs if a wholesale transfer could be achieved by agreement with the claimant. Mr Joss Brushfield, a banker at GRG who became closely involved in the matter from about this time, was acutely aware that West Register was not experienced in property management and would be likely to have to appoint a manager of the properties.

55. Mr Brushfield first appears in the documents commenting in an email in August 2009 on the claimant's case as one where "the borrower is toast and is threatening to throw away the keys". He was aware that if West Register acquired the portfolio, it would have the burden of managing it, perhaps for a long time. He decided he did not want West Register to acquire the portfolio and preferred to pursue negotiations with the claimant, as we shall see.

56. Mr Smith was keen to exert pressure on the claimant to repay the debt in full if he wished to avoid losing the properties. He consulted internally in mid-August 2009 about the possibility of taking a second charge over the jet owned by the claimant subject to outstanding payments for which the claimant was seeking an extension of time. This would provide personal recourse against the claimant which under the loan agreement was lacking.

57. Mr Smith met the claimant, Mr McConville and Mr Dyson on 24 September 2009. Mr Smith described the meeting as ending on an "acrimonious" note, as he had expected. Mr Smith conveyed the message that the bank expected repayment of the debt in full by the expiry date of the loan agreement in December 2009, little more than two months away. He told Mr Dyson that the bank would not accept a discounted redemption of less than £70 million.

58. In early November 2009, Mr McConville discussed a strategy with Mr Dyson. The claimant had already made representations to the local MP, Mr Graham Brady, complaining about the bank's conduct. Mr McConville proposed an offer of £65 million by 17 December 2009 as a discounted redemption of the loan, in return for release of the security; or an offer of £70 million with a further extension of three months. Mr Dyson conveyed the offer to Mr Smith.

59. A further meeting was arranged for 10 November 2009, grimly described by a Mr Tim Jones of GRG as "the Morley massacre". Mr Dyson emailed Mr Smith the day before the meeting observing that the focus was likely to be on an extension of time until 31 March 2010 to enable the claimant to raise funds for a discounted redemption at £70

million, rather than the £65 million previously discussed. After the meeting, the claimant wrote to Mr Smith on 18 November, setting out his "full and final offer".

60. The offer was £70 million to be paid by a third party investor called Kaiser Investments (Kaiser), with an extension of time until 21 March 2010. Kaiser was in fact a Turks and Caicos Islands company controlled by the claimant for the purpose of certain of his overseas investments. He asked for one quarter's worth of interest payments to be waived. He also gave his word that if the deal did not complete by 21 March 2010, "the portfolio will be handed back to RBS in a fully functioning and working entity in a consensual manner with all agreements in place and documentation required".

61. After some further telephone calls and emails, the claimant penned a revised final offer sent to Mr Brushfield on 24 November 2009. He described the position as "precarious" due to the risk of losing Kaiser as an investor. The offer was now of £71 million by 31 March 2010, but £660k of it would have fallen due anyway, as it represented a quarterly interest payment. The claimant required the offer to be accepted within 24 hours, after which Kaiser's willingness to fund it would "fall away".

62. Mr Smith spoke by telephone to Mr McConville the next day, saying the bank would accept £70 million as an alternative to acquisition of the portfolio by West Register, but payment would have to be by the end of January 2010 and certain other conditions would have to be met. He relayed this by email to Mr Brushfield the same day, adding the purely figurative observation that if the claimant did not agree to those terms then "its his head on a spike".

63. On 26 November 2009, the bank entered into an agreement with the Commissioners of HM Treasury to join the "Asset Protection Scheme" (the APS; the APS agreement), whose purpose was, in the words of a recital to the accession agreement concluded that day, "to protect certain eligible financial institutions against exceptional credit losses on certain portfolios of assets and exposures".

64. Under the terms of the APS, the Asset Protection Agency, then an executive agency of HM Treasury, worked in tandem with eligible financial institutions including RBS to minimise such losses as far as possible. It is unnecessary at this stage to state at length the functions and activities of the APA. Broadly, the government would underwrite a substantial proportion of losses incurred in respect of "Covered Assets" within the APS.

65. The APA, in return, had authority to impose on eligible financial institutions policies intended to safeguard assets as far as possible and minimise losses. The APA could also grant or withhold consent to transactions that would impact on Covered Assets. The bank therefore considered that it must obtain the consent of the APA to the proposed discounted redemption of the claimant's loan by a payment of £70 million.

66. The head of GRG at the time was Mr Derek Sach, who was called by the claimant. He explained that, at the time, there was a spectrum of views about whether institutions such as RBS faced with distressed assets and potentially bad debts should, generally, lean in the direction of foreclosure, i.e. enforcement of such security as the bank could realise, or forbearance, i.e. granting further time and sometimes further credit to give the borrower an opportunity to recover, thereby enabling better debt recovery in the long term.

67. Each case would turn on its individual merits and on the judgment of the bankers involved and officials at the APA. In December 2009, the claimant's proposal was scrutinised by GRG, which recognised that the consent of the APA would be required for the deal to go through. Mr McConville and Mr Smith discussed the terms of the £70 million discounted buyout of the loan. The climate of the discussions and emails was fraught.

68. Mr Smith met the claimant, Mr McConville and Mr Dyson on 3 December. Mr Smith made clear his anger that the claimant had written to the local MP about the matter. After that, Mr McConville provided Mr Smith with a copy of the correspondence with the MP. It was clearly intended to put pressure on the bank to allow the deal to proceed. Mr Smith warned that the bank still needed a fall back plan to proceed by an insolvency process.

69. He met Mr McConville, with Mr Brushfield, at the bank's London offices on 10 December 2009. Unusually, Mr McConville made a full note of the meeting. Mr Brushfield's theme was to warn that the bank could manage the portfolio for several years until it recovered its value. Mr McConville's note attributes an aggressive tone to Mr Smith and coarse language from him on the subject of whether his managing director (Mr Sach) would accept his recommendation for a proposal to settle at "£71m net".

70. Although Mr Smith denied using such language and Mr Brushfield said he did not recall it, I find it likely that it was used. Mr Smith's denial was unconvincing. However, I do not regard it as particularly significant in the context of stressful negotiations between hardened men of business. I do not think Mr McConville would be discountenanced by such language, though he departed from his normal practice by making a full note in order to record it.

71. He also attributed to Mr Smith a remark he said was made in a lift at the end of the meeting to the effect that he, Mr Smith, had seen the claimant's house in Manchester and there was a building plot next to it. I do not find any sinister or intimidatory meaning in this remark, though I accept it was probably made despite Mr Smith's denial, again unconvincing. The negotiations were at a critical and stressful point, the tempo was swift and the atmosphere strained.

72. No use of robust language prevented the negotiations from continuing, with both sides willing to reach agreement. Mr McConville was pressing for confirmation of the deal by 15 December. On 14 December 2009, four days before the expiry date of the loan agreement, Mr Smith and Mr Brushfield sought approval from Mr Sach for the deal. Mr Sach gave his blessing, writing: "[a]pproved @ £70m plus the mo[ne]y held in escrow re swap".

73. Mr Smith then set about obtaining approval from APA. On 16 December he had a "long chat" with Mr David Skelly of APS Compliance, as he explained to Mr Brushfield in an email. Mr Smith reported that the claimant had found a further £100,000 needed to complete the deal "at a headline number of £71m". Mr Brushfield was impressed, describing Mr Smith as the "negotiation god", but cautioning against asking the claimant for more money.

74. While Mr Sach evidently accepted the benefit of avoiding (in the words of Mr Smith and Mr Brushfield's note) "50 LPA Receiverships with potential subsequent portfolio acquisition by West Register plus insolvency and SDLT [stamp duty land tax] costs estimated at £5m", the APA was guarded. Mr Skelly emailed Mr Smith on 17 December 2009. He did not accept that the matter fell within the scope of the APS which, he said, had not been "triggered". He was accepting the referral on a "notification basis".

75. He pointed out that, unusually, "the borrower is currently performing" and the deal was to proceed by a repayment, though not in full. He regarded the bank as already committed to the deal, since the "key commercial decision" had already been taken (by Mr Sach) on 14 December 2009. He then looked at whether the action now proposed was in the best interests of the bank and therefore HM Treasury, and accepted that it probably was.

76. On 18 December 2009, Mr Smith sent Mr McConville draft heads of terms for the settlement agreement. The claimant had until 31 January 2010 to make the payment of just over £70 million. On 12 January 2010, Mr Smith emailed Mr Brushfield saying Mr McConville was reporting that the "investor" (i.e. Kaiser) had "gone to Aspen", a favourite ski resort in Colorado known to be popular with wealthy individuals. The claimant was, reportedly, in Dubai.

77. Messrs Smith and Brushfield sent the "supplemental facility agreement" to the claimant on 22 January 2010, signed by them the previous day. It extended the loan facility to 31 January 2010 and provided that the bank accepted £70.1 million plus some interest, with a deposit of £2 million, payable in full by 31 January 2010, in full satisfaction of the claimant's obligations under the loan agreement and a consensual handover of the portfolio if payment were not made by that date.

78. Had the claimant signed and returned that agreement, it would have become a binding contract between the parties. The APA had not stood in the way of the deal proceeding. But the claimant did not sign and return it to the bank. He made a written counter-offer through Mr McConville on 29 January 2010. He sought to extend the deadline for payment by two months, until 31 March 2010. He added a clause making a deposit of £2 million in part payment returnable if the deal did not complete.

79. The claimant signed that amended version of the supplemental facility agreement. He was willing to be bound by it. The bank did not countersign and return that version of the agreement. However, the deal remained alive. There were discussions and emails on 8 February 2010 about payment of the £70 million in two tranches, one of £53.3 million by the end of February 2010 and the balance of £17.7 million by the end of March 2010. Meanwhile, the claimant was seeking funding from another bank, HSBC.

80. On 12 February 2010, the claimant signed another amended version of the supplemental facility agreement, with a payment date of 26 February 2010, extendable to 31 March 2010 if the claimant produced evidence of a refinancing package by 25 February. The claimant committed himself, as before, to a consensual surrender of the secured properties in the portfolio if payment of the redemption amount of £70.1 million were not made by 31 March 2010. However, he did not pay the deposit of £2 million.

81. By 9 March 2010, Mr Smith was reporting internally that if the deal should not proceed and the bank needed to take control "via hostile appointment", he would be inclined to use an accountancy firm "on a quasi pre packed basis to West Register with the asset manager appointed and agreed up front for continuity post WR [West Register] acquisition".

82. However, Mr Smith was in email discussions with Mr McConville about "the logistics for debt redemption on the 31st March". At a meeting on 23 March, Mr McConville and Mr Dyson made known that the claimant needed a further month, until 30 April, to find the redemption monies. In return, Mr Smith required the claimant to execute by 31 March an "irrevocable agreement" to transfer the portfolio on 1 May 2010, failing payment by 30 April.

83. In addition, among the six conditions required, the bank would need a deposit of £12.7 million by 31 March 2010 (returnable in the event of transfer of the portfolio), a "[f]ull tenancy schedule" for all the secured properties, including rents, arrears, agreed concessions, committed capital expenditure, rent reviews and unexpired term and any relevant claims, litigation and planning matters, as well as management information for the previous nine months.

84. The claimant objected to the inclusion of the "call option", i.e. the irrevocable agreement to transfer the portfolio in the absence of payment by 30 April 2010. He wrote that he needed to raise £900,000 to complete the deal and was living in rented accommodation with his partner, baby and four dogs. He had disposed of the "toys, trappings and personal assets" of which the bank disapproved. However, the assets declared to HSBC by his solicitors five days earlier recorded ownership of four luxury cars, two boats and (subject to a mortgage) the jet, along with real property and investments in South Africa.

85. By the end of March 2010, the deal remained unsigned, though Mr Dyson commented in an email to Mr Smith that the claimant was "within a hairs breadth of settling in full at the agreed sum of £70.1m plus interest." The claimant did provide the full tenancy schedule the bank had required, among other things, in return for its willingness to extend the time for payment until the end of April 2010.

86. The bank kept in view its alternative plan to appoint a receiver, a Mr Joe Pitt of BNP Paribas, who would straight away sell the portfolio to West Register. Consistently with this twin track approach, the bank produced an "APS Compliance Memo" on 6 April 2010, seeking the APA's view on the proposed discounted redemption of the loan at £70.1 million with an extended deadline of 30 April; and noting the alternative plan to transfer the portfolio on a "pre-pack" basis to West Register.

87. Unfortunately, a fire occurred at Maritime Business Park on 12 April 2010. This was one of the secured properties in the portfolio. The claimant later sought about £4 million from the insurers of the property, who repudiated liability. No insurance monies were ever recovered in respect of the fire. This setback for the claimant came at a difficult time as it diminished the value of the bank's security by several million pounds.

88. On 16 April 2010, HSBC confirmed in writing to RBS that it had approved an advance of £40 million and was considering a further advance of £16.5 million, expected to be available in time for the deadline of 30 April 2010. Mr Morley, however, wrote on 27

April, three days before the deadline, saying he was £600,000 short of what he needed to complete the deal and asking for a loan of that amount secured on his home and repayable within six weeks.

89. On 29 April 2010, the claimant's solicitors sought an extension of 10 working days to complete the deal. The formal funding approval from HSBC was delayed and, when it reached the claimant on 13 May 2010, still subject to formal ratification. The aggregate amount was a little under £52.6 million, though £39.36 million of that was subject to an LTV covenant at 65 per cent in relation to the properties to be secured.

90. On 14 May 2010, RBS sought the views of the APA in a "Compliance Memo" on a yet further extension to 31 May 2010, recommending "approval of extension of period to refinance to 31 May subject to receipt of documentary evidence of the sources of repayment. If client does not comply with terms of refinance then appoint receivers". The APA, through Mr Scott Orr, this time spoke of making a "decision" and in emails of 19 and 20 May sought detailed particulars of the deal, the portfolio and the alternative of receivership.

91. On 24 May 2010, HSBC ratified the loan facility terms offered, subject to "final sign-off" from the Fire Authority concerning the fire insurance claim. Mr Dyson confirmed this news in an email to Mr Smith. He expressed optimism that final "loose ends" could be dealt with the same week and completion could take place.

92. Mr Brushfield, just back from a holiday, was very keen on the deal and, while he respected the personnel at the APA, he was concerned that they did not have understanding and experience of the property development industry. He emailed Mr Orr at the APA on 25 May 2010 to respond to the queries and sing the praises of the deal, which he described as "all the more compelling" because security over one property was defective, while another had burned.

93. He argued in a subsequent exchange with Mr Orr on 27 May 2010, who queried the reliability of information from the claimant about tenants and rents, that the bank had managed to extract "a full tenancy schedule" from him "despite having no rights in the loan documents to do so". This, he said, was "as a result of having the West Register 'Sword of Damocles' hanging over Morley".

94. In oral evidence Mr Brushfield expressed regret at that allusion; probably it did not occur to him that the claimant and the court would ever see the email. The language is mild compared to Mr Smith's. It is arguable that the loan agreement did require the information in the "full tenancy schedule" to be disclosed; but the point is moot because the demand for it was part of Mr Smith's price for extending the repayment date to the end of April 2010.

95. Mr Brushfield was unable to persuade the APA to agree to the deal. Mr Brian Scammell's view in an email of 28 May 2010 was that on the information available, the "Asset Management Objective would be best served by RBS/West Register acquiring the portfolio (excluding the unsecured Haydock asset) for £65.76 million." The Asset Management Objective (or AMO) was defined in the APS agreement as:

> "to maximise the expected net present value of the Protected Assets, including by minimising losses and potential losses and maximising recoveries and potential recoveries."

96. Mr Scammell cited two reasons for his view: unreliable rent information and "the exceptionally high LTV which seems to have been achieved in the refinancing". Mr Brushfield did not agree. He forwarded Mr Scammell's email the same day to Ms Joy McAdam at the bank, commenting that this was "certainly their craziest decision yet…"

97. Mr Phil Pearce of GRG appealed the same day to the executive scheme head of the APS, Mr Donald Workman, who was called as a witness by the claimant. Mr Pearce said there was "no small measure of disbelief" at the APA's decision. Mr Workman offered a meeting the following week, but it is not clear whether anything came of that.

98. Mr Pearce confirmed to Ms McAdam that the bank retained the option of withdrawing the asset from the APS. Mr Smith and Mr Dyson were continuing, at the end of May and the start of June 2010, to deal with the outstanding issue of drawing down the HSBC monies and assignment by RBS to HSBC of the fire insurance claim.

99. On 1 June 2010, Mr Smith reported internally that Mr McConville expected the full £70.1 million funding package to be available later that day. Mr Brushfield and Mr Smith pleaded with personnel at the APA to relent and allow the deal to go through. On Thursday 3 June, their efforts bore fruit: Mr Scammell emailed Mr Skelly bestowing approval on the deal allowing the claimant to redeem the loan at £70.1 million "providing RBS receives those proceeds for value no later than close of business on Tuesday 8 June 2010".

100. The APA's view was that the claimant had an opportunity and the "ball" was "firmly in Mr Morley's court". However, 8 June came and went without the deal being completed. The APA's view as expressed in Mr Scammell's email was that, if the deadline were missed, the bank should "make demand and … [appoint] receivers who will sell the portfolio to West Register on a pre-pack basis…".

101. No specific rationale was cited for the APA selecting 8 June as the turning point; perhaps it was scepticism over whether the claimant could or would want to raise the full £70.1 million to retain control over assets worth much less. Whatever the APA's reasoning, on 9 June 2010 it approved the release of the bank's security for the appointment of receivers and pre-pack sale of the assets to West Register.

102. The same day, the claimant proposed that he should acquire seven identified properties in the portfolio for £40 million. These included Haydock, over which the bank did not have good security; but not Maritime Business Park, where the fire had occurred. The claimant offered a "consensual handover" to RBS of the remainder, which he also offered to manage, subject to conditions.

103. On 15 June 2010, unaware of the APA's veto of the discounted redemption deal at £70.1 million on which so much work had been done, the claimant set out four options in a letter to the bank. He prefaced these by withdrawing from that proposal, describing it as "commercial suicide". The first option was an offer of £64 million for the whole portfolio. The second was the purchase of five identified properties within it for £32 million.

104. The third option emanated from Mr Smith: a three year loan of £61 million, with full personal recourse to the claimant and a cash payment of £14 million, interest at 3 per cent over LIBOR and an LTV covenant of 125 per cent. A hedging instrument for 50 per cent of the loan would be required.

105. The claimant was not interested as the terms would leave him personally exposed. The fourth option was "a consensual handover of the assets covered by the existing facility", with a confidentiality agreement and joint title over the Haydock property, over which the bank held no security.

106. In the letter, the claimant urged a once and for all full and final settlement "[w]hilst conceding that a degree of intransigence on both sides has crept into what has understandably become a protracted negotiation". He emphasised that he had been through a traumatic and emotional three months and expressed the hope that a deal could be reached.

107. At the time these negotiations were going on a general dialogue was being conducted between the bank and the APA, led by Mr Workman for RBS with the participation of others, through various joint committees. I have been shown minutes of these committee meetings, which it is unnecessary to recount in detail. Mr Workman described the impact of the APA's involvement, commenting that they were "clearly an interested party".

108. Mr Workman sent a memorandum to Mr Sach on 17 June 2010, entitled "Summary of Current Position on APS". He noted that 72 cases had been sent to the APA for approval of a proposed arrangement, in only four of which, including the claimant's case, approval had been declined. He commented that the APA wanted the bank:

> "to use West Register to acquire property assets … notwithstanding the commercial judgment in GRG that does not endorse that approach in most instances".

109. Returning to the claimant's position, he wrote on 21 June 2010, ruling out option 1 because the insurers of the Maritime Business Park had declined liability in respect of the fire. He commended his second option (purchase of five properties for £32 million), which still stood. He urged that a deal needed to be agreed in the next week or two; otherwise, he might cease maintaining insurance cover, rent collection and related management services in respect of the properties to be transferred to the bank under option 2. He copied the letter to Mr Graham Brady MP, Mr Dyson and his solicitor.

110. There were discussions about the second option during the rest of June 2010 and into July 2010. A meeting at the offices of Mr David Haffner of Kuits, the claimant's solicitors in Manchester, was fixed for 8 July 2010. The bank had in place a plan for appointment of a receiver and set out thus in an "Asset Purchase Proposition" emailed internally by Mr Brushfield on 8 July:

> "The purchase will be done by way of a pre-pack. The properties will therefore be acquired on the same day as the receiverships. Thereafter, once the asset manager has collated and verified full information on the assets two valuations will be undertaken and if the average of those two valuations is greater than the base price paid (i.e. £65.76m) the Bank [sic] will pay the additional amount."

111. The meeting took place on Thursday 8 July 2010. It was eventually agreed that Mr Haffner's note of it was admissible, although Mr Haffner was not called. I regard his note as substantially accurate. There is no reason why it would not be and nothing said by the three witnesses present, from whom I heard, led me to think it was inaccurate. In addition to Mr Haffner and another solicitor, those present were Mr Smith, Mr McConville and Mr Dyson.

112. My findings are therefore in line with Mr Haffner's note, as follows. Mr Smith began by saying a "split deal", enabling the claimant to keep some but not all the properties in the portfolio, would not work. He said the bank would prefer a consensual handover but was going to do a pre-pack insolvency on the Monday (12 July) unless the consensual deal had been done by then. He added that if that deal was done, the bank would take no action in respect of the Old Boston property, where the bank's security was defective.

113. Mr Smith then handed to Mr Haffner a draft contract for consensual transfer to West Register of the entire portfolio. If the claimant agreed to it, the bank would not appoint a receiver and would pay the claimant a little bit of extra money he could use to pay his unsecured creditors. He then explained that the bank had a valuation of the assets at £55 million. If he paid £65 million, "all he has done is lost 10 million" and "he could even put it at full value because it would make no difference and there would be no loss to the bank".

114. Mr Haffner's note continues, attributing the following to Mr Smith which I accept as an accurate account of what he said:

> "In that way the capital requirements would be reduced by virtue of a sale to West Register as West Register would be a low risk borrower reducing the banks capital requirements and also West would pay a very low rate of interest with a full cash sweep allowing the West debt to be quickly repaid even assuming no capital growth. The way they viewed the assets would mean that West could make a profit in the future and that would be very favourable for the bank."

115. Mr Smith then said that a body called Northern Trust would manage the properties on their behalf, acting for "an LPA receiver". If a consensual deal was done, the Old Boston property issue would need to be resolved and that property handed to the bank, with any insurance proceeds.

116. Discussions followed and "[t]he point was made that this appeared to be working entirely for the banks benefit and in order that the bank could make a profit out of it and that an immediate sale to their own company was unfair". The meeting ended with Mr Smith reiterating that receivers would be appointed on Monday if a consensual deal had not been concluded by then.

117. The next day, Mr McConville travelled down to London for a further meeting, this time with Mr Brushfield present as well as Mr Smith. The purpose was, as Mr Dyson described it, a "last ditch attempt to salvage a deal". Mr Brushfield did not hold out much hope, but still did not want West Register to acquire the portfolio and was prepared to do what he could to prevent that.

118. They discussed a variation of the option 2 proposal: instead of acquiring five properties for £32 million, the claimant would acquire a further two properties, making seven in

all, for £40 million. Mr Brushfield reported afterwards that the offer was "pretty good" but saw "no real reason to treat with them" and noted that the APA's views were "clear and unlikely to change".

119. The claimant then amended his offer on 19 July 2010, proposing to purchase for £17.5 million a reduced part of the portfolio comprising five properties. He developed the offer in a letter of 23 July, expressing keenness to complete the deal and describing his offer as an "on our knees" proposal. Mr Brushfield reported the offer to the APA on 26 July, commenting that it appeared to him a "reasonable bid for the value of the sub portfolio".

120. He would have been prepared to agree £17.5 million as a reasonable price. He reported accordingly to his corporate director, Mrs Lesley Strawbridge. She felt that a further £3 million should be demanded because of the absence of good security over the Haydock property. I infer that she also considered the extra £3 million would be needed to persuade the APA to agree to the deal.

121. The claimant accepted that demand and the price for the five properties, called the "List B" properties, was agreed at £20.5 million. The "List A" properties, i.e. the remainder of those in the portfolio, were to be transferred to West Register voluntarily, by written agreement rather than in a receivership.

122. The claimant's solicitors wrote to Mrs Strawbridge at GRG on 27 July 2010, threatening injunction proceedings if the appointment of a receiver went ahead. Their argument was that any sale of the portfolio to West Register would "fall foul of the rule that a mortgagee cannot sell 'to itself'"; and that a sale could be restrained if the mortgagee did not act in good faith or failed to take reasonable precautions to obtain the best price reasonably obtainable.

123. Mrs Strawbridge emailed the claimant direct the next day saying a decision was awaited on whether the claimant's offer could be accepted and the deadline was extended to 4pm on 30 July, which would leave time for discussions and a possible counter-offer from the bank. Later the same day, she emailed the claimant again stating that the bank would accept £20.5 million for the sub-portfolio of List B properties on a consensual basis. The APA confirmed that it would give consent to that arrangement.

124. Three written contracts were then executed. The first, dated 3 August 2010, was an agreement between the claimant and West Register providing for repurchase of the List B properties for £20.5 million and surrender of the List A properties. The second, of the same date, was a supplemental agreement with RBS whereby the bank agreed to release its security over the List A and B properties and to release the claimant from his obligations under the loan agreement. The third, dated 31 August 2010, was a deed of assignment by the claimant to West Register of rent arrears in respect of the List A properties.

125. It is these three agreements which, the claimant says, were entered into by reason of intimidation or under economic duress. In consequence of that, and alleged earlier breaches of duty by the bank, the claimant claims damages.

The Causes of Action

Alleged breaches of duty by the bank

126. In considering the claimant's causes of action, I will follow approximately the order of the claimant's lengthy written closing submissions, though in less detail and without reciting all the numerous authorities cited to me by both parties.

127. The claimant relied on breaches of three duties: a duty (in tort and in contract) to provide banking services with reasonable care and skill; a duty owed in contract to act in good faith and not for an ulterior purpose unrelated to pursuit of the bank's legitimate commercial interests; and a duty owed in the capacity of mortgagee to sell mortgaged assets in good faith and to take reasonable steps to obtain the best price reasonably obtainable.

128. The first of these is the duty to provide banking services with reasonable skill and care. The duty is founded on section 13 of the Supply of Goods and Services Act 1982 and, in tort, on the House of Lords' decision in *Hedley Byrne & Co v. Heller & Partners Ltd* [1964] AC 465 (per Lord Morris at 502-503).

129. The claimant submitted that the standard of care normally includes compliance with relevant regulatory rules (per Beatson J, as he then was, in *Shore v. Sedgwick Financial Services Ltd* [2007] EWHC 2509 (QB) at [161]); but that the content of the duty is "fact specific".

130. Here, Mr Hugh Sims QC argued, the bank must supply lending services during the period of the loan agreement, as extended, honestly, fairly and professionally in accordance with the claimant's best interests, managing conflicts of interest fairly; so as not to frustrate the claimant's compliance with his obligations under the loan agreement; and in compliance with its own policies and procedures, particularly in relation to the activities of GRG.

131. Breach of that duty is asserted in a 23 page passage in the claimant's written closing submissions. Paraphrasing as best I can, the claimant says the bank's aim was to engineer a default by the claimant to get its hands on the property portfolio. In pursuit of this aim, the bank exerted pressure on him to pay a higher rate of interest; charged default interest at 3 per cent over its base rate; and obtained a valuation to "force" a breach of covenant.

132. The claimant says the bank bullied the claimant through Mr Smith, threatening to ruin a healthy business by receivership and a pre-pack sale of the portfolio and using that threat to seize the portfolio. It is said that Mr Brushfield was "corrupted" by Mr Smith when the former's efforts to obtain a sensible outcome failed; the "dominant shaping force of events in 2010" were Mr Smith and the APA.

133. The claimant makes detailed criticisms of the various stages of the negotiations to restructure the lending in 2008 and 2009. He painted a picture of Mr Smith as a man "whose intentions were destructive and appreciated by him to be unlawful", effectively submitting that he set out to destroy the claimant's business and, if necessary, personally bankrupt the claimant or at least threaten to do so.

134. The claimant relied on what he said were threats of unlawful acts made by Mr Smith at the meeting on 8 July 2010 and on the conduct of the APA and Mrs Strawbridge in seeking an additional £3 million pounds for the List B properties. He relied on Mr Brushfield's willingness to accept the lower amount. These matters are, it is said, instances of failure to meet the required standard of care and skill in the provision of lending services.

135. The claimant submits that, but for those breaches of the duty to exercise reasonable skill and care, he would not have entered into the disputed agreements, thereby suffering losses; which losses, he submits, are recoverable as damages for breach of the duty.

136. The bank did not dispute the existence of the duty to exercise reasonable skill and care in providing lending services. Nor did it dispute that in measuring compliance or otherwise with the duty, the court can refer to relevant regulatory standards. Mr Paul Sinclair QC submitted, however, that the bank's internal policies and procedures were not relevant to the required standard of care. These are specific to an individual organisation and may be mere aspirations or a counsel of perfection.

137. The bank denied any breach of the duty; it exerted legitimate pressure in the course of normal commercial relations and negotiations with a counterparty who knew well how to negotiate and who "gave as good as they got". The bank, Mr Sinclair argued, tried in good faith and in difficult circumstances, against a falling and failing property market, to reach agreement on a restructuring. The attempt to cast Mr Smith in the role of "evil movie villain, with a personal vendetta against Mr Morley", was unfounded.

138. The problem lay in the claimant's failure to raise enough funds to buy out the portfolio. Mr Brushfield, in particular, did not want West Register to acquire the portfolio. Nor did the bank surrender its commercial interests to the different views of the APA. The latter was persuaded to accept the claimant's buy out of the portfolio. It was the claimant who pulled out of the deal by withdrawing, on 21 June 2010, his offer of discounted redemption.

139. Even if the influence of the APA had been malign and the bank had acted with the aim of pleasing the APA to the claimant's prejudice, the bank's motive would not be sufficient (outside the bounds of the tort of conspiracy, not in play here) to fix it with liability, since an actor's motive is not material to liability; the question is whether the conduct is wrongful, not what the motive was (*Allen v. Flood* [1898] AC 1, per Lord Herschell at 123-4).

140. The bank also submitted that even if it had breached the duty to use reasonable skill and care, the breach did not cause the claimant's decision to enter into the disputed agreements. The specific breaches of duty alleged, such as obtaining the January 2009 valuation and GRG failing to discharge the business "turnaround" standards it set itself, were not the reason the claimant decided to enter into those agreements; he would have done so anyway.

141. The second duty relied on is to act in good faith and not for a purpose unrelated to the bank's legitimate commercial interests: *Property Alliance Group Ltd v. Royal Bank of Scotland plc* [2018] 1 WLR 3529, at [169] in the judgment of the court. It was there held that a power to obtain a valuation could be exercised in the bank's interest, without

balancing it against the customer's, but not so as to "vex [the customer] maliciously". The power could not be exercised:

> "for a purpose unrelated to its legitimate commercial interests or if doing so could not rationally be thought to advance them".

142. The claimant also relied on decisions of Leggatt J (as he then was) and Leggatt LJ (as he had by then become) identifying a category of "relational" contracts, requiring a high degree of co-operation, communication and confidence between the parties; suggesting that "traditional English hostility towards a doctrine of good faith in the performance of contracts … is misplaced" (*Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] 1 Lloyds Rep 526 at [153]) and rejecting any "simple dichotomy between relationships which give rise to fiduciary duties and other contractual relationships" (*Sheikh Tahnoon Al Nehayan v. Kent* [2018] EWHC 333 (Comm) at [167]).

143. Mr Sims submitted that the loan agreement, as extended, had "characteristics redolent of a joint venture or long term relational contract". He pointed to the absence of personal recourse to the claimant, in whom trust was therefore reposed; to the intention that further properties would be developed, to the financial advantage of the bank as well as the claimant; and to the requirement of a hedging instrument, intended in principle to protect both parties against the impact of interest rate changes adverse to them.

144. The power to call for a revaluation of charged assets was, said Mr Sims, implicitly limited by "concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality" (*Socimer International Bank Ltd (in liquidation) v. Standard Bank London Ltd* [2008] Lloyds Rep 558, per Rix LJ at [66]). So was the power to vary interest rates, which must not be set dishonestly, for an improper purpose, capriciously or arbitrarily (*Paragon Finance plc v. Nash* [2002] 1 WLR 685, per Dyson LJ at [36]).

145. The claimant asserts four breaches of the bank's implied duty to act in good faith. First, he says the bank manufactured a dispute about the ICR covenant by deliberately including interest payable under the collar for the purpose of measuring compliance, and then imposing the default 3 per cent over base interest rate "as a means of '*infuriating*' him into agreeing a financial restructure on terms favourable to the bank".

146. Secondly, the claimant accuses the bank of obtaining the January 2009 revaluation to "force" a breach of the LTV covenant, to exert further pressure. Third, the claimant relies on the making of threats to impose a pre-packed sale of the portfolio to West Register unless the claimant agreed to hand it over voluntarily. Fourth, he says the bank refused to accept his buyout offer of £71 million "in a timely manner" and then rejected revised offers of £32 million, £40 million and £17.5 million respectively.

147. The claimant again argues that, but for these breaches of duty, he would not have entered into the disputed agreements and that the breaches sound in damages.

148. The bank acknowledged that Leggatt LJ's category of "relational" contracts had gained traction through subsequent judicial statements but pointed to Fancourt J's admonition in *UTB LLC v. Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [202] that "not all long term contracts that involve an enduring but undefined, cooperative relationship between

the parties … will, as a matter of law, involve an obligation of good faith". The question is (*ibid.* at [203]):

> "whether a reasonable reader of the contract would consider that an obligation of good faith was obviously meant or whether the obligation is necessary to the proper working of the contract".

149. Mr Sinclair acknowledged, also, the implication of good faith where a contractual discretion is exercised; but insisted that the law observes a distinction between such a discretion and a decision whether to exercise an absolute contractual right. The calling in of a loan is an instance of the latter, not the former, he reminded me (*UBS AG v. Rose Capital Ventures Ltd* [2018] EWHC 3137 (Ch), per Chief Master Marsh at [56]).

150. The bank denied that the loan facility was an arrangement exhibiting the features of a relational contract of any kind. The term was only three years. The claimant could have repaid it in full at any time. The parties did not have to collaborate to perform their obligations. There was no joint participation in profits from any new property developments. The traditional tests for implying terms had not been displaced and were not met here.

151. The bank's right to call for a valuation of the assets, Mr Sinclair acknowledged, had to be exercised for legitimate commercial purposes and not for the purpose of vexing the claimant maliciously. The right to enforce the bank's security, by contrast, was an absolute contractual right and not a discretion and could not be the subject of any obligation of good faith.

152. Mr Sinclair submitted that the bank did not exercise the contractual discretion to obtain the January 2009 valuation in order to vex the claimant maliciously, but to confirm its entitlement to take enforcement action and thereby enhance its negotiating position in the restructuring discussions. That was a legitimate commercial purpose.

153. Communicating an intention to appoint a receiver if agreement could not be reached was also legitimate; the bank had an absolute contractual right to do so. If it could do so, it could also say it could do so. Nor was it wrong for the bank to reject the bids of £40 million and £32 million, nor to ask for £20.5 million, rather than £17.5 million, for the List B properties comprising the rump of the portfolio purchased by the claimant.

154. Mr Sinclair said the bank was entitled to charge the default interest rate because the claimant was in breach of the ICR covenant; though I am not clear whether he says the claimant was in breach of the covenant even if interest owed pursuant to the collar is disregarded, as the claimant says it should be. In any case, Mr Sinclair submits that the collar dispute was not subject to any good faith obligation and was not manufactured to "infuriate" the claimant.

155. Finally, the bank repeats its denial, in the alternative, that any breach of this second duty was the effective or dominant cause or a sufficiently substantial cause of any loss to the claimant: he would have entered into the disputed agreements even without the breaches on which he relies, since he lacked access to the funds he needed to have any other practical options.

156. I come to my reasoning and conclusions on the claim for breaches of the first two duties relied on. I consider first the scope of the two duties on which the claimant relies. I agree that the bank had to exercise reasonable skill and care in providing lending services to the claimant and that compliance with regulatory standards would be relevant to whether the duty was breached. That is not controversial.

157. I do not, however, accept that compliance with the policies and procedures in GRG's internal procedures manual is to be treated in the same way as compliance with rules setting professional standards across a trade or profession. The latter are evidence of what reasonable people in the trade or profession would expect of its members and, therefore, evidence of what the public should be entitled to expect. The former are evidence only of what a particular organisation requires of itself.

158. The standards which an organisation sets itself, by means of written policies and procedures, may or may not have much probative value in indicating what the required standard of care is and whether it was met. They may accurately replicate industry wide professional standards. Or they may be strategies adopted for internal purposes which have little to do with the standard of care required. Much depends on the facts.

159. I paraphrase the second duty relied on as a duty to act honestly and in good faith. I reject Mr Sims' argument that the loan agreement, as extended several times, was a "relational" contract of any kind. It was an ordinary loan facility agreement. The contractual discretions it conferred on the bank had to be exercised in the manner identified in the judgment of the court in the *Property Alliance Group* case, not so as to vex the claimant maliciously, nor for purposes unconnected to the bank's commercial interests.

160. Mr Sinclair is right to say that the decision to call in the loan was a contractual right and not a discretion. There were two relevant contractual discretions: the bank's power to obtain a revaluation of the charged assets; and its power to charge a default interest rate, expressed as 3 per cent over the bank's base rate. These discretions had to be exercised for purposes rationally connected to the bank's commercial interests and not so as to vex the claimant maliciously.

161. I do not accept the claimant's suggestion that the subordination of the bank's commercial judgment to the diktat of the APA affected the execution of the bank's duties to the claimant. If the APA required the bank to treat the claimant unlawfully, the claimant might have a remedy in tort against the APA (which is not sued in these proceedings), but the bank would be as much liable as if it had acted without APA influence. Conversely, if the bank's treatment of the claimant was lawful, the APA's influence does not make it unlawful.

162. Applying those propositions to the facts, I begin with some general observations about the relationship between the parties and the way it developed. The terms of the loan agreement of December 2006 represented a good bargain from the claimant's point of view. He was not personally at risk of having to pay back the principal amount loaned. The interest rate was relatively low and he gained access to up to £75 million of the bank's money.

163. I infer that these terms, favourable to the claimant as they were, reflected the bank's desire to lure the claimant away from his then current bankers. However, the bank's

security turned out to be grossly inadequate. The sharp drop in commercial property values during 2008 destroyed the sufficiency of the bank's security cover. The loan became a potential bad debt and the bank naturally became increasingly anxious to do something about it.

164. The hedging instrument, i.e. the collar, contributed to the worsening of commercial relations between the parties when changes in interest rates increased the cost to the claimant of making interest payments under the collar. The claimant became a passionate enemy of such hedging instruments, describing them in oral evidence as "financial death". However, he did not resist the bank's requirement to enter into the collar.

165. A dispute about the amount payable under the terms of the collar developed. It exacerbated already strained relations between the parties. I reject the suggestion that the bank manufactured that dispute to create an artificial breach of the ICR covenant. The bank charged the interest it believed it was entitled to under the collar, rightly or wrongly.

166. One aspect of the dispute was how much was payable and whether repayment of an overpayment was due to the claimant. Another was whether the bank was wrongly including interest payable under the collar for the purpose of measuring compliance with the ICR covenant.

167. These issues were secondary to the underlying problem which was that the market valuation of the security dropped so low that the claimant had no prospect of avoiding an "Event of Default" in the form of a breach of the LTV covenant. Since he owed the bank about £75 million which could only be recovered against properties worth less as time went on, it would be unrealistic to expect the bank to do nothing to improve its deteriorating position.

168. The hardening of the bank's attitude when Mr Jones took over from Mr Sneddon coincided with the downturn in its fortunes vis-à-vis the claimant and generally. The claimant had no legitimate expectation, still less any legal right, to expect that it would behave in the same way in 2008 as it had done in late 2006. Times were changing and the terms of the loan agreement looked increasingly like a bad deal for the bank.

169. The bank sustained substantial losses in 2008 and 2009, to the point where public funds were committed to propping it up, through the APS agreement, administered by the APA on behalf of the taxpayer. Although the terms of the APS agreement and the role of the APA in the claimant's case were unknown to the claimant at the time, he was as aware as everyone else in property and banking of the deteriorating business environment.

170. The bank's attempts to agree a restructuring of the claimant's loan facility in 2008 and 2009 have to be seen in that context. The pressure it exerted on the claimant was considerable. However, the loan agreement included a "bonus" payment of some £15 to £20 million for use by the claimant personally, after paying off other debts and allowing funding for further developments.

171. With £15 to £20 million at his disposal, the claimant was not a poor man. He might well be thought able to pay a higher rate of interest and to meet his obligations under

the collar, unsuited though it was to his business model. He had no right to assume that funds allocated for his personal use would be protected or insulated. The bonus payment was his, but subject to his obligation to repay it and about £50 million more to the bank.

172. The claimant evidently decided to part with the bonus payment fairly quickly, leaving it unavailable. He did not put any of it aside for a rainy day. He spent it on South African mining investments, property, cars, a yacht and a jet. These assets turned out not to be very liquid when the impact of the downturn hit home. As the claimant said in evidence, no one was buying yachts or lending much against properties in 2010.

173. If the claimant had kept as little as £5 million in reserve, he could probably have completed the discounted redemption deal and retained ownership of the whole portfolio, while repaying the bank about £5 million less than he had borrowed. That deal was not blocked by the APA. Instead, he withdrew from it, deciding it was "commercial suicide". His chance of salvaging the portfolio thereafter lay in persuading the bank to prefer forbearance to enforcement.

174. The bank, for its part, had for some time been balancing the pros and cons of forbearance and negotiation, on the one hand, and foreclosure and enforcement, on the other. The APA was pulling the bank in the direction of the latter. The commercial judgment of Mr Brushfield, Mr Workman and, to a lesser extent, Mr Smith, favoured the former. The tension between these two approaches is a normal fact of commercial life.

175. But the tension was more acute than usual in those turbulent economic times. It produced the bank's "twin track" approach, balancing day by day the advantages of a buy out by the claimant against a buy in by West Register. Subject to the propriety of a pre-pack sale to a subsidiary rather than open market property sales, there was no reason why the claimant should expect anything different from the bank.

176. In the light of those background facts, I return to the alleged breaches of the first and second duties. I will start with Mr Smith. He is a tough man who negotiates in a blunt and robust way and speaks his mind pithily and at times coarsely. His phrasing could be more elegant. He had little time or concern for a nurturing approach to the claimant's business. He wanted to get back the money the bank had lent, or as much of it as he could.

177. He had no understanding or knowledge of the GRG procedures manual. He regarded GRG's involvement in the claimant's case as appropriate for reasons that were straightforward: the bank's security was inadequate, the loan could turn out to be bad and the relationship was poor and getting worse. He would not have been interested in the claimant's "PD" (probability of default) rating, which Mr Sims says was exaggerated.

178. The claimant criticises the use of GRG for giving precedence to enforcement of security over rehabilitation of ailing businesses, rather than the other way round as set out in GRG's internal policies and procedures manual. The claimant also says that his business was not in trouble; it was sound and performing well and his PD rating was deliberately set too high.

179. I think these criticisms are much overstated. It is artificial to say that the business was performing satisfactorily and to blame all the claimant's woes on the hedging instrument and the disputes that arose in respect of it. The bank's requirement to inject some urgency into the restructuring negotiations and to consider enforcement action was no less real merely because tenants were paying their rent on time and occupancy rates were good.

180. Mr McConville's wish that the bank would leave the claimant in peace to run his business is understandable. A different bank with a more long term view and a less acute liquidity problem of its own might have been willing to do so. But the bank was not bound to do so. It was entitled, also, to take account of its duties under the APS agreement, even if that meant modifying its commercial judgments, provided it did not thereby wrong the claimant.

181. In the provision of lending services to the claimant, the bank was not bound to protect the claimant against the consequences of breaching the LTV covenant and to stay its hand and refrain from exercising its contractual rights in response. It is no answer for the claimant to plead, as he does, that the drop in the market value of the properties was a matter beyond his control.

182. I do not find the bank at fault in the conduct of the restructuring negotiations. They were at arm's length and commercial. Mr McConville and the claimant required no lessons in commercial negotiation. The bank's duty of skill and care did not require it to negotiate the restructuring any differently from the way it did so. It was not required by its duty to the claimant to advise him how to resist its attempts to get more money out of him.

183. I reject also the claim that the bank's aim was to engineer a default by the claimant to enable it to seize the property portfolio. The bank did not need to engineer any "Event of Default". The plain breach of the LTV covenant was such an event.

184. I reject also the suggestion that the LTV covenant breach was manufactured. The claimant points to the phrase "force a breach of covenant" to portray the obtaining of the January 2009 valuation as a wrongful exercise of the bank's contractual power to do so. That is misplaced. The obtaining of the valuation was not a wrongful act. The breach did not occur when the valuation was received. It had already occurred. The valuation merely evidenced it.

185. Nor do I accept that the bank's decision to charge the default interest rate of 3 per cent over base was a wrongful exercise of the contractual discretion to do so. Mr Jones recognised that this would "infuriate" the claimant but that does not support the claimant's contention that the default rate was imposed with the specific intention of infuriating him, as Mr Sims submitted.

186. The initial rate of interest was low (1 per cent over the bank's base rate) and favourable to the claimant. He accepts that interest rate cuts were causing the bank to lose money from the deal. The decision to raise the rate to the default rate was rationally connected to the bank's commercial interests. There was no breach of the duty to exercise the contractual discretion properly.

187. I do not accept that the claimant was bullied by Mr Smith by threats to wreck his business and personally bankrupt him; nor that Mr Brushfield was corrupted and led astray in the direction of endorsing a pre-pack sale of the portfolio, against his better judgment. Mr Brushfield was a strong character; he stood up to the APA and helped to reduce the chances of the receivership and pre-pack sale favoured by the APA.

188. Finally, I see no breach of the duty to exercise reasonable skill and care in the bank's rejection of the claimant's various offers (respectively of £40 million, £32 million and £17.5 million) and to settle at £20.5 million for the rump of the portfolio even though Mr Brushfield would have accepted the offer of £17.5 million. The bank was entitled, as a matter of commercial judgment, to reject the first two offers.

189. In relation to the last offer which led to the disputed agreements, the bank properly held out for a higher price than the £17.5 million offered and its judgment was vindicated when that offer was accepted. The claimant was able to raise the additional £3 million. It is unreal to say that securing the price rise of £3 million was a negligent provision of lending services.

190. For those reasons, breach of the duty to exercise reasonable skill and care is not made out. The bank's provision of lending services did not fall below the standard required.

191. As for the second duty relied on, by the same reasoning I reject the submission that the obtaining of the revaluation received in January 2009, the charging of the default interest rate or the manner in which the negotiations were conducted, were acts done in order to vex the claimant maliciously. All the bank's actions were rationally connected to its commercial interests. I reject the claim for breach of the second duty by the same reasoning as in the case of the first duty.

192. As noted above, the claimant also relies on a third duty owed by the bank in its capacity as mortgagee of the charged assets. The claimant says the bank threatened to breach that duty by appointing a receiver to sell the whole portfolio on a pre-packed basis to West Register.

193. There are two aspects to the complaint. The first is that the sale would not have had the character of an arm's length transaction between commercial parties independent of each other; any receivership should have proceeded by way of open market sale of the properties. The second is that the threat not to place them for sale on the open market was a threatened breach of the duty to take reasonable steps to obtain the best price reasonably obtainable.

194. The bank denies threatening to breach the duty it owed as mortgagee. It was entitled, it says, to plan a pre-pack sale to West Register by a receiver appointed for the purpose. The claimant had no interest in the proceeds of any sale because it was not conceivable that open market sales would raise more than the £75 million (plus some interest) he owed. The pre-pack sale would be to a separate entity, would not be at an undervalue and had the virtue of saving transaction costs running into millions of pounds.

195. I do not think this issue has any bearing on the outcome of the claims for breach of the first two duties, which I have just rejected. I regard the third duty as relevant to the claims for damages founded on the tort of intimidation and on economic duress, to which I now turn.

Alleged intimidation and economic duress

196. I consider these two grounds of claim together because they overlap substantially both in law and in fact. The claimant asserts that the disputed agreements were procured by threats amounting to the tort of intimidation, sounding in damages; or that they were entered into under economic duress and liable to be set aside; and that the court has power to award, and should award, damages in lieu of rescission of those agreements.

197. The claimant relies heavily on alleged threats by the bank to breach its duties as mortgagee of the properties in the portfolio, to which I have just referred. His submissions start with the uncontroversial proposition that a mortgagee must, in selling the security, obtain the best price reasonably obtainable (*Cuckmere Brick Co Ltd v. Mutual Finance Ltd* [1971] 1 Ch 949, per Salmon LJ at 968H-969A; per Cairns LJ at 978A-B).

198. Mr Sims submits, next, that a mortgagee cannot sell to itself, nor to a subsidiary if there is no real independently conducted negotiation between the mortgagee and the subsidiary. He cites the speech of Lord Templeman giving the judgment of the Privy Council in *Tse Kwong Lam v. Wong Chit Sen* [1983] 1 WLR 1349, at 1355F-G. Where there is a sale to a connected party, there is a "heavy onus" on the mortgagee to show that it acted fairly to the borrower.

199. The claimant says that the mortgagee's duties of good faith extend to acts preparatory to the exercise of a mortgagee's power of sale and that, in any case, a threat to sell the mortgaged property in a manner that will necessarily breach the mortgagee's duties is a threat to commit an unlawful act. The claimant charges the bank with breaches or threatened breaches of its duties *qua* mortgagee in the following respects.

200. First, it is said that the pre-pack sale would in substance infringe the rule against self-dealing. There was no real separation between West Register and the bank. They were treated as a single economic entity, staffed by employees working for the same organisation. There was no disclosure on the subject of how the properties would be paid for by West Register. The payment would probably be a mere accounting exercise rather than a real transfer of value.

201. Further, Mr Sims argues that the bank's duty to obtain the best price reasonably obtainable was owed to the claimant as a person "with an interest in the equity of redemption", as a matter of principle, whether the borrower's interest lies in reducing exposure under a personal loan, or in "the prospect of a return of equity", in the case of a non-recourse loan such as this one.

202. The claimant says the bank made no serious attempt to ascertain the market value of the properties whether individually or if sold as a package. The state of the market was such that there were few "comparables". That made it all the more necessary to seek an updated valuation, which was not done, and to place the properties on the open market, which was not done either.

203. Mr Sims referred to the analysis of Jacobs J, sitting in the High Court of Australia in *Australia & New Zealand Banking Group Ltd v. Bangadilly Pastoral Co Pty Co Ltd* [1978] HCA 21, (1978) 139 CLR 195, at [3]:

> "… when there is a possible conflict between that desire [to get the best price reasonably obtainable] and a desire that an associate should obtain the best possible bargain the facts must show that the desire to obtain the best price was given absolute preference over any desire that an associate should obtain a good bargain. When those circumstances exist it may not be sufficient that steps are taken in the conduct of the sale which would suffice to support the validity of the sale when there was no conflict of interest. The steps taken or not taken in the conduct of the sale cannot be considered separate from the conflict of interest."

204. It is contended for the claimant that the bank cannot show that it did not give precedence to the interest of West Register as buyer. It took no advice on whether to sell each property separately or to sell them in groups. The threat to sell the whole portfolio to West Register without independent advice or an updated valuation was a manifest threat to commit an unlawful act, i.e. to breach the bank's duties as mortgagee.

205. Turning to the tort of intimidation, the claimant refers to Longmore LJ's recent statement of the elements of the tort in *Berezovsky v. Abramovich* [2011] 1 WLR 2290, at [5]: there must be a threat to do something unlawful or "illegitimate"; it must be intended to coerce the claimant to take or not take certain action; the threat must in fact coerce the claimant to take (or not take) that action; and damage must be incurred as a result.

206. Mr Sims also referred to Dyson J's (as he then was) formulation of the elements of economic duress, drawn from earlier authority, in *DSND Subsea Ltd v. Petroleum Geo-Services ASA* [2000] BLR 530, at [131]. There must be pressure to enter into a contract with the practical effect of compulsion or a lack of practical choice, which is "illegitimate" and is a significant cause inducing the victim to enter into the contract.

207. Dyson J referred to a "range of factors" used to determine whether conduct is "illegitimate", including any actual or threatened breach of contract; good or bad faith; whether the victim had any real choice; whether the victim protested at the time and whether he affirmed or sought to rely on the contract. Dyson J noted that conduct which is "illegitimate" must be "distinguished from the rough and tumble of the pressures of normal commercial bargaining".

208. Mr Sims submitted that the threatened conduct could be "illegitimate" even if lawful, if it was not "morally or socially acceptable", in Steyn LJ's phrase in *CTN Cash and Carry Ltd v. Gallagher Ltd* [1994] 4 ALL ER 714, at 719. It was enough if the claimant's will was "deflected"; it was no longer necessary to show that his will had been "overborne" if he faced "a choice between two evils" (*Lynch v. DPP of Northern Ireland* [1975] AC 653, per Lord Simon (dissenting) at 690-691, a case on duress as a defence to murder).

209. As to the facts, Mr Sims submitted that the bank set out to exploit the claimant's difficulties obtaining funds from other sources. The threats began during the negotiations, from November 2009 and continuing into 2010. Mr Smith, he submitted, made specific threats at the meeting on 8 July 2010 and the bank effectively repeated them on 26 July when sending out demand letters. The specific threat was to "expropriate the portfolio by a pre-pack disposal directly to West Register".

210. That, said Mr Sims, was a threat either to do an unlawful act or to do an illegitimate act, even if it was not an actual breach of the bank's duty *qua* mortgagee. There was a plain

breach of "reasonable commercial standards of fair dealing" and a breach of the regulatory requirement of the Financial Conduct Authority to act honestly, fairly and professionally in accordance with the client's best interests, to conduct its business with integrity, observe proper standards of market conduct and manage conflicts of interest fairly.

211. Mr Sims submitted that the threats did coerce the claimant, who gave in to the threat by agreeing to part with the portfolio, albeit that he was able to hang on to a small proportion of it. The effect of the threats was that he began a frantic quest to raise funds, attempting to mortgage his home, his yacht and an Italian sports car. He would not have entered into the disputed agreements had it not been for the bank's threats to carry out the unlawful or at least illegitimate act of disposing of the entire portfolio to West Register.

212. The claimant was therefore entitled to damages for the tort of intimidation. As for economic duress, the claimant says he is entitled to damages or equitable compensation in lieu of rescission, which is available "even where the right to rescind is not available, and may have been lost". For this proposition, the claimant relies on a passage in Snell's Equity, 33rd edition at 20-048, which corresponds to 20-046 in the 34th edition (footnotes omitted):

> "The circumstances conferring a right to rescind may also give rise to a right to claim damages or equitable compensation. In such cases the right to rescind is independent of, and cumulative with, the right to reparative relief. The claimant may claim rescission or damages or both, and they may sue for damages or equitable compensation even if they affirm the contract or if rescission is otherwise barred…. ."

213. That passage ends with what is now footnote 154, citing two English cases including *Houldsworth v. City of Glasgow Bank* (1880) 5 App Cas 317, at 338 (Lord Blackburn), and an unreported 2012 decision of the Grand Court of the Cayman Islands. *Houldsworth* was a case of share purchase induced by fraud by the bank from which the shares were purchased. The right to rescission had been lost as against the bank because it had gone into liquidation. The purchaser was held to have no right of action against the liquidator.

214. Mr Sims argued that while damages in lieu of rescission are a matter for the court's discretion and are subject to the usual equitable bars, including laches, there was no reason not to allow the damages remedy here. The equitable jurisdiction is now in section 50 of the Senior Courts Act 1981 (formerly section 2 of Lord Cairns' Act, the Chancery Amendment Act 1858). There is no need to include in the proceedings a claim for the equitable relief (such as injunction or specific performance) in lieu of which damages are awarded.

215. For the bank, Mr Sinclair submitted that economic duress cannot be committed where a threat is made to do an act which is lawful unless the person making the threat acts in bad faith; see *Times Travel (UK) Ltd v. Pakistan International Airlines Corporation* [2019] 3 WLR 445, per David Richards LJ, who disagreed (at [101]) with Steyn LJ's test of "whether conduct is morally or socially acceptable" and held at [105] that:

> "… the doctrine of lawful act duress does not extend to the use of lawful pressure to achieve a result to which the person exercising pressure believes in good faith it is entitled … whether or not, objectively speaking, it has reasonable grounds for that belief."

216. Further, said Mr Sinclair, the economic pressure must (unlike in cases of threats of violence) have been a "significant cause", not merely "a reason" for the claimant's decision to enter into the disputed agreement: *Dimskal Shipping Co SA v. International Transport Workers' Federation* [1991] 2 AC 152, 165; as explained by Mance J (as he then was) in *Huyton v. Cremer* [1999] 1 Lloyds Rep 620, 636, setting as a minimum a "but for" test whereby the illegitimate pressure must have "actually caused" the making of, or the terms of, the contract; the pressure "must have been decisive or clinching".

217. The bank further relies on what Mance J said later, at 636 and 638, that relief may not be appropriate if the party subject to the pressure to enter into a contract decides not to pursue alternative legal redress reasonably open to him, to make no protest and to conduct himself in a way "which showed that, for better or worse, he was prepared to accept and live with the consequences, however unwelcome".

218. Mr Sinclair submitted that a contract entered into under economic duress is voidable and can be rescinded but not if the innocent party takes no step to set it aside once free of the duress; if he does nothing, he may be taken to have affirmed the contract and will have lost the right of rescission (Chitty on Contracts, 33rd edition at 8-054).

219. Furthermore, said Mr Sinclair, rescission entails a willingness and ability to make restitution of gains from the rescinded contract (*ibid.* at 7-132); and the right to rescind may be lost by third parties acquiring rights over the subject matter of the contract (*ibid.* at 7-139).

220. Mr Sinclair submitted that Lord Diplock's view that economic duress is not a tort *per se* has clearly prevailed over Lord Scarman's contrary view (in *The Universal Sentinel* [1983] 1 AC 366, respectively at 385 and 400); see Leggatt LJ's first instance judgment in *Sheikh Tahnoon Al Nehayan v. Kent* (cited above) at [222]-[224], agreeing with Sales J (as he then was) in *Investec Bank (Channel Islands) Ltd v. Retail Group plc* [2009] EWHC 476 (Ch) at [122].

221. Therefore, the bank contends, damages in a case of economic duress could only be awarded where statute permits this in lieu of rescission as in misrepresentation cases where section 2(2) of the Misrepresentation Act 1967 so provides; whereas Lord Cairns' Act and its modern counterparts, sections 49(1) and 50 of the Senior Courts Act 1981, do not, being limited to permitting damages in lieu of an injunction or specific performance.

222. On the tort of intimidation, Mr Sinclair submitted that it is not committed if the defendant merely warns the claimant without threatening him. To be a threat there must be an element of improper coercive pressure (Clerk & Lindsell on Torts, 22nd edition, at 24-59 to 24-62). Nor is it tortious to threaten an act the defendant is legally entitled to do (*Rookes v. Barnard* [1964] AC 1129, per Lord Reid at 1168-1169). Further, there may be a defence of justification if, on the facts, the defendant's conduct was objectively justified (*ibid.* per Lord Devlin at 1209).

223. In relation to the facts, Mr Sinclair's main points were as follows. He distinguished three possible variants of alleged threats by Mr Smith on 8 July 2010: that unless the claimant signed up to a consensual deal:

(1) the bank would appoint receivers on Monday (12 July 2010);

(2) the bank would appoint receivers on Monday to sell the portfolio on a pre-pack basis to West Register;

(3) the bank would appoint receivers on Monday to sell the portfolio on a pre-pack basis to West Register at an undervalue and/or without proper market testing and/or for an improper purpose.

224. Mr Sinclair complained of a lack of clarity on the claimant's side. He said the claimant's evidence wavered between threats (1) and (2) but did not include any suggestion that threat (3) was made. Mr Haffner's note does not record it being made and it was not put to Mr Smith that it was made. Threats (1) and (2) were to do lawful acts, Mr Sinclair submitted.

225. He contended that the bank was entitled not just to appoint a receiver but to appoint one for the purpose of a pre-pack sale to West Register. Lord Templeman in *Tse Kwong Lam* had not ruled out the validity of a sale by a mortgagee to its subsidiary. The bank simply had to show that the sale was in good faith, not for an improper purpose and that reasonable steps were taken to obtain the best price.

226. Mr Sinclair argued that a pre-pack sale to West Register would not be unlawful because a fair price would be guaranteed by the proposal to obtain two valuations and if their average was greater than the base price paid, £65.76 million, "the Bank will pay the additional amount". I interject that Mr Brushfield may have meant that West Register would pay the additional amount. The pre-pack nature of the sale, said Mr Sinclair, was rational and envisaged for the proper commercial purpose of minimising transaction costs.

227. Moreover, Mr Smith clearly believed he was acting lawfully in saying what he said at the 8 July 2010 meeting; the contrary is not suggested. Therefore, Mr Sinclair submitted, Mr Smith cannot be said to have acted in bad faith and it was not put to him that he was. It follows that unless the threats made were to do unlawful acts, the claim must fail; "lawful act" duress cannot exist without bad faith, as explained by David Richards LJ in the *Times Travel* case.

228. Mr Sinclair went on to make detailed factual submissions on causation. These were to the effect that the claimant did not submit to any threat and that any threat was not a "significant cause" of him entering into the disputed agreements. To the contrary, the claimant continued to negotiate and apply pressure to the bank – including by hiring public relations consultants – to agree to a "split deal" along the lines eventually agreed.

229. The claimant did not protest or litigate, Mr Sinclair said. He affirmed the contract even if, contrary to the bank's case, it was ever voidable for duress. He has made no offer of restitution. Third party rights over the List A properties, or some of them, have been acquired for value.

230. Even if he could ever have rescinded the disputed agreement, he has long since lost the right to do so. The right could only be asserted against West Register, which is not a party to the present action. Finally, damages in lieu of rescission cannot be awarded anyway except in misrepresentation cases. Such were the bank's main points.

231. I come to my reasoning and conclusions on the claims in respect of intimidation and economic duress, having carefully considered the parties' rival contentions. I start with the contention that the threats began in November 2009, during the refinancing negotiations, and continued into 2010. The background was that the bank had responded to perceived breaches of covenant by warning that it might call in the loan early, a course which could, if the loan were not then repaid, lead to appointment of a receiver.

232. As early as February 2009, the claimant was alive to the possibility of a receiver being appointed when he explained his reservations about injecting cash into the business given the risk that it might be taken by the bank in the course of a receivership. The claimant was an experienced property developer and borrower from banks, who must have been well aware of the remedy of receivership available to a secured creditor bank in a case of default.

233. His awareness of possible receivership is then underlined by his commitment, during the negotiations for discounted redemption in the early part of 2010, to execute a consensual transfer of the portfolio to the bank should he fail to come up with the redemption monies on time. By 23 March 2010, Mr Smith was no longer content to accept his word; he required an irrevocable conditional transfer and a full tenancy schedule in return for more time.

234. Although Mr Brushfield described the prospect of a West Register receivership as a sword of Damocles which enabled the bank to obtain the full tenancy schedule without being entitled to it, I do not accept that Mr Smith's demand for the full tenancy schedule on 23 March 2010 amounted to a threat. It was a commercial response, together with his demand for an irrevocable conditional transfer of the portfolio, to the claimant's request for more time.

235. Indeed, I do not accept that until the meeting on 8 July 2010 anything said by the bank's officers to the claimant amounted to a threat to appoint a receiver, still less a threat to appoint one to undertake a pre-packed sale of the portfolio. I therefore focus on the meeting of 8 July 2010 in considering what threats, if any, were made.

236. I accept Mr Sinclair's submission, founded on David Richards LJ's judgment in the *Times Travel* case, that "lawful act" duress cannot exist in the absence of bad faith on the part of the person applying the pressure. I do not approach the issue of any "lawful act" duress applying Steyn LJ's less stringent standard of conduct which is morally or socially unacceptable.

237. I reject any suggestion – though I do not think the suggestion is made by the claimant – that Mr Smith acted in bad faith, at the meeting of 8 July 2010 or at any other time. Aggression and unpleasantness are not the same thing as bad faith. He clearly believed that the bank would be acting within its rights if it were to appoint a receiver on Monday 12 July 2010 for the purpose of a pre-pack sale of the entire portfolio to West Register.

238. In the absence of bad faith, duress could only be made out if the bank, through Mr Smith, made a threat to do an unlawful act. As I have said, such a threat could only have been made, if at all, at the meeting on 8 July 2010. The same applies to the tort of intimidation. The required element of improper coercive pressure could only be present if any threat made were to do an act the bank was not lawfully entitled to do.

239. I turn to consider what threat or threats, if any, were or were not made at the meeting on 8 July 2010. The first level of threat mentioned in the bank's closing submissions - threat (1) - was that unless the claimant signed up to a consensual deal, the bank would appoint receivers on the Monday, 12 July 2010.

240. If that and no more had been threatened, it would be a threat to do an act the bank was entitled to do. The claimant was in clear breach of, at least, the LTV covenant. That was an "Event of Default". The legal charges over the properties enabled the bank to appoint receivers to take control of the charged properties. The contrary was not suggested either by the claimant (or his agents) at the time, nor by Mr Sims in his submissions.

241. The second suggested level of threat - threat (2) - is that unless the claimant signed up to a consensual deal, the bank would appoint receivers on the Monday to sell the portfolio on a pre-pack basis to West Register. I am satisfied that Mr Smith made this threat. It was not a mere warning.

242. Mr Smith's narrative, tone and demeanour places it in the category of a threat, judging from his own account and that of Messrs McConville and Dyson and the content of Mr Haffner's note. That note records that Mr Smith provided a pre-prepared draft consensual transfer agreement and then explained with evident disdainful insouciance how and why, in Mr Haffner's words:

> "[t]he way they viewed the assets would mean that West could make a profit in the future and that would be very favourable for the bank".

243. I am in no doubt that handing over the pre-prepared draft transfer agreement was intended to concentrate the minds of Messrs Dyson and McConville and of his solicitors. Mr Smith's subsequent narrative was the "or else" part of the threat, if the transfer agreement were not executed. It is therefore necessary to consider further whether that was a threat that the bank would do an unlawful act.

244. Would it be lawful for the bank to carry out the threat? Before addressing that important question, for completeness I must mention the suggested threat (3): that unless the claimant signed up to a consensual deal, the bank would appoint receivers on the Monday to sell the portfolio on a pre-pack basis to West Register *at an undervalue and/or without proper market testing and/or for an improper purpose*.

245. Subject to one point, I agree with Mr Sinclair that there is no evidence that threat (3) was made, either in Mr Haffner's note or in the written and oral accounts of the three witnesses present at the meeting from whom I heard. It is, indeed, inherently unlikely that a bank employee would say he intended to sell a mortgaged asset at an undervalue or without proper market testing. If he did, a finding of bad faith would be likely to follow.

246. The one qualification is that it was the claimant's case, and was effectively put to Mr Smith, that the bank's purpose was improper. The suggested purpose was to impel the claimant, improperly, to hand over his property portfolio to the bank voluntarily. However, that suggested improper purpose adds nothing of substance to threat (2). It is no more than the required element of coercive pressure that must be present to show duress or intimidation.

247. The operative threat was therefore threat (2), which Mr Smith made. The question is whether it was a threat to do an unlawful act. His disdainful and aggressive tone and demeanour at the meeting, unpleasant though they were, are not sufficient. What matters is whether what he threatened the bank would do was something unlawful. I have had to consider this question carefully.

248. I remind myself that there are two issues: whether the buyer is genuinely separate from the mortgagee seller; and whether the mortgagee has taken reasonable steps to obtain the best price reasonably obtainable. Where the sale is to a connected party, there is a heavy onus on the mortgagee to justify the sale; it must show that it did not give precedence, in any conflict of interest, to its own interests, or those of its associate, over the interests of the mortgagor.

249. If the question is addressed from the standpoint of the conventional jurisprudence on mortgagees' duties when selling a mortgaged asset, found in cases such as *Cuckmere Brick Co Ltd*, *Tse Kwong Lam* and *Australian and New Zealand Banking Group Ltd*, the likely conclusion is that the pre-pack sale to West Register would be unlawful and the sale transaction liable to be set aside.

250. Looking at the issue on conventional lines, there was no real separation or arm's length negotiation between the bank and West Register. They were both lumped together as "we" in the parlance of the bank's and West Register's employees at the time. Their interests were the same. The bank's witnesses treated West Register as part of the bank. The only separation was in legal personality and, no doubt, for accounting purposes.

251. Secondly, and again viewing the matter on conventional lines, even if which is highly doubtful, West Register could be viewed as a genuinely separate commercial entity from the bank, the closeness of the two and their aligned and interwoven commercial interests would raise very serious suspicions about the "price" to be paid for the portfolio by West Register.

252. It was wholly unclear, on the evidence before me, whether or how any real value would be transferred from West Register to the receiver or the bank. Mr Workman did not feel able to say when he gave his evidence. Mr Smith's description at the meeting of 8 July 2010 was of a proposed transaction that would be little more than an accounting exercise, with monetary values distorted by the low cost of Treasury funds.

253. The bank's and West Register's method of valuing the portfolio did not adequately test the market. Mr Brushfield, notionally working for West Register, emailed internally on 8 July 2010 that after the acquisition "two valuations will be undertaken and if the average of those two valuations is greater than the base price paid (i.e. £65.76m) the Bank [sic – West Register?] will pay the additional amount."

254. The "base price paid" appears to be the amount of the January 2009 valuation plus an additional £10 million, to judge from Mr Smith's explanation on 8 July 2010, as recorded in Mr Haffner's note. I have no clear explanation for adding £10 million rather than say £15 million. And if obtaining the two valuations were other than cosmetic, why should the additional amount be derived from the average of them and not from the higher of the two?

255. To perform its duty, in conventional terms, to take reasonable steps to obtain the best price reasonably obtainable, the bank would have to do much more than it planned to do. It may even have had to consider whether the portfolio might after all be sold to the claimant, say for £68 million or £69 million. If that were not possible, it would need further professional valuation advice.

256. Would the portfolio fetch more if sold in separate parcels, or in clusters, or as a single package? Common sense suggests that if the properties were marketed in such a way as to offer potential purchasers all those options, value would be maximised and a better price obtained than if the properties were sold only as a single package and not marketed at all.

257. If a conventional analysis is applied, therefore, it is very likely that what Mr Smith was threatening the bank would do was to carry out an unlawful and defective performance of the bank's duties as mortgagee. The saving of transaction and marketing costs could not alone justify selling the portfolio as a single package. The envisaged transfer to West Register seems more akin to seizure than sale, i.e. the mortgagee entering into possession through its subsidiary, rather than selling to it.

258. But that is not the end of the matter. The question must then be asked whether the conventional analysis is appropriate in the present context. There are two reasons why it may not be. They can be illustrated by supposing that the claimant had brought a prompt legal challenge, say on Friday 9 July 2010, to restrain the appointment of a receiver on Monday 12 July.

259. First, West Register might be able to redeem the situation by undertaking to sell the properties onwards, on the open market, if the court should indicate that its tenure of the portfolio was more akin to possession than purchase. The mortgagee's duty would, on that footing, be unperformed but not yet incapable of lawful performance.

260. Secondly and more importantly, the claimant might have been found to lack any standing to challenge the receivership and pre-pack sale to West Register, on the ground that any sale at an undervalue would not prejudice or otherwise affect him because the negative equity position was such that he would gain nothing even if the properties were sold on the open market, separately or otherwise, at full market value.

261. That would, of course, be a matter of evidence including expert valuation evidence; but there is a possibility that a court might have been unwilling to restrain the bank, by that reasoning. In all the cases cited on this issue, the mortgagor had a personal stake in the outcome. The amount of any undervalue is recoverable as damages or credited to the mortgagor's account and goes to reduce his indebtedness or produce a surplus.

262. In the present case, the bank's position was that the claimant had no financial interest in how any receivership was conducted because he could have no conceivable equity in the properties. Any breach of the mortgagee's duties as conventionally formulated would therefore cause the claimant no loss. This unusual position arose because of the non-recourse nature of the loan; the claimant could not be made to pay back the debt personally.

263. The claimant did protest at the time that he should be entitled himself to bid for the properties on the open market. This raises the possibility that the best price reasonably

obtainable for them, or some of them, might be from the mortgagor. That would mean the party supposed to gain from performance of the mortgagee's duty actually loses rather than gains from its performance, in that the mortgagor pays more than anyone else would for the assets.

264. In a topsy-turvy world where the beneficiary of the duty pays rather than receives money through performance of the duty, the conventional analysis in *Cuckmere Brick Co Ltd* and the other cases does not work well. No sum would be credited to the mortgagor's account arising from performance of the duty. The transaction would become more like a reprise of the deal involving discounted redemption of the loan.

265. Mr Sims argued that the duty remained the same; although the claimant was not personally liable to repay the loan, he was entitled to his chance of a "return of equity" later, once the market had recovered. That is an interesting proposition but is not the rationale for the mortgagee's duty to obtain the best price reasonably obtainable. The rationale is not to provide the mortgagor with a business opportunity but to ensure he receives fair value from the sale.

266. These issues would no doubt have been debated in court if the claimant had made his hypothetical injunction application on 9 July 2010. It is difficult to predict what the outcome would have been; perhaps, a settlement; perhaps, a vindication of the bank's position; perhaps, a finding that the bank was proposing to act unlawfully.

267. In those circumstances, I cannot be satisfied that what Mr Smith was threatening was to do an unlawful act. He was threatening to do an act which might or might not turn out to be unlawful. It could be said that Mr Smith's threat flirted with illegality but did not inexorably commit to it. To be unlawful, the act would have to be unlawful vis-à-vis the claimant and not just in the abstract.

268. The threat made was not to do an act that was, unequivocally, unlawful. I have therefore come to the conclusion that Mr Smith stayed, just, the right side of the line. The case is close to the borderline, but I have concluded that I should categorise Mr Smith's threat as part of what Dyson J in the *DSND Subsea Ltd* case called "the rough and tumble of the pressures of normal commercial bargaining".

269. I turn to consider the other elements of intimidation and economic duress, which can be dealt with more briefly. Did the claimant protest at the time the threat was made? He was not personally at the meeting, but at least one of his agents Mr McConville and Mr Dyson protested at the meeting that what Mr Smith was proposing was unfair.

270. Was the claimant presented with no practical choice but to submit to the threat by signing up to the "consensual" transfer agreement? No; he retained the choice to resist the threat. Indeed, he did so. He did not sign the pre-prepared transfer agreement presented by Mr Smith at the meeting. He, or his agents Mr McConville and Mr Dyson, decided to continue negotiating.

271. Mr McConville went to London the next day to seek a better outcome than transferring the whole portfolio to the bank. This strategy succeeded, up to a point. The claimant did not decide to litigate, as he could have done. He instructed his solicitors to send a letter before claim, which they did, on 27 July, relying on the bank's proposed breach

of its duties as mortgagee. But instead of litigating, the claimant entered into the disputed agreements.

272. In my judgment, the bank is right to submit that the claimant affirmed those agreements. He took no step to have them set aside until over five years later. He retained control over the five List B properties and continued to manage them. He allowed third party rights to be acquired over some of the List A properties. He did not ask the bank for his £20.5 million back, nor proffer the List B properties to the bank for them to become once again secured assets. It is far too late for the disputed agreements to be rescinded now.

273. For those reasons, neither intimidation nor economic duress is made out. I dismiss the claim for damages founded on them. I need not decide whether, as a matter of law, the claimant could obtain damages in lieu of rescission and could do so without attempting to rescind the disputed agreements; or whether, as the bank contends, damages in lieu of rescission can only be awarded where expressly permitted by section 2(2) of the Misrepresentation Act 1967.

Loss and damage

274. The decisions I have already made mean that the claim must fail. It is therefore not necessary to the outcome of the case to decide issues of causation of loss and the quantum of damage, if any. The parties prepared their cases fully, on the basis that the court would decide issues of causation and quantum of damage, should the claimant succeed on liability.

275. If he had succeeded to any extent on liability, I would have had to decide those issues. The task would be to determine the amount of compensation, if any, which broadly speaking would put the claimant in the position he would have been in, had any particular wrong found to have been committed not been committed.

276. I had the benefit of hearing from expert witnesses called by each party in the fields of property valuation (Mr Colin Jennings for the claimant and Mr Simon Heather for the bank) and forensic accounting (Ms Kay Linnell for the claimant and Mr Travis Taylor for the bank). I am grateful to them all for their detailed and careful reports and joint statements. Their evidence engendered much controversy and there was little common ground.

277. The expert evidence on property valuation examined the condition and history of each of the List A properties, looking at values, actual occupancy rates, yields and rental income and comparing them with what, in the experts' opinions, would have been the values, occupancy rates, yields and rental income had the List A properties remained in the hands of the claimant.

278. The expert evidence on forensic accounting involved financial projections and forecasts of what income and profit the claimant would have made from such of the properties as he would have retained in his control. This involved looking at changes in the value of money and in the strength of the commercial property market over time, during the years that followed the global financial crisis that started in 2008.

279. In a case such as this, it is very difficult for a court to decide what it would have awarded by way of compensation if, contrary to the court's primary decision, the claimant had made good any of his claims. I recognise that it is often desirable for the court to do so, in case the findings on liability are later altered on appeal.

280. On the other hand, assessment of damages, particularly on a hypothetical basis or bases, would be a complex exercise here and must be constrained by considerations of proportionality, bearing in mind the already considerable length of this judgment. The outcome of any assessment of loss may depend on the kind of wrongdoing that is later found to be established.

281. The claimant's case was based on six "counterfactual" scenarios about what would have happened but for the bank's wrongdoing. In all of them, reliance is placed on the proposition that the claimant was exceptionally good at maintaining high occupancy rates and good levels of rental income. He would, he submitted, have ridden out the financial crisis and recovered from the downturn in property values.

282. The six scenarios were, first, that he would have retained, nurtured and developed the whole portfolio; second, that he would have negotiated a discounted redemption of the loan; third, that he could have bid for the properties on the open market; fourth, that he would have retained the properties included in his offer of £32 million on 22 June 2010; fifth, that he would have retained the properties included in his offer of £40 million on 9 July 2010; and sixth, that he would have retained the List B properties for £17.5 million rather than £20.5 million.

283. The bank's headline points were as follows. Even if any of the wrongs asserted had been established, the outcome would not have been different. The bank, not the claimant, was the loser. The claimant received about £75 million of the bank's money and lost only the List A properties which on any view were worth far less than that.

284. He paid only £20.5 million to retain the List B properties. Taking account of the approximately £40 million of prior debt paid off in 2006 out of the £75 million, he has still received about £10 million of "debt forgiveness" which is a loss to the bank and a gain to the claimant. He could not afford to conclude the discounted redemption deal at £70.1 million. That would have been the case anyway, even if he was wronged.

285. The bank submitted that on any scenario, including if it had wronged the claimant in some way, it would not, realistically, have continued lending to the claimant indefinitely; it would still have appointed receivers, even if it should not have appointed a receiver to dispose of the portfolio on a pre-packed basis to West Register. Sales of the List A properties on the open market would not have produced any gain for the claimant because market values had collapsed.

286. I do not think it would be proportionate to burden this already long judgment with further lengthy exposition of what, in my view, would have happened and how it would have translated into loss and damage (or not, as the case may be) in relation to the various permutations of hypothetical types of wrongdoing on the bank's part and in relation to each of the scenarios advanced by the claimant and contested by the bank.

287. To do so would require not just headline findings about what in my judgment would have happened but for wrongs that, as I have found, were not committed; it would also

require a detailed assessment of the quality and content of each of the four expert witnesses' evidence leading to different conclusions but without proceeding from the starting point of known forms of actionable conduct. I therefore do not embark on that exercise.

Conclusion and Disposal

288. For all the reasons given above, the claimant has not established the causes of action on which he relies. I therefore dismiss the claim.