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Case No: HC12E01325

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 October 2014

Before :

Stephen Smith QC
Sitting as a Deputy Judge of the High Court

- -

Between :

Freemont (Denbigh) Limited	**Claimant**
- and -	
Knight Frank LLP	**Defendant**

- -
- -

James Hall (instructed by **Moore Blatch LLP**) for the **Claimant**
Jamie Smith (instructed by **Mayer Brown International LLP**) for the **Defendant**

Hearing dates: 19, 20, 23, 24 June and 8 July 2014

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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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Stephen Smith QC sitting as a Deputy Judge of the High Court:

1. This judgment is given on the trial of five preliminary issues directed by Master Price on 12th August 2013.

Overview of the proceedings

2. The proceedings involve a claim by Freemont (Denbigh) Limited ("**Freemont Denbigh**") against Knight Frank LLP ("**Knight Frank**") for damages said to run to many millions of pounds in connection with a valuation of development land which was made in early August 2006. The explanation for the delay in the proceedings coming before the court is that the first intimation of a claim was not given until April 2012; and the claim form was not issued until the limitation period had almost expired.

3. The development land formed approximately 17 acres of a larger plot of land (comprising some 80 acres in total) on the outskirts of Denbigh, North Wales, which until 1995 was the site of the North Wales Hospital. The North Wales Hospital was constructed as an asylum for mentally ill patients. The principal buildings on the site are of considerable historic interest, with some being protected by Grade II or Grade II* listings. A report prepared for HRH the Prince of Wales in July 2004, on the occasion of his visit to the site, records:

   "The genesis of the hospital was adverse publicity about the appalling treatment of poverty-stricken monoglot Welsh people suffering from serious mental illnesses who were forced to seek treatment in English asylums. Plans for it were laid in 1842 and building actually commenced in 1844. It was the first mental hospital to be built in Wales. Its construction, the cost of which was a collaborative venture of the (then) six counties of North Wales, required an amendment of the Lunacy Act, which did not originally allow authorities to collaborate on such projects."

   And:

   "The original U-shaped complex is in restrained 'Tudorbethan' style: built of locally sourced limestone ashlar, with local sandstone dressings and slate roofs. It is listed Grade II because it is an exceptionally fine and pioneering example of early Victorian asylum architecture. It is recognized by specialist building historians as the best of its kind in Wales …"*

4. By 2003 the principal buildings had fallen into disrepair or worse: in his speech on the occasion of his visit, the Prince of Wales lamented that "*the shocking example of cynical asset-stripping which has taken place here is truly disheartening*".

5. In 2003, a predecessor company to Freemont Denbigh acquired the entire site, including the development land and the buildings, for £310,000 plus VAT. The name of the purchasing company was Acebench Investments Limited ("**Acebench Investments**"). There is no suggestion that Acebench Investments or any of its successors was guilty of the asset stripping to which Prince Charles referred.

6. Acebench Investments entered into negotiations with the local planning authority, Denbigh County Council, with a view to the grant of planning permission in respect of the development land. On 10th May 2005 Denbigh County Council resolved to grant outline planning permission, subject to a satisfactory agreement being entered into which imposed appropriate planning obligations, pursuant to Section 106 of the Town and Country Planning Act 1990 (**"the Section 106 Agreement"**).

7. In June 2005 attempts were made to market the development land. A number of developers expressed an interest.

8. In July 2005, a company named Freemont Limited ("**Freemont**") became the registered owner of the entire site. Acebench Investments and Freemont were connected in a way which I shall explain below. An entry on the proprietorship register of the title stated that the price paid for the site was the same price as Acebench Investments had paid in 2003, ie two years before the resolution to grant outline planning permission; the same entry purports to record that the price was actually paid on 31st October 2003.

9. Two developers made initial offers for the development land in early September 2005: one for £10.45m and the other for £11.1m. Both offers were subject to a number of conditions, one of which was the grant of satisfactory detailed planning permission.

10. One of the terms of the proposed Section 106 Agreement was a requirement for Freemont to provide a bond to secure its agreement to deposit £5m or thereabouts into an account in the name of the Council, in order to finance works to the listed buildings on the site.

11. In May 2005 Freemont engaged a broker to assist with the provision of the bond. The broker's name was Gamble & Spencer Limited ("Gamble Spencer") and the individual handling the instruction was Susan Leece-Roberts.

12. Mrs Leece-Roberts identified Lloyds Bank as interested in providing the bond. But before agreeing to provide the bond, Lloyds Bank required a valuation to be undertaken.

13. Towards the end of July 2006, the entire site was transferred by Freemont to Freemont Denbigh. Freemont Denbigh was connected to Freemont in a way which I shall also describe below. Again, the indications are that the price paid for the site was the same price as Acebench had paid for it some three years earlier, notwithstanding the very considerably higher initial offers already received from developers to which I have referred.

14. Knight Frank were the valuers who provided the valuation report required by Lloyds Bank. Their report was dated 1st August 2006; it was said to be provided for secured lending purposes. The report valued the development land as at 26th July 2006 at £17m with the benefit of outline planning permission, and £18.7m with detailed planning consent.

15. Although the Section 106 Agreement was thereafter signed, and outline planning permission was granted, detailed planning consent was never obtained and no development has taken place at the site. Neither the whole site nor the development land has been sold. The position today is that the listed buildings have fallen even further into disrepair. Indeed, such is the state of disrepair and so high are the likely costs of reinstatement, that the whole site is considered by Freemont Denbigh to be worthless.

16. Freemont Denbigh's claim against Knight Frank is that it has entirely lost the value in the site, and that that loss was caused by the negligent overvaluation of the site by Knight Frank in 2006. Freemont Denbigh says that it relied on the valuation report for the purposes of assessing whether to sell the development land to developers in the months or years which followed the report, but because the developers were not prepared to match Knight Frank's valuation, it declined all offers for the land.

17. Had the valuation been for what Freemont Denbigh now alleges was the correct figure, it claims that it would have taken a different approach to the offers and would have accepted one of them. Its plea of loss is contained in sub-paragraphs 21(b) and (c) of its Amended Particulars of Claim, viz.:

    "(b) The Claimant has accordingly suffered the loss of profit on the said sale and claims damages for the same, together with damages for all subsequent marketing costs and costs of future disposal of the Property and interest, giving credit for any sum received by the Claimant from a future sale of the Property, and further past and future consequential expenses and losses that would not have been incurred but for the Defendant's negligence and interest. …

    (c) Further or alternatively, the Claimant has suffered the loss of a chance to sell the property (either in its then current state with the benefit of the Outline Planning Permission; or pursuant to a conditional contract; or following the

obtaining of detailed planning permission as aforesaid) and claims damages for the same, together with damages (etc as per (b))"

18. It is no part of Freemont Denbigh's claim that Knight Frank's valuation report was deficient for the express purpose for which it was provided, viz. in connection with the provision of security by Lloyds Bank. Following the provision of the report, the bond was provided for the three years for which it was required by Denbigh County Council (ie for the duration of the outline planning permission).

19. The claim form in these proceedings was issued on 18th July 2012. Following the exchange of statements of case, on 12th August 2013 the proceedings came before Master Price. The direction for the trial of preliminary issues was one of the orders made on that occasion, the determination of all other issues being postponed pending the outcome of the trial. Five preliminary issues were identified, viz.:

    (a) In relation to the Defendant's valuation of the Property and the preparation of its Valuation Report dated August 2006, did a contract of retainer come into existence between the Defendant and the Claimant?

    (b) If the answer to (a) is yes, what were the terms of the contract of retainer?

    (c) Did the Defendant owe the Claimant a common law duty of care to exercise reasonable skill and care in the valuation of the Property and the preparation and provision of the Valuation Report?

    (d) Whether, in the light of answers to (a) to (c) above and/or the content of the Valuation Report, the Claimant was precluded from relying on the Valuation Report?

    (e) Are the heads of loss as pleaded in paragraphs 21(b) and 21(c) of the Particulars of Claim capable of falling within the scope of any obligation or duty held to be owed by the Defendant to the Claimant and/or are they too remote/unforeseeable to be recoverable from the Defendant?

20. Whether Knight Frank were negligent is not a matter for me to determine. Nor am I required to determine whether Freemont Denbigh did rely on the report as alleged, nor whether it has in consequence suffered any of the losses pleaded.

21. Before I give my ruling on the preliminary issues, I shall have to consider some of the factual background in closer detail. But before I do that, for reasons which I shall explain, I need to refer to general developments in the law of negligence in the last 25 years as regards the question of whether a professional who provides a report owes a duty of care not just to the person to whom the report is addressed, but to others who may seek to rely on the report.

The extent of the common law duty of care owed by a valuer

22. A professional instructed to prepare a report for a fee will obviously owe a contractual duty of care to the other party (or parties) to the contract. I shall have to consider the contractual position in this case later in this judgment. The point I address now is the position which arises irrespective of whether Freemont Denbigh were owed a contractual duty of care by Knight Frank, viz. the question whether Knight Frank owed Freemont Denbigh a general duty of care in tort (ie at common law) and if so, the extent of that duty.

23. I address that point now because of Knight Frank's challenge to the authenticity of key parts of several documents disclosed by Freemont Denbigh upon which Freemont Denbigh relies in support of its claims.

24. The high watermark for a claimant asserting breach by a valuer of a common law duty of care is the decision of the House of Lords in ***Smith v. Eric Bush*** *[1990] 1 AC 831.* There were actually two cases before the House of Lords on that occasion, the second (and more difficult) case being ***Harris v. Wyre Forest District Council***. In each case the House of Lords decided that a valuer who had valued residential property for mortgage security purposes on the instructions of the intended mortgagees, owed a duty of care also to the intending purchasers/mortgagors.

25. In the ***Eric S Bush*** case, the existence of a duty of care was conceded (the House of Lords held rightly) because the valuer *knew* that his report was going to be shown to the intended purchasers and that they would *in all probability* rely upon it. In the ***Wyre Forest*** case the valuer did not know that his report would be shown to the purchasers, but he did know that in all probability the purchasers would rely upon it.

26. At p.865D-E Lord Griffiths said:

> *"I would certainly wish to stress that in cases where the advice has not been given for the specific purpose of the recipient acting upon it, it should only be in cases where the adviser knows that there is a high degree of probability that some other identifiable person will act upon the advice that a duty of care should be imposed. It would impose an intolerable burden upon those who give advice in a professional or commercial context if they were to owe a duty not only to those to*

whom they give the advice but to any other person who might choose to act upon it."

At p. 859H Lord Griffiths also stressed that these two decisions of the House of Lords were given in the context of purchases of dwelling houses of modest value, and reserved his position in respect of, *"quite different types of property for mortgage purposes, such as industrial property, large blocks of flats or very expensive houses"* where *"prudence would seem to demand that the purchaser obtain his own structural survey to guide him in his purchase"*. See too in this connection the speech of Lord Jauncey of Tullichettle at p. 872C.

27. In ***Caparo Industries Plc v. Dickman*** *[1990] 2 AC 605*, the issue was whether a statutory auditor of a public company owed a duty of care when giving his audit report not just to the company to which he reported, but also to shareholders who purchased shares in reliance on the report and third parties (referred to as investors) who also purchased shares in reliance on the report. The House of Lords held that the auditor did not owe a duty of care to either the shareholders or the investors. Key to the decision of the House of Lords was the purpose for which the auditor's report was provided to the company (and to the shareholders), ie to enable the shareholders to exercise their rights and powers as shareholders in the company, not for the purposes of reaching decisions about investment.

28. Lord Oliver of Aylmerton observed at p. 642F that no decision of the House of Lords had gone further than ***Smith v. Eric S Bush***, and at p.641G said that that case:

"provides no support for the proposition that the relationship of proximity is to be extended beyond circumstances in which advice is tendered for the purpose of the particular transaction or type of transaction and the adviser knows or ought to know that it will be relied upon by a particular person or class of persons in connection with that transaction."

To similar effect, Lord Jauncey of Tullichettle said at p.662C-D:

"If the statutory accounts are prepared and distributed for certain limited purposes, can there nevertheless be imposed upon auditors an additional common law duty to individual shareholders who choose to use them for another purpose without the prior knowledge of the auditors? The answer must be no. Use for that other purpose would no longer be use for the "very transaction" which Denning LJ in the Candler case [1951] 2 KB 164, 183 regarded as determinative of the scope of any duty of care. Only where the auditor was aware that the individual shareholder was likely to rely on the accounts for a particular purpose such as his present or future investment in or lending to the company would a duty of care arise."

29. In ***South Australia Asset Management Corporation v. York Montague Ltd*** *[1997] AC 191*, a number of lenders brought claims against valuers for breaches of duties of care in contract and tort. The principal issue was whether the valuers – who were found to have been negligent – were liable in respect of losses caused by a fall in the property market after the date of valuation. That may or may not be a consideration in this case if the claim proceeds to a full trial, but it is not a question with which I am concerned at this trial.

30. During the course of his speech in the ***South Australia*** case, Lord Hoffmann said this at p. 211H:

> *"Because the valuer will appreciate that his valuation, though not the only consideration which would influence the lender, is likely to be a very important one, the law implies into the contract a term that the valuer will exercise reasonable care and skill. The relationship between the parties also gives rise to a concurrent duty in tort: see* ***Henderson v. Merrett Syndicates Ltd*** *[1995] 2 AC 145. But the scope of the duty in tort is the same as the duty in contract.*
>
> *A duty of care such as a valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss he has suffered. Both of these requirements are illustrated by* ***Caparo Industries Plc v. Dickman*** *[1990] 2 AC 605."*

31. ***Scullion v. Bank of Scotland plc*** *[2011] 1 WLR 3212* was a case where a valuation was carried out for the benefit of an intended lender of a flat which the intending purchaser sought to acquire not for his own residential purposes, but so that he could let it to tenants. The valuation gave a capital value for the flat and also a rental value. After the projected rental value failed to be achieved, the purchaser sold the flat and sought damages from the valuer for the deficiency in the rent. The claim succeeded at first instance but the Court of Appeal reversed that decision, holding that the valuer had not owed a duty of care to the purchaser.

32. In para. 46 of his judgment, Lord Neuberger of Abbotsbury MR said:

> *"In my view, this case is distinguishable from the two cases considered in Smith v. Eric S Bush on four grounds, which are to some extent connected and which all stem from the fact that the transaction which [the lender] was proposing to fund, as [the valuer] well knew (not least because it was stated in terms at the top of the report), was the purchase of a residential unit, not as the purchaser's residence but for the purpose of an investment."*
>
> The four grounds were: (1) that the transaction was *"essentially commercial in nature"*; (2) that in contrast to the evidence of reliance in the *"buy to*

occupy" market which was before the House of Lords in the ***Eric S Bush*** and ***Wyre Forest*** cases, there was no evidence in the ***Scullion*** case to support the proposition *"that anything like 90% of those people who bought to let in 2002 relied only on valuations prepared by a valuer instructed by their mortgagees"*; (3) that a purchaser buying a property to let is at least just as interested in the property's rental value as its capital value; and (4) that where a property is being bought to let, a valuer instructed by the prospective mortgagee would appreciate that his client is primarily interested in the property's capital value.

33. I should dwell for a moment on Lord Neuberger's third point, because in my judgment it has ramifications for the argument that a common law duty of care was owed in this case in respect of the losses claimed. Lord Neuberger said this by way of further explanation (para. 51):

"As Etherton LJ pointed out, unlike capital value rental return can be a tricky and sensitive issue, as is well demonstrated by the fact that the report had to state how easy it would be to let the flat within 60 days. A valuer valuing a property for a prospective mortgagee for a buy-to-let purchaser would, I think, expect the purchaser, at any rate if he was prudent, to obtain his own advice on some important matters not covered in the report. Those matters would include the ease with which the property could be let, the level of rent he could expect to get, the rent-free period he may have to allow, the other terms he would have to agree, the fee he would have to pay for finding a tenant, the fee payable for managing the property, the likely length of any tenancy, and the probable period of any voids."

34. The law regarding the common law duty of care owed by a valuer can be summarized in the following propositions:

(1) that a duty of care in tort is likely to be owed to the person for whom the report was prepared (even though a contractual duty of care may also be owed to the same party);
(2) that the duty of care in tort is likely to be limited to the purposes for which the report was prepared;
(3) that a duty of care in tort may also be owed by a valuer valuing premises for mortgage purposes (at least if they are modestly valued residential premises), to the purchaser of those premises, if (i) the valuer knows that his report is likely to be shown to the purchaser, and (ii) the purchaser intends to use the premises for his own residential purposes, not to let them, and (iii) the valuer knows that his report is likely to be relied upon by the purchaser for the purpose of deciding whether to purchase the premises; but
(4) that a duty of care in tort is unlikely to be owed by a valuer instructed to produce a report for a lender for security purposes, to an investor who relies on the report for other purposes.

35. Propositions (1)-(3) in the previous paragraph have been settled for many years. Proposition (4), however, whilst it builds on views expressed in the earlier authorities, cannot be viewed as having been settled before the decision in ***Scullion*** in 2011 (the first instance judge in that case had awarded the claimant damages for the valuer's breach of a common law duty of care, an award which the Court of Appeal set aside). It is quite possible that proposition (4) was not in the mind of the individual(s) who conceived this case, whereas proposition (3) was.

36. Knight Frank's case is that the controlling mind of Freemont Denbigh believed when he conceived the claim against them that there was at least a chance of establishing that Knight Frank owed Freemont Denbigh a duty of care at common law in respect of the losses claimed, if Freemont Denbigh could prove that Knight Frank *knew* that Freemont Denbigh intended to rely on the valuation for the purposes of deciding whether or not to sell the development land. And to that end, he set about concocting documents; that is to say he set about creating documents, viz. a series of notes of discussions, which included statements which had not been made during the course of the discussions. I should make clear that it was not Knight Frank's case at the trial that there were no discussions on any of the occasions which the notes purport to record: on many, perhaps most (but not all), such occasions Knight Frank accept that there was or may well have been a discussion between the relevant individuals – their case is that the discussion did not extend to the challenged statements.

The history of the case in more detail

The Claimant and connected companies and individuals

37. Ayub Bhailok is a solicitor who has at all material times practised in partnership with Robert Fielding from premises in Preston, under the name Bhailok Fielding. Mr Bhailok has always held the majority stake in the partnership.

38. Acebench Investments is a company incorporated in England. The directors of Acebench Investments at the material time were Mr Bhailok's brother Yousuf and Yousuf's wife. The shares in Acebench Investments were held by another English company, Acebench Limited. The shares in Acebench Limited were in turn held by Mr Bhailok, his brothers Yousuf and Mustaq, and Freemont Limited.

39. Freemont Limited is a British Virgin Islands company said to be owned by Ahmed Patel. Mr Patel is said to be a "*distant relative*" of the Bhailoks who is a retired schoolteacher living in India. Mr Patel's evidence on an application by Knight Frank for security for costs earlier in these

proceedings, was that his sole income is a pension of £168 per month. Mr Patel is also said to be the sole owner of Freemont Denbigh.

40. In his evidence on the security for costs application, Mr Bhailok said that Mr Patel – acting through Freemont Limited - was able to purchase the site because of savings Mr Patel had accumulated over the years, the proceeds of disposal of land he owned in India, and financial support from a company named Northern Estates Limited. Mr Patel gave evidence to the same effect on that application: in a witness statement dated 4th September 2013, he said:

"In 2006 I owned some land in India which I disposed of in the town of Bharuch, which is located in the State of Gujurat. I subsequently used my savings as well as the sale proceeds from said disposal to purchase the Property. As my own funds were insufficient to acquire the property, I applied for a loan of approximately £1.7 million from Northern Estates Limited, which is a lender company incorporated in the British Virgin Islands to assist in the purchase. The funds provided by Northern Estates were used to meet the remainder of the purchase price as well as the fees for all the relevant experts who were required to be involved in the obtaining of planning permission/furthering the development proposals for the Property."

41. This evidence was incorrect. Northern Estates was not actually incorporated until 26th September 2006, and so could not have provided any funds for the purchase of the site in July 2006. It is also instructive that Mr Patel addressed the source of funds in *2006*: this appeared to suggest that the entry in the register of title to the effect that Freemont Limited – also said to be Mr Patel's company – had paid the purchase price for the site in October 2003 (though not actually registered as owner until July 2005), may also have been incorrect.

42. In his second witness statement dated 18th April 2014 (which was prepared for the trial), Mr Patel purported to correct both these points. He said:

"… Freemont Limited purchased the Property … on 31 October 2003. At the time I was a director and shareholder of Freemont. The purchase of the Property was funded from money held by the business account of Freemont together with proceeds I had received from the sale of agricultural land in India together with some funds that I held."

43. In the witness box at trial, Mr Bhailok said that Mr Patel had accumulated rental income from UK properties which he had inherited from his father, which was also used to contribute to the purchase price. And he also suggested that Mr Patel's cousin in India, a Dr Najma Patel, may also have made a contribution to the purchase price.

44. I was shown no documentary corroboration for any of these alleged transfers of funds.

45. Mr Bhailok claims to have no interest in either Freemont or Freemont Denbigh. He says that he has never had a contract of employment or retainer or any other form of engagement with either company, though he has from time to time represented that Bhailok Fielding were retained as the solicitors to Freemont Denbigh. He has, however, been very extensively involved in the affairs of Freemont and Freemont Denbigh throughout their involvement with the North Wales Hospital site.

46. It was, for instance, Mr Bhailok who liaised with the planners, the proposed developers, the broker Gamble Spencer, Knight Frank and others, on behalf of Freemont and later Freemont Denbigh. Mr Bhailok is the person to whom I have referred as the controlling mind of Freemont Denbigh because there can be no doubt on the material before me that, at least de facto, that is what he was. In contrast, on that material, Mr Patel's involvement in the affairs of Freemont and Freemont Denbigh was non-existent.

47. It is understandable, therefore, that Knight Frank should view Mr Patel as no more than a cypher, and consider that the real party at interest in this case is Mr Bhailok, possibly with his brothers or other close members of his family. However, it is not necessary for me to decide whether this is the reality of the position for the purposes of the determination of the preliminary issues.

48. One other entity on the Claimant's side which I should mention is a firm of property consultants named Eckersley Property Consultants ("**Eckersley**"). Eckersley were closely involved with Mr Bhailok in the dealings concerning the site after being retained early in 2004, through their partner John Bretherton.

Initial events

49. It is a curiosity that although Freemont is said to have purchased the site from Acebench Investments in October 2003, it was not registered as the owner of the site until July 2005. Moreover, the discussions with the authorities and others in connection with the application for planning permission were all carried out in the name of Acebench Investments as owner. Knight Frank suggest that what actually happened was that Freemont did not agree with Acebench Investments to become the owner of the site until the middle of 2005, and that the evidence to the effect that that agreement was reached in 2003 is another concoction. Again, there is force in Knight Frank's point, but as before I do not believe it is necessary

for me to resolve that dispute for the purposes of the determination of the preliminary issues.

50. Mr Bhailok's first contact with the broker's representative, Mrs Leece-Roberts, was by email on 22nd May 2006. He told her that "we" (viz Bhailok Fielding) act for Freemont and gave her a brief explanation of the site, the planning situation and the need for the £5m bond. Mrs Leece-Roberts replied by asking for an indication of the value of the development land, to which question Mr Bhailok responded as follows on 23rd May:

    "Our value with planning is in excess of £17m … Without the planning – not sure of value – but we are only asking for the guarantee to cover the £5m – when the section 106 is signed ie when we have the outline planning."

51. On 30th May Mrs Leece-Roberts sent a letter to Mr Bhailok by fax timed at 13.12. That letter said that "the Bank" (which was not identified in the letter) was willing to provide the required bond in the sum of £5m in favour of Denbigh County Council, subject to formal approval and a valuation, at a cost of 2% of the face value of the bond per annum. In email exchanges later that day, Mr Bhailok sought to explore the possibility of a reduction on the cost; a reduction to 1% in year 1 and 0.75% in years 2 and 3, was subsequently agreed.

The File Notes

52. A further document dated 30th May 2006 is headed *"File Note – AB"* and purports to record a telephone discussion with Mrs Leece-Roberts.

53. This note is the first in the series of notes which Knight Frank alleges Mr Bhailok has concocted (or concocted in part) to bolster Freemont Denbigh's case, and I shall therefore make some observations about the notes at this juncture. They purport to record discussions, either over the telephone or in meetings, with Mrs Leece-Roberts, Knight Frank personnel and others. But not all the oral discussions which the unchallenged contemporaneous documents disclose that Mr. Bhailok had with those those people during the relevant period were recorded in attendance notes.

54. Most (but not all) of the notes have been printed on paper which has been 'recycled', in the sense that sheets of paper on which they have been printed had been previously used to print out a document (on one side only) which had no (or little) connection with the affairs of Freemont Denbigh. For whatever reason, says Mr Bhailok, the original printed document found its way into a box which was used in the office for printing documents such as attendance or file notes. For instance, the

reverse side of the 30th May file note appears to be part of a quotation for a window-frame, which bears the date 15th March 2006.

55. Mr Bhailok says that this shows that the file notes were produced contemporaneously with the conversations they purport to record (or at least in 2006, not some later year). Knight Frank say that it does not show that – all it shows is that if the file note was concocted, the concoctor took additional steps to give the notes a veneer of contemporaneity.

56. In an ordinary case, it might not be especially difficult to do this. For instance the concoctor could have trawled back in time through a computer's electronic cache of documents to find one which bore an appropriate date, and could have printed out that document on one side only, before immediately 'recycling' it: in other words the date the original document bears does not mean that that is the date upon which it was printed. This, however, is no ordinary case, because, as I shall explain, in 2009 Bhailok Fielding's computer hard drives were destroyed.

57. The relevant part of the file note dated 30th May 2006 is the third paragraph, which reads as follows:

"I told Susan that it was Freemont's intention to sell the site ie the enabling development and also the Listed Buildings, if possible once Outline Planning Permission was secured. I told her that we had already undertaken a marketing exercise and that initial offers had been received for the 17 acres. Offers received were somewhat varied by several million pounds and Susan confirmed that a valuation for the site would assist both the bank to take a view on the security for the bond but also give Freemont a realistic and current market figure of what the buildings and/or the site are actually worth, especially as the offers received have been so varied."

58. Mrs Leece-Roberts gave a short witness statement to Knight Frank, and was cross-examined at the trial in circumstances which I shall explain below. In her witness statement she said that she was surprised to read the contents of this and several other notes prepared by Mr Bhailok, which do not reflect advice or direction which she usually gives to clients. She also did not recall Mr Bhailok indicating to her that he intended to rely on the valuation produced by Knight Frank to determine whether to sell the site.

59. The file note indicates that it was prepared before Mrs Leece-Roberts' letter to which I have referred (which the note states was to follow), and therefore also before the email correspondence later that day which followed on from the letter. It is notable that there is no support in either Mrs Leece-Roberts' letter or in the email exchanges, for the notion that the discussion between Mr Bhailok and Mrs Leece-Roberts earlier in the day had included the points in the third paragraph of the note which I have quoted.

60. It might be thought that recourse to the metadata for the file note, or other computer forensic investigations, would resolve the issue of the dates upon which the challenged notes were created. However, investigations of that nature have not been possible in this case because in 2009 Bhailok Fielding upgraded their computer system to new computers. When that happened, the firm decided to destroy the hard drives of the (5) computers previously in use, even though once removed the hard drives of the computers could all have been accommodated within the confines of one small storage box. Prior to the destruction Bhailok Fielding did not take any images or even any electronic copies of the material on any of the hard drives. The destruction was carried out by a local firm, which demagnetized and then crushed each hard drive.

Further discussions

61. On 7th June Mr Bhailok emailed Mrs Leece-Roberts and asked whether the Eckersley Partnership would be acceptable to the Bank as valuers. By a letter dated 8th June and timed by fax at 16.34, Mrs Leece-Roberts said that Eckersley were not on the Bank's valuation panel.

62. The exchange concerning Eckersley at this point in the story is however notable for a number of reasons. First, if Eckersley were able to provide the valuation sought (and there are suggestions that it would have done so at no cost to Freemont Denbigh), then if Freemont Denbigh required a valuation for its own comfort or purposes, one might have expected it to have asked Eckersley to provide it. Secondly, and perhaps more significantly, the fact that on 7th June Mr Bhailok was contemplating asking Eckersley to carry out the valuation would appear to give the lie to any notion that at that stage Freemont Denbigh wanted an independent valuation for its own purposes: Eckersley, having acted for Freemont Denbigh for some time already, could not be viewed as independent.

63. The next challenged file note prepared by Mr Bhailok is dated 8th June. This note purports to record a discussion with Mrs Leece-Roberts regarding a number of valuers, including Eckersley and Knight Frank, and then this:

"She said that it may be better to go to Knight Frank in any event as they were not involved in this matter previously and that they could provide a more accurate assessment and valuation given their national expertise in development land. She suggested it was probably better going to somebody independent like Knight Frank as that way we had an independent valuation which would give us today's market value for the site which would be used to inform the company of what level of offers should be acceptable.

She also pointed out that as the offers received for the site were quite variable if an independent valuer was instructed Freemont would not then be pressurised into accepting an offer that would be lower than the valuation report would provide as it would also give Freemont a fresh pair of eyes just in case the valuation threw up any problems or issues which had not been picked up."

64. This is another of the notes whose content surprised Mrs Leece-Roberts. I have already made the point that the contemplation of involving Eckersley at this time undermines the notion that what Freemont Denbigh wanted for its own purposes was an independent valuation. It is also odd that Mrs Leece-Roberts' letter timed at 16.34 that day does not mention the discussion, or Knight Frank, even though the discussion, if it actually occurred, must have taken place before the letter was sent, because it purported to end with a promise by Mr Bhailok that he would send Mrs Leece-Roberts details of the new company. The details were sent in an email dated 8th June (the timing is unclear because the clock on Mr Bhailok's computer does not appear to have been working, or at least was inaccurate), whose receipt was acknowledged in the letter. The correct sequence that day was therefore discussion (if it occurred), email then faxed letter.

The involvement of Knight Frank

65. Mr Bhailok's first contact with Knight Frank was on 9th June, when he spoke to Sam Rowlands. Mr. Rowlands worked in Knight Frank's sales and marketing department in Liverpool, which was a different department from its valuations department. Mr Rowlands was not the right person to provide a valuation report.

66. Mr Bhailok produced what purports to be a file note of his discussion with Mr Rowlands on 9th June. This note is also alleged by Knight Frank to be (at least in part) a concoction. The principal parts read:

"I confirmed that it was our client's intention to dispose of the land once the Outline Planning Permission was secured and that the valuation was required by our clients for this purpose, ie to be sure of the land values but also to assist the Bank in giving a Bond that would be required as part of the Section 106 Agreement.

He was told therefore that a land site valuation was required to give our clients the comfort of the anticipated proceeds when the land was sold and also to give the Bank the comfort for the purposes of the Bond."

67. Mr Rowlands did not provide a witness statement. But what is striking about this note is how the part I have just quoted differs from an email also dated 9th June which Mr Bhailok sent to Mr Rowlands, which began by referring to "*our telephone conversation this morning*". That email

nowhere mentions that a purpose of the proposed valuation would be to assist Freemont Denbigh to be sure of the proceeds of sale it could anticipate. Instead the relevant part of the email focuses only on the requirements of the Bank:

"Lloyds are prepared to provide this guarantee/bond but need a "land site valuation" of the 17 acres. Lloyds will take a first charge on the site to protect themselves – which gives them enormous comfort – in view of the potential valuations achievable. We therefore (with regards to this site) need a "land site valuation" of the 17 acres to give them the comfort of the anticipated proceeds."

68. Mr Bhailok's email was passed on within Knight Frank to Reuben Vose, who was a valuer working in Knight Frank's valuation department. Mr Rowlands arranged a visit to Bhailok Fielding's offices for Mr Vose.

69. The office visit took place on 13th June, and was attended by Mr Vose and a Mr Kennedy also of Knight Frank. Mr Bhailok produced a file note which purported to record the discussion. The relevant paragraph reads as follows:

"They were told that our clients wanted a land valuation to satisfy themselves of the value of the land with Outline Planning Permission so that they understood the level of proceeds that will be achieved once the permission is secured and otherwise to ensure that there were sufficient margins, taking into considerations [sic] the obligations under the Section 106 Agreement and the possible requirement for a Bond. They were also told that the valuation would also be used as a comfort zone for Lloyds TSB to ensure that there was sufficient equity in the land to cover any requirement for the Bond which was a requirement for the Section 106 Agreement."

70. Thus, according to Mr Bhailok, at this meeting Knight Frank would appear to have been told that the primary purpose of the valuation was so that Freemont Denbigh could know how much they could expect to achieve on a sale. The requirement of a valuation for the security purposes of the Bank was a secondary purpose (indeed a bond was described as being only a "possible" requirement).

71. This note is thus out of line with the thrust of the discussions to date, as set out above. Mr Vose, who left the employment of Knight Frank several years ago, provided a short witness statement for the trial. In that statement he took issue with the accuracy of a number of Mr Bhailok's notes. He said:

"Whilst I cannot recall the detail of specific conversations with Mr. Bhailok, I do not remember being asked whether the borrower could rely on the valuation that I

was producing. To the best of my recollection, I do not think I was asked that question by Mr Bhailok or in fact that I have ever been asked that question by any borrower. If I were, I would advise that the valuation was for the lender's purposes only."

72. Perhaps just as telling, however, is the email exchange on the next day, 14th June, between Mr Vose and Mr Bhailok. Mr Vose wrote:

    "I appreciate that you don't require a full detailed report for secured lending purposes and that a letter only will be required for Lloyds TSB in order for them to guarantee a bond … "

    And Mr. Bhailok replied:

    "You have seen we have already had several offers circa £15m-£17m. The bond is only to the tune of £4.8m.

    We simply require a land site valuation … We are not looking for a fully fledged report.

    …

    We can in fact get this done by Eckersley's (at no cost) but the agent that handled this matter is on holiday for 2 weeks."

    Again the contemplation of Eckersley as valuers is notable, for the reasons I have explained.

73. The emails thus suggest that Mr Bhailok's thinking was that the report was required for secured lending (and no other) purposes; and that the instruction was a somewhat grudging one. There is no sense that the report was needed by Freemont Denbigh for its own purposes.

74. The next three weeks were taken up with other matters, though Mr Bhailok made repeated attempts to persuade Knight Frank to reduce their fee quote for the work they were to undertake.

75. On 6th July Mr Bhailok sent an email to Mr. Bretherton updating him on the requirement for a bond and the need for a valuation of the development land. Mr Bhailok said with reference to Lloyds Bank:

    "We therefore … need a "land site valuation" of the 17 acres to give them the comfort of the anticipated proceeds."

76. The email is consistent with the valuation being required for the Bank's purposes, not any purposes of Freemont Denbigh. Contrast Mr Bhailok's note of the discussion with Mr Bretherton on 6th July which apparently

preceded the email, which again had the main focus of the valuation being provided to assist Freemont Denbigh, *"to make a decision going forward once the Outline Planning Permission had been granted given Freemont's intention to sell the land."*

77. That note is also challenged. In cross-examination it was put to Mr Bretherton that he never had a conversation with Mr Bhailok, *"where he said to you that Freemont would expressly be relying upon a secured lending report from [Knight Frank]"*. Mr Bretherton's response was telling, and certainly did not corroborate the accuracy of that part of the note:

    "I can't honestly recall. It would be impossible for me to – to – I would love – I would like to say yes it was true. But I can't recall, clearly. It's eight years ago."

78. A further file note prepared by Mr Bhailok purportedly recording a telephone conversation on 19th July with Reuben Vose has the primary purpose of the valuation being to make Freemont Denbigh "*comfortable*" in entering into the Section 106 Agreement once they understood what price the development land would achieve. That note is also challenged by Knight Frank, with the support of Mr Vose's evidence.

79. A similar note of a conversation on the same day with Mrs Leece-Roberts contains the following passage:

    "I told her that Freemont for its own purposes needed to know what the 17 Acres was valued at with the benefit of Planning Permission and whether there were any specific problems or issues that would be highlighted from the Report. This would enable Freemont for its own purposes to progress with its intention to sell once the Planning Permission had been secured. Susan confirmed that just like Freemont the Bank would require a detailed Report which also had a site valuation."

    That note is also challenged by Knight Frank, with the support of Mrs Leece-Roberts' evidence.

80. On 20th July Knight Frank appeared to suggest in email exchanges that the price of £1,750 plus VAT which they had agreed for the work they thought was required, might not be sufficient for the *"present site valuation"* which it had become clear that Lloyds Bank was looking to receive. Following a discussion between Mr Vose and Mrs Leece-Roberts on 21st July, Mr Vose increased the price for the work required, which he described as *"a full and detailed valuation and report for secured lending purposes"* to £12,500 plus VAT. This led to further email discussions. Eventually, on 25th July, the price was agreed at £10,000 plus VAT.

81. In the meantime, Mr Bhailok purported to record a discussion he had with Mrs Leece-Roberts on 24th July which referred to the report needing to meet all the requirements of Freemont Denbigh *"for its own purposes"*. Knight Frank challenge this note as well.

82. There is also a note of a telephone discussion between Mr Bhailok and Mr Bretherton on 24th July, which purports to record that Mr Bretherton had suggested that the report would be prepared for the purposes of enabling Freemont Denbigh to obtain a valuation of the development land in connection with a possible future sale. Knight Frank challenge the suggestion. In cross-examination, Mr Bretherton said that he could not recall the specific conversation, though he thought it *"not unrealistic"* that it would have occurred

83. When Mr Vose informed Mrs Leece-Roberts on 25th July of the agreement on Knight Frank's fees, she informed him that Lloyds Bank would be issuing *"formal instructions"*, viz to him.

84. A further file note prepared by Mr Bhailok purports to record a telephone conversation with Reuben Vose on 25th July during which Mr Vose was persuaded to reduce the fee for the valuation to £10,000 plus VAT. Knight Frank challenge this note, with the support of Mr Vose. The material parts of the note read as follows:

    "… a full valuation report was required by our client company because they needed to know that there was substantial value in the land that would give them the comfort of entering into a Section 106 Agreement and Bond, both of which were requirements for the grant of the Outline Planning Permission. He agreed and confirmed that the purpose of the valuation was twofold, ie to satisfy our clients that there is sufficient value in the land – which he confirmed over the phone as being circa £17m so that our clients would know what would be achieved on disposal once Outline Planning Permission was secured and that that in turn would also give the Bank the comfort that as the value was so high that there was more than sufficient equity to cover the security they needed for the Bond."

    And:

    "… he was comfortable with the valuation at being at circa £17m. He confirmed that he would be in a position to undertake the inspection very quickly and provide the report very quickly to enable us to move the matter forward.

    After failed attempts at reducing the valuation fee substantially I agreed a fee with him of £10,000 plus VAT, on behalf of Freemont to do a full and detailed valuation and report which would give our clients the comfort about the value of the site with planning permission and what it was worth and what will be achieved once it is sold and that it would then give our clients also the comfort to

enter into the Bond and the Section 106 Agreement and also give the Bank the comfort that there was enough security for lending purposes."

85. It seems odd that Mr Bhailok would have made points such as this to Mr Vose when Mr Bhailok had – according to the note to which I have referred above – made similar points to Mr Vose on the office visit on 13th June. Perhaps more significant, however, is the tension between this note and Mr Vose's email to Mrs Leece-Roberts, copied to Mr Bhailok, which is timed at 14.46 on 25th July. That email was obviously written after the discussion that day with Mr Bhailok because in the first line Mr Vose informed Mrs Leece-Roberts that he had agreed a fee of £10,000 plus VAT. But Mr Vose goes on to say that the inspection of the site was to be undertaken on the afternoon of 26th July, and the report was to be completed by 4th August. It is difficult to believe that those important points were not discussed with Mr Bhailok during their telephone conversation, and yet Mr Bhailok's record is vague: both events were to take place *"very quickly"*.

86. A further note of a conversation between Mr Bhailok and Mr Vose on 26th July, which again purports to record a reference to what Freemont Denbigh *"can expect to achieve on selling the land with permission and also whether it was appropriate to enter into the Bond and Section 106 Agreement"*, is challenged by Knight Frank with the support of Mr Vose.

87. On 26th July Mr Bhailok sent a short email to Mr Vose. The material part reads:

"As discussed and agreed yesterday – the fees are indeed agreed at £10,000 plus vat. It is noted that the report will be available for next Wednesday – and that you will have formed a view by this Friday – which you will communicate to Susan and Lloyds."

88. The suggestion that the view formed should be communicated to the broker and the bank at the earliest opportunity, but not to himself, does not sit easily with the suggestions in Mr Bhailok's file notes that a purpose – at times expressed as the predominant purpose – of the valuation was to enable Freemont Denbigh to make decisions in reliance upon the report.

89. There is also a note of a telephone conversation between Mr Bhailok and Mrs Leece-Roberts on 26th July. This contains the following paragraph:

"She confirmed that this was purely a formality bearing in mind the report was being prepared for both Freemont and the Bank. As it was being prepared for Freemont it had to provide the Solicitor's Undertaking in respect of the fees and insofar as Lloyds were concerned the fee agreement was purely a procedure to ensure that they would not be liable for any costs."

Insofar as there is an implicit suggestion in this passage that the report was prepared for Freemont Denbigh's purposes generally (rather than just in connection with its requirement for a report for secured lending purposes), Knight Frank challenge this passage, with the support of Mrs Leece-Roberts.

The contractual documentation

90. Mr Vose was keen to receive a solicitors' undertaking – in the name of Bhailok Fielding – for the payment of Knight Frank's fees. On 26th July Bhailok Fielding gave that undertaking by faxed letter. Tellingly, the heading on the letter was, "*Valuation for Security Purposes*". The letter itself confirmed that Knight Frank would provide its views on valuation to Gamble Spencer and Lloyds later in the week, with the report to be provided to Freemont Denbigh in the following week.

91. Knight Frank replied to Mr Bhailok on 27th July, thanking him for his letter of instruction dated 26th July. The letter said that its purpose was to confirm the basis upon which the instruction would be carried out, and asked for the duplicate provided to be signed and returned.

92. Knight Frank's letter was in several respects ineptly prepared. It referred to the customer as being Mr Bhailok – that was clearly wrong, as Mr Vose well knew. It referred to the property to be valued as being the former North Wales Hospital, ie the whole site, when all that had been agreed to be valued was the development land. There were other more minor errors. But the letter did clearly state that the purpose of the valuation was "*Bank mortgage purposes*".

93. Knight Frank's letter was received by Mr Bhailok by fax on the afternoon of 27th July; the hard copy was received at Bhailok Fielding on 28th July.

94. Mr Bhailok says that he signed and returned a copy of the faxed version of Knight Frank's letter, on 27th July, under cover of a compliments slip which he dated 27th July. Mr Bhailok took copies of all the documents he returned, which has enabled them to be put before me. I see no reason to doubt that that is what Mr Bhailok did, even though Knight Frank say that they have not been able to locate in their files a copy of the instruction letter signed by Mr Bhailok. Mr Bhailok was keen to ensure that the valuation was available as soon as possible, and he had been alerted by Mr Vose by email that morning that Mr Vose wished him to sign and return the letter of confirmation and he had told Mr Vose that he would do so.

95. During the email exchanges on 27th July, Mr Vose asked Mr Bhailok whether the valuation was to be addressed to Freemont Denbigh. Mr Bhailok's response was that he thought the report should be addressed to

Lloyds, but that Mr Vose should raise the point with Mrs Leece-Roberts. Again, this suggestion by Mr Bhailok does not sit easily with the view that the report was being provided for Freemont Denbigh to rely upon.

96. Prior to sending the letter to Mr Bhailok on 27th July, Mr Vose had enquired of Mrs Leece-Roberts whether she had *"any news on the bank instruction letter"*. Mrs Leece-Roberts replied that the Bank was waiting for an undertaking from Mr Bhailok before issuing *"formal instructions"*.

97. Despite not having received an instruction letter from Lloyds Bank, Mr Vose started work on his valuation. He did eventually – on 1st August – receive an instruction letter from the Bank, which was dated 27th July.

98. Lloyds Bank's letter informed Mr Vose that his client was Lloyds Bank, and that the purpose of the instruction was *"to assist in consideration of an application for new banking facilities"*. The letter misdescribed the property to be valued (referring to the whole site rather than just the development land). It also contained several other inapposite terms. It requested a report to the Bank by 3rd August.

99. Clause 15.7 of the Lloyds instruction letter stated that Knight Frank would be accepting responsibility to Lloyds Bank alone. Clause 15.8 gave instructions as to who the report was to be addressed to. Curiously, given the terms of clause 15.7, one of the listed addressees was Mr Fielding of Bhailok Fielding; another was Mrs Leece-Roberts.

100. In the meantime on 27th July, Mr Bhailok supplied to Mr Vose a draft "appraisal" report, which had been produced by Mr Bretherton and which Mr Bhailok hoped Mr Vose would find to be of assistance with the valuation. The report gave a description of the site and the marketing efforts to date, and referred to the offers received. The first and final paragraphs of the report are the most interesting for present purposes, viz.:

"I am instructed by Freemont (Denbigh) Limited to provide an appraisal report which will assist their Bankers to consider the security of the property for a Bond to comply with their financial obligations under the terms of a Section 106 Agreement which is to be entered into with the Local Authority as a condition of securing Planning Consent"

and:

"This overview clearly demonstrates that, upon the Grant of Outline Planning Consent, the property would have a value for loan security purposes which would clearly provide support for a Bond of £4,800,000."

The focus of the appraisal was thus a valuation for the purposes of the provision of the security by the Bank, not for any other purposes Freemont Denbigh might have.

101. By email dated 2nd August Mr Vose informed Mr Bhailok and Mrs Leece-Roberts that he had completed his report in draft, and the draft was currently being reviewed by a colleague in the Manchester office.

102. On 2nd August Knight Frank sent to Lloyds Bank a letter which purported to *"confirm"* the letter of instruction dated 27th July which Knight Frank had received on the previous day. In reality, what the Knight Frank letter did was seek to impose its terms and conditions on the engagement. As with their earlier letter to Mr Bhailok, Knight Frank requested Lloyds Bank to sign and return a duplicate of their letter. This Lloyds Bank did, but not until 7th August, after Knight Frank had issued their report.

103. Mr Vose circulated a copy of the Knight Frank report by email on 4th August. The email was addressed to Mr Conroy at Lloyds Bank and copied to Mr Bhailok and Mrs Leece-Roberts.

104. The front-sheet of the report bore the date 1st August 2006. It also stated that the report was *"prepared on behalf of Lloyds TSB Bank Plc"*. The report recorded that the instructions for it were given in Lloyds Bank's letter dated 27th July as confirmed in Knight Frank's letter dated 2nd August. The instruction recorded was to provide a market value of the unencumbered freehold interest in the 17 acres of development land, *"for secured lending purposes"*.

105. Knight Frank's opinion as stated in the report was that the market value of the unencumbered freehold interest in the 17 acres as at the date of inspection (26th July) was £17m with the benefit of outline planning permission, and £18.7m with detailed planning consent.

106. Under the heading *"Suitability for Lending"* Knight Frank said this:

"The suitability of the property as banking security must therefore be assessed in the context of the amount of the loan required against the marketability of the property in the event that the Bank is required to realise the asset.

We are unable to provide any comment as to the value if the bank was required to realize their loan during the course of the development of the scheme, as this would be dependent upon the status of the property at that point in time and the market conditions prevailing at the date of disposal."

107. Hard copies of Knight Frank's valuation were sent to various people in the following days, including to Mr Fielding on 7th August.

108. The last document to which I need to refer is the final challenged file note created by Mr Bhailok. That note purports to record a telephone conversation between Mr Bhailok and Mr Vose on 7th August. The final paragraph of the note says this:

"He [sc Mr Vose] confirmed that our clients should not hesitate and should sign up to the Section 106 Agreement as quickly as possible as there was no risk to them and there was more than sufficient equity even with the Bond when the site is sold and that these were the levels they can expect to achieve."

Mr Vose's evidence is that that is not the sort of thing he would ever say. Viewed in the context of the unchallenged material over the course of the previous two months, it would certainly have been very odd if he had said it.

The witnesses

109. Freemont Denbigh called six witnesses at the trial: Ayub Bhailok, Ahmed Patel, John Bretherton, Yusuf Patel, Robert Fielding and Yvonne Kirton. Knight Frank called three witnesses: Reuben Vose, Susan Leece-Roberts and Elaine Tooke. The expert evidence of Michael Handy instructed on behalf of Freemont Denbigh was admitted without cross-examination: he opined that as regards 6 of the notes containing challenged passages, there was no evidence on which to base a conclusion that they had not been produced on or about the dates shown on the notes, but equally there was no evidence to substantiate those dates.

Yusuf Patel, Yvonne Kirton, Elaine Tooke and Robert Fielding

110. I have little to say about the evidence of Yusuf Patel, Yvonne Kirton, Robert Fielding and Elaine Tooke. Yusuf Patel, a computer consultant, gave evidence about the destruction of Bhailok Fielding's computer hard drives, which was carried out in a manner he advised and oversaw. Yvonne Kirton gave evidence about her practice as Mr Bhailok's secretary when typing up Mr Bhailok's manuscript file notes to produce typed file notes such as the ones to which I have referred (she destroyed the manuscript originals after the typing was complete). Robert Fielding gave evidence regarding the practices within Bhailok Fielding, and in particular the destruction of the computer hard drives in 2009. Elaine Tooke gave evidence about procedures which ought to be followed within Knight Frank. I have no doubt that each of these witnesses was endeavouring to give truthful evidence and I have no hesitation in accepting the evidence each gave. But none of that evidence goes to the heart of any of the points I have to decide.

Mr Bretherton

111. I also have no doubt that Mr Bretherton was a witness of truth. But on the aspect of the case where it was important for Mr Bretherton to support Freemont Denbigh's claim, viz. in corroborating Mr Bhailok's note of the challenged part of his conversation with Mr Bretherton on 6th July, Mr Bretherton could not recall whether he had ever had a conversation with Mr Bhailok in which Mr Bhailok had said that Freemont (or Freemont Denbigh) would be relying on a secured lending report from Knight Frank.

Mr Patel

112. Ahmed Patel was not an impressive witness. His understanding of English was almost non-existent. When he first entered the witness box it quickly became apparent that even with the assistance of the interpreter, he was not going to be able to follow, or answer questions on, the text of either of the witness statements he had signed, because they were in English and no Gujarati translation was available. He was stood down until translations were obtained.

113. But even after translations were obtained, and making allowances for the language difficulties and the shortcomings of the translator, it was difficult to get Mr Patel to focus on the questions he was asked, and his answers were not always consistent. For instance, on the revised account of how Freemont was able to purchase the site in 2003 (not 2006 as he had stated in his first witness statement), Mr Patel said that part of the price was paid from monies Freemont had accumulated from properties which it owned in England. But his evidence in court appeared to be that the rent earned on those properties had to be paid to a bank, and when he was asked whether Freemont produced any financial accounts, his answer was:

"Because that company never produced any profits so there was always the debt so – so there is only debts on that."

114. I address the question of the source of the purchase monies further below in the context of assessing the credibility of Mr Bhailok. Irrespective of that, I formed the view that Mr Ahmed Patel was an unsophisticated elderly man who had had no involvement with the North Wales Hospital site (save as a companion to Mr Bhailok when he was visiting England), and who had no real knowledge of the detail of the development proposals: he appeared to have received no paperwork at all. I could not find his evidence to be reliable on any point of controversy in the absence of satisfactory corroboration.

115. In any event, it is clear that Mr Patel was not in any way involved in the decision to instruct Knight Frank and therefore he could not give evidence of Freemont's (or Freemont Denbigh's) intentions when that instruction was being developed and when it was ultimately given. Mr Bhailok was undoubtedly the controlling mind of Freemont and Freemont Denbigh throughout the times material to them respectively, as indeed Mr Patel confirmed in his evidence.

Mr Bhailok, Mr Vose and Mrs Leece-Roberts

116. There is a conflict of evidence between these witnesses as regards the parts of the file notes which I have set out or referred to earlier in this judgment. It is not possible to resolve that conflict without finding that either Mr Bhailok or Mr Vose and Mrs Leece-Roberts have not told the truth in their evidence. If I have to resolve the conflict, I have to choose between them; and if I decide that it was Mr Bhailok who was not telling the truth, it will follow that he (or someone in cahoots with him) is guilty of having concocted a significant number of documents with a view to trying to improve Freemont Denbigh's prospects of success in the litigation by misleading the Court.

117. I have asked myself whether it is necessary for me to resolve this conflict. I understand that each party contends that it may prevail, irrespective of how the conflict is resolved. However, each party also contends that if the conflict is resolved in its favour, I cannot do otherwise than answer the preliminary issues in its favour. I therefore have no option but to decide whether Mr Bhailok, on the one hand, or Mr Vose and Mrs Leece-Roberts, on the other, have not told the truth.

118. In his instructive article entitled ***The Judge as Juror: The Judicial Determination of Factual Issues***, published in Current Legal Problems 38, Mr Justice Bingham (as he then was) made this observation:

> *"The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:*
>
> *(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;*
> *(2) the internal consistency of the witness's evidence;*
> *(3) consistency with what the witness has said or deposed on other occasions;*
> *(4) the credit of the witness in relation to matters not germane to the litigation;*
> *(5) the demeanour of the witness."*

119. Mr Justice Bingham went on to conclude that the first three of the tests may be regarded in general as giving a useful pointer to where the truth lies, whereas the fourth test is more arguable. As regards the fifth, he was of the view that:

"the current tendency is … on the whole to distrust the demeanour of a witness as a reliable pointer to his honesty."

Mrs Leece-Roberts

120. Mrs Leece-Roberts was a reluctant witness. I do not know the circumstances in which she was persuaded to give the short statement she did to Knight Frank's lawyers. However, when the time came for her to appear at the trial, it became clear that she was not going to attend voluntarily. I was told that her attitude was shaped in part by her embarrassment at giving evidence against a party for whom she used to act, and in part by the practical consideration of a recent accident having unfortunately befallen her husband, who needed her assistance in order to obtain proper medical attention. In those circumstances I was persuaded to issue a witness summons on short notice requiring Mrs Leece-Roberts to attend Court at a time when it was thought that she would be least needed by her husband. She duly attended.

121. Once Mrs Leece-Roberts entered the witness box, it quickly became apparent to me that she was obviously a witness of the truth. Her calm and careful manner when giving evidence, and her quiet assurance when rejecting suggestions made on behalf of Freemont Denbigh that she would indeed have said or heard what the controversial passages in Mr Bhailok's notes purported to record her as having said or heard, were impressive.

122. It is correct that Mrs Leece-Roberts could not remember the content of particular conversations she had had with Mr Bhailok at the relevant times, and she accepted that she could not. But after a gap of eight years, for the first seven of which she would have been blissfully unaware that her communications so long ago would eventually be subject to microscopic analysis, she could scarcely be criticized for not recalling the words actually spoken. It lies uneasy in the mouth of a claimant who has left it until almost the very last minute of the limitation period before issuing a claim, to cast doubt on the evidence of non-party witnesses because they have genuinely forgotten in the intervening years precisely what was said in telephone conversations which lasted just minutes.

123. Mrs Leece-Roberts was adamant that she would not have said the things which Mr Bhailok said she said and which Knight Frank challenge. I would have had no hesitation in accepting her denials even in the absence of the factors which discredit Mr Bhailok's account to which I refer below. Mrs Leece-Roberts was in my judgment one of those witnesses – perhaps a rarity as Mr Justice Bingham suggested - whose demeanour whilst giving evidence was a reliable pointer to the truth.

124. I should mention specifically the note of the telephone conversation on 24th July between Mr. Bhailok and Mrs Leece-Roberts, which contains at least one sentence which Knight Frank challenge. Mr James Hall, counsel for Freemont Denbigh, submits that Mrs Leece-Roberts did not take issue with the challenged passage when the note was shown to her in cross-examination, which is correct. However, in my judgment that does not mean that Mrs Leece-Roberts *"tacitly accepted"* the accuracy of that passage. That would have been inconsistent with the essential thrust of her evidence, in particular as regards the contents of the other notes she was shown or commented upon.

Mr. Vose

125. Mr Vose left Knight Frank several years ago and has no continuing duty of loyalty to the firm. Like Mrs. Leece-Roberts he gave his evidence calmly, albeit at times a little nervously. His nervousness was understandable, given the allegations of negligence levied against the report he prepared.

126. Like Mrs Leece-Roberts, Mr Vose was adamant that he, or as the case may be Mr Bhailok, did not utter the controversial words which Mr. Bhailok recorded as having been uttered during the course of their conversations in 2006. There was nothing in Mr Vose's demeanour whilst giving evidence to indicate that Mr Vose was not telling the truth when he denied the points put to him on behalf of Freemont Denbigh.

Mr. Bhailok

127. Mr Bhailok gave his evidence calmly and confidently. As with Mr Vose, I observed nothing in Mr Bhailok's demeanour whilst giving evidence which suggested that he might not be telling the Court the truth.

128. Mr Jamie Smith, counsel for Knight Frank, referred me to a number of matters not germane to the litigation which he said discredited Mr Bhailok as a witness of truth. One of these matters was the fact that Mr Bhailok was disciplined by the Solicitors' Disciplinary Tribunal in 2001. I agree with Mr Smith that it was not accurate to describe the charges found proven against Mr Bhailok as *"technical account breaches"*, as Mr Bhailok

did in cross-examination: the Tribunal actually found Mr Bhailok and Mr Fielding had been guilty of conduct unbefitting solicitors, for a number of reasons. However the charges found proven were not charges of dishonesty, and those findings, in my judgment, do not impugn Mr Bhailok's credibility.

129. Another matter which Mr Smith referred me to was Mr Bhailok's unsuccessful attempt to reclaim the VAT paid on three high value motor vehicles which he purchased using Bhailok Fielding monies: one vehicle (a Bentley Continental) was seemingly for his own use, another (a Mercedes) was for the use of his wife, and the third (another Mercedes) for the use of his brother. But whilst Mr Fielding was cross examined in connection with the rejection of the reclaim by the VAT Tribunal (and, surprisingly, indicated that he had no knowledge of the purchases), Mr Bhailok was not; it would therefore not be fair to Mr Bhailok for me to attribute to him a dishonest motive for the VAT claim when that allegation was not put to him and he did not have the chance to comment upon it.

130. A further matter to which Mr Smith referred in this connection is something which does not quite fit Mr Justice Bingham's description in test (4), because it concerns Mr Bhailok's evidence at an interlocutory stage of these proceedings, and is therefore "germane" to the proceedings, albeit not to the Preliminary Issues. I suppose such a matter might be described as falling within test (4) *a fortiori*.

131. When the proceedings commenced in 2013, Knight Frank made an application for security for costs. Freemont Denbigh resisted the application. The evidence for Freemont Denbigh was given by Mr Bhailok, in the form of his first and second witness statements, and Mr Patel. In the course of his evidence, Mr Bhailok addressed the suggestion made by Knight Frank that he himself was personally involved with Freemont Denbigh and Acebench Investments. The suggestion was made because of the recognition in the authorities that impecunious claimants asked to provide security for costs can be expected to seek financial support for the proceedings from those who stand to benefit (whether directly or ultimately) from success in the proceedings.

132. Mr Bhailok rejected the suggestion that he was personally involved with either Freemont Denbigh or Acebench Investments, and in doing so he said this:

"I can confirm that I have never been a director or shareholder of the Claimant or Acebench Investments Limited as suggested and therefore I am not required to provide security for the Claimant. The articles referred to by Ms Lewis in her witness statement are factually inaccurate such as the reference to me being a director of Acebench Investments Limited. Ms Lewis identifies that these articles

are inaccurate in her own witness statement … so I am unsure what the relevance of the articles are to the application. This seems to me to be a deliberate attempt by the Defendant to muddy the waters by attempting to undermine my credibility as the articles have no relevance to the basis of the application. I am a solicitor and an officer of the court and am aware of my duties when signing the statement of truth attached to this witness statement."

133. It is correct that Mr Bhailok had never been either a director or a shareholder of Acebench Investments. But what Knight Frank did not know at that point in the proceedings, was that Mr Bhailok (and his wife) had been at all material times, and remained, shareholders of Acebench Limited, the parent company of Acebench Investments. I accept Knight Frank's criticism of Mr Bhailok's evidence in the first sentence of the passage I have just quoted, that it was not candid; indeed, I have no doubt that the evidence was deliberately not candid. Had Mr Bhailok provided the Court with the complete picture, he could not have gone on to say with any confidence, "*and therefore I am not required to provide security for the Claimant*".

134. In my judgment this demonstrated lack of candour is a factor which does count against the credibility of Mr Bhailok. If it had stood alone, it would at least have caused me to be circumspect before accepting Mr Bhailok's evidence on any controversial issue.

135. Mr Smith also referred to the inaccuracies in the evidence of Mr Bhailok and Mr Patel regarding the source of funds for the acquisition of the site by Freemont and/or Freemont Denbigh, to which I have referred. He submits that it is incredible that Mr Bhailok and Mr Patel, when sitting down together to prepare that evidence, as they did in 2013, could have so fundamentally misremembered the true sequence of events.

136. I agree that it is difficult to understand how such serious mistakes could have been honestly made. In the light of the errors, my findings as regards the credibility of Mr Patel, and in the absence of documentary corroboration for any of the transfers alleged to have been made by Freemont or Freemont Denbigh in respect of the purchase of the site, I cannot find that either company actually transferred funds in connection with their respective acquisitions of the site. I therefore do not accept that any person actually paid £310,000 plus VAT for the site, other than Acebench Investments. And that means that the evidence of Mr Bhailok and Mr Patel (including Mr Patel's attempted correction of his initial evidence in his second witness statement) to the effect that Freemont Limited or Freemont Denbigh did make actual payments to purchase the site, was untrue, as they must have known.

137. The interlocutory evidence is therefore a significant pointer to the conclusion that as between Mrs Leece-Roberts and Mr Vose on the one hand, and Mr Bhailok on the other hand, it is the former two witnesses who are to be believed rather than the latter, on the question of the authenticity of the challenged passages in the notes of discussions to which I have referred. But significant though this point is, there is in my judgment an even stronger reason for disbelieving Mr Bhailok, which falls within Mr Justice Bingham's test (1).

138. Careful study of the challenged parts of the discussions recorded in the notes, when set in their context, convinces me that the challenged aspects cannot have taken place. They are out of kilter with the contemporaneous correspondence for the reasons I have endeavoured to explain when discussing them. And it defies belief that if Mr Bhailok really had intended Knight Frank's report to be prepared for the purpose of enabling Freemont/Freemont Denbigh to make a decision on whether to sell some or all of the site at some point in the future, that important consideration did not find expression in any of the contemporaneous (and unchallenged) documentary communications.

139. Mr Hall strenuously urged me to accept that the challenged parts of the notes were accurate. He rightly referred me to the well-known passages in the speech of Lord Nicholls of Birkenhead in ***Re H (Minors) (Sexual Abuse: Standard of Proof)*** *[1996] AC 563*, to the effect that whilst the standard of proof in a civil case is on the balance of probabilities, the probability of a solicitor concocting false documents to support a case, even ostensibly for the benefit of a (distant) family member, is so unlikely that it would require very persuasive evidence. He submitted that I should reject Knight Frank's case because:

"it invites the Court to find an incredibly elaborate, foresightful, and sophisticated scheme of forgery, concoction and the persuasion of witnesses to perjure themselves (as well as [Ayub Bhailok] being prepared to take exceptional risks with his own career as a solicitor, and with the future of [Bhailok Fielding] as a firm) which is inherently unlikely."

Whilst I consider that this submission exaggerates the elaboration and sophistication which was required, and believe that the only witness who may have been persuaded to give perjured evidence was Mr Patel, I agree with the general thrust of this submission. I have therefore given very anxious consideration to whether my conclusions on the key points are wrong. Nonetheless, I do not believe that they are.

140. In short, therefore, I accept Knight Frank's submission that the challenged passages in Mr Bhailok's attendance notes were concocted because (a) I accept that Mrs Leece-Roberts and Mr Vose were witnesses of

the truth and their evidence cannot be reconciled with Mr Bhailok's, (b) in my judgment Mr Bhailok's evidence in the interlocutory proceedings was such as to cast doubt on his general reliability as a witness on points of controversy, and (c) most important of all, the challenged passages in Mr Bhailok's notes do not fit with the story told by the unchallenged contemporaneous material.

Ruling on the preliminary issues

141. In the light of the discussion above, I can give my answers on the five preliminary points much more shortly.

(a) In relation to the Defendant's valuation of the Property and the preparation of its Valuation Report dated August 2006, did a contract of retainer come into existence between the Defendant and the Claimant?

142. In my judgment the answer to this question is yes.

143. It may be that in the end Knight Frank intended to have a contractual relationship only with Lloyds Bank; that they did also enter into a contractual relationship with Lloyds Bank; and that they believed that their contract of retainer was with the Bank alone. But for a long period of time the intention was for the retainer to be between Knight Frank and Freemont Denbigh; there was nothing exceptional about this – I was told that it was not uncommon for a developer to procure a valuation for security purposes which the developer would then use to try to obtain funding.

144. I agree that some of the documentation produced by Knight Frank was ineptly worded. But there can be no doubt that the correspondence between Knight Frank and Mr Bhailok on 26th and 27th July was with Mr Bhailok in his capacity as agent of Freemont Denbigh. And at the latest when Mr Bhailok returned the faxed version of Knight Frank's letter on 27th July 2006, the contract was formed. There is no inconsistency in my acceptance of Mr Bhailok's evidence that he did sign and return the letter despite no copy having been located by Knight Frank, and my findings as regards the general unreliability of Mr Bhailok's evidence in matters of controversy, because Mr Bhailok had earlier told Mr Vose that he would immediately sign and return the letter, and there is no good reason why he should have delayed doing so. In short, Mr Bhailok's evidence on this point does fit with the general story.

(b) If the answer to (a) is yes, what were the terms of the contract of retainer?

145. The critical term of the contract was that Knight Frank would provide a valuation of the development land for the purpose of enabling Freemont Denbigh to obtain the financing which it required, in short, a report for financing or secured lending purposes.

146. Insofar as it is suggested by Freemont Denbigh that it was also a term of the contract of retainer that the report was to be provided for Freemont Denbigh to rely upon in the future when forming its plans for the development land, I reject the suggestion.

147. There is no basis for a submission that the contract contained an express term to that effect. Nor is there any basis on the findings I have made for a submission that that is what the parties must have intended, and therefore the contract contained an implied term to that effect: having rejected the challenged parts of Mr Bhailok's notes, and found him to be an unreliable witness on matters of controversy, there is no support in any of the contemporaneous documentation for the suggestion. What is more, all the unchallenged contemporaneous documentation speaks of a report prepared only for secured lending purposes (or is consistent with the report being prepared only for such a purpose).

(c) Did the Defendant owe the Claimant a common law duty of care to exercise reasonable skill and care in the valuation of the Property and the preparation and provision of the Valuation Report?

148. The answer to this question is yes, Knight Frank did owe Freemont Denbigh a duty of care in tort (in addition to a contractual duty of care), but that duty of care extended only to the provision of a report for secured lending purposes. In other words, Knight Frank were to take care to produce a report which gave a fair value for the development land so that Freemont Denbigh was able to obtain the financing it had negotiated. If Knight Frank had negligently valued the land at such a low figure that Lloyds Bank had been deterred from providing the bond, Freemont Denbigh would have been entitled to sue Knight Frank both for breach of contract and for damages at common law. But that did not happen: the valuation achieved the aim of persuading (or at least not dissuading) Lloyds Bank to provide the bond which was required.

149. It would be remarkable if the duty of care owed by Knight Frank in tort were more extensive than their contractual duty of care. There is no warrant for any extension of the duty in this case and I therefore find that the common law duty was coincident in its extent with the contractual duty of care.

150. Even if there had been no contractual duty of care owed by Knight Frank to Freemont Denbigh, with therefore the only contractual duty being owed by Knight Frank to Lloyds Bank, any duty of care at common law owed by Knight Frank to Freemont Denbigh (assuming for present purposes that a common law duty of care would have arisen at all in the absence of a contractual relationship) could not have extended to protect Freemont Denbigh from losses arising from any subsequent decision not to sell the development land or the site. Those decisions would have been investment decisions of a similar type to the decisions made by the shareholders in ***Caparo Industries Plc v. Dickman*** *(loc cit)*, and just as the shareholders in that case had no claim against the company's auditors for the losses they suffered on their investment decisions, so Freemont Denbigh could have no viable claim in this case.

151. In this connection it is worth bearing in mind the comment made by Knight Frank in the report under the heading *"suitability for lending"* to which I have referred; and the points made by Lord Neuberger in paragraph 51 of his judgment in ***Scullion v. Bank of Scotland plc*** *(loc cit)* which I have cited. At any point in time, whether and how a large development opportunity such as the North Wales Hospital should be marketed, and if so at what price, and whether any discount should be countenanced on the asking price, are questions which can be described as tricky in the same way Lord Neuberger described the questions which would have arisen in connection with an assessment of the likely rental return in the ***Scullion*** case. In a case such as this, advice on the price which might be achievable would have to involve a consideration of a number of factors, such as the present situation of the larger developers prepared to undertake a development of this nature (including the number of large developments they were currently undertaking); the political and economic situation at the time of marketing; (possibly) the envisaged political and economic situation at the time when sales of the developed units would come onto the market; and the likely costs of financing the development. Mr Vose said that he was not skilled in giving such advice, whereas Knight Frank's sales department are more likely to have had the necessary skills; I accept that evidence.

152. I also note that Mr Bretherton's firm, Eckersley, were accustomed to offer *"advice on disposals, acquisitions, and development across a full range of property sectors"* (as advertised on their website). Freemont Denbigh's needs, if it had them, for advice in connection with a disposal of the development land, were capable of being fulfilled by its long-standing advisors. It will be recalled that Eckersley were not instructed to carry out the valuation report in respect of the bond, not because they were not able to prepare such a report, but because they were not independent of Freemont/Freemont Denbigh.

153. I reject the submission made by Mr Hall that Knight Frank knew (or at least they knew that there was a high probability that) the report would be relied on by Freemont Denbigh when considering whether to dispose of the property or otherwise in connection with the site or its development. Knight Frank knew that Freemont Denbigh had previously retained Eckersely, and could reasonably have assumed that Freemont Denbigh would turn to them for advice in connection with disposals or the development generally. Indeed Mr Bretherton's appraisal report which was provided to Mr Vose towards the end of July had recorded:

"Our primary role was to advise upon the marketing and subsequent sale of the development and in early 2005 we undertook an extensive marketing exercise."

(d) Whether, in the light of answers to (a) to (c) above and/or the content of the Valuation Report, the Claimant was precluded from relying on the Valuation Report?

154. No, Freemont Denbigh was not precluded from relying on the report for the purposes for which the report was provided, viz. to enable it to try to obtain the financial support it required. But if it did indeed rely on the report in the months or years ahead for other purposes for which the report was not provided, it is not entitled to bring a claim against Knight Frank in respect of any loss it suffered in consequence of that reliance. Knight Frank did not owe Freemont Denbigh a duty of care to protect it against such loss, either in contract or in tort.

155. It follows that I do not need to consider whether Knight Frank by their terms of business (or in any other way) excluded liability to Freemont Denbigh: the liability alleged did not arise because no duty of care was owed to protect Freemont Denbigh from the losses it claims to have suffered.

(e) Are the heads of loss as pleaded in paragraphs 21(b) and 21(c) of the Particulars of Claim capable of falling within the scope of any obligation or duty held to be owed by the Defendant to the Claimant, and/or are they too remote/unforeseeable to be recoverable from the Defendant?

156. No, the heads of loss claimed (including loss of profit on a subsequent sale alternatively the loss of a chance of a subsequent sale at a profit) are not capable of falling within the scope of the duties which I have found were owed by Knight Frank to Freemont Denbigh. The further questions of remoteness or foreseeability therefore do not arise.