Neutral Citation Number: [2025] EWCA Civ 562

Case No: CA-2024-000932

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS IN MANCHESTER
HHJ Mark Cawson KC sitting as a Judge of the High Court
[2024] EWHC 631 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 2 May 2025

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE JONATHAN BAKER
and
LORD JUSTICE SNOWDEN

- -

Between:

ROWLAND PHILLIP BRATT	**Claimant/ Appellant**
- and –	
NIGEL LAWSON JONES	**Defendant/ Respondent**

- -

Adam Rosenthal KC (instructed by **Gowling WLG (UK) LLP**) for the **Appellant** (Mr Bratt or the Claimant)
Graham Chapman KC and Scott Allen (instructed by **DAC Beachcroft LLP**) for the **Respondent** (Mr Jones or the Valuer)

Hearing date: 6 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.30 a.m. on Friday 2 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Geoffrey Vos, Lord Justice Baker and Lord Justice Snowden:

Introduction

1. This appeal arises out of a claim for professional negligence against a valuer of a development site for the purposes of an option agreement. It raises the question of the legal and evidential significance of the bracket within which valuations prepared by competent valuers might reasonably differ. The Claimant, Mr Bratt, seeks to extend the boundaries of the current law, as explained in *Merivale Moore plc v. Strutt & Parker* [2000] PNLR 498 (*Merivale Moore*). He submits, in effect, that if the challenged valuation is outside the bracket, there is no need for a claimant to go on to prove that the valuer had failed to take adequate professional skill, care and diligence in reaching their valuation. It is, instead, for the valuer to prove he was not negligent.

2. HHJ Mark Cawson KC, sitting as a judge of the High Court (the judge), found that the Valuer, Mr Jones, had made a mistake in carrying out one aspect of his valuation. He indicated that he would have been inclined to find that this had been negligent and that it caused a loss of £495,000 to Mr Bratt. The judge, however, determined that the appropriate margin for a non-negligent valuation of the property was "anywhere between 10% and 15%" either side of the "correct" value. Since Mr Jones's valuation had been within 14.15% of the value that the judge determined to be the correct value of the property, he dismissed Mr Bratt's claim for damages for professional negligence.

3. Mr Bratt argues that the judge was wrong to fix so wide a range for a valuation of the type in question. He contends that if the judge had adopted the correct margin of no more than 10% either side of the correct valuation, Mr Jones's valuation would have been outside the acceptable range. This would, according to Mr Bratt, have shifted a burden to the Valuer to prove that he had not been negligent, and that since he had not discharged that burden, Mr Bratt should have succeeded.

4. Mr Bratt also challenges the judge's determination of the correct value for the property, contending that it was a valuation that could not reasonably have been reached on the evidence. Accordingly, Mr Jones's valuation should have been found to fall outside the acceptable bracket with the same consequences.

5. We have decided that Mr Bratt's submissions as to the law in this area cannot succeed. For the reasons we will explain, whilst a valuation outside the acceptable bracket is an indication that something may have gone wrong, a claim in negligence or breach of contract against a valuer cannot succeed unless the court is satisfied that the valuer has failed to exercise due and proper professional skill, care and diligence in undertaking the valuation.

The facts

6. Mr Jones was appointed as an independent expert under an option agreement dated 28 May 2002 between Mr Bratt and Banner Homes Limited (Banner Homes), a property development company. The option agreement related to freehold development land at Cotefield Farm, Bodicote, Banbury, Oxfordshire (the Site).

7. The option was exercisable by Banner Homes following the grant of planning permission for residential development of the Site, and it provided that the price payable

by Banner Homes to Mr Bratt for the Site would be 90% of the market value (as defined) of the Site at a specified valuation date, less certain sums.

8. The option agreement provided that, if the parties were unable to agree the market value, they were entitled jointly to instruct an independent surveyor, experienced in the valuation of development land for the use specified in the relevant planning application, to determine the market value.

9. On 26 March 2012, outline planning permission was granted to Banner Homes for the construction of 82 dwellings on the Site. On 14 June 2013, Banner Homes served a notice fixing that date as the valuation date for the purpose of the exercise of the option agreement. The parties could not agree the price to be paid, and so Mr Jones was appointed by them on 30 August 2013 as expert valuer under the option agreement.

10. Thereafter, Mr Jones met with the parties and issued various procedural directions. Pursuant to those directions he received submissions in late 2013 from surveyors acting on behalf of Mr Bratt and on behalf of Banner Homes. Mr Bratt's surveyor focused his submissions on evidence of what he maintained were comparable transactions of development land and expressed the view that the market value of the Site was £8 million. In contrast, Banner Home's surveyor focused on a residual valuation of the anticipated development (albeit cross-referenced to some of the comparables used by Mr Bratt's surveyor), and arrived at a market value for the Site of £1,766,000.

11. Disagreement between the parties over the relevance to the valuation of a small piece of land owned by Mr Bratt, not forming part of the Site but required for access, prevented Mr Jones from proceeding with his valuation for almost two years. In the event, Mr Jones did not complete and provide his determination of the market value of the Site (the Determination) until 20 April 2016, shortly before the deadline for Banner Homes to exercise the option.

12. By the time that Mr Jones was able to complete his Determination, he had access to two additional comparable transactions in relation to development land that had not been available to the parties' surveyors in late 2013. Those related to sales of development land at Bloxham Road, Banbury (Bloxham Road) in April 2014 and Aynho Road, Addersbury (Aynho Road) in August 2014. Mr Jones regarded Bloxham Road as directly comparable to the Site, since both were greenfield sites on arterial roads to the south of Banbury, adjacent to existing housing. He rejected Aynho Road as a comparable because he took the view it was located in a village which he thought commanded a premium.

13. In attempting to ensure that he was comparing like-for-like, Mr Jones assumed that the price paid for Bloxham Road should be increased by £795,000 to take account of abnormal items of cost. Those "abnormals" were items that the selling agents of Bloxham Road (Savills) had told Mr Jones that the purchaser of that land had calculated that it would need to spend to deal with the particular features of that site to make it ready for development.

14. Mr Jones did not, however, make any addition in respect of enhancements that the purchaser of Bloxham Road might have factored into its bid. "Enhancements" are building costs that are projected to be spent by a developer over and above what would be necessary to produce standard functional houses (e.g. more expensive chimneys).

Mr Jones did **not** increase the price paid for Bloxham Road to allow for any enhancements because, although Savills had told him of the £795,000 for abnormals, they had not mentioned that the purchaser had made any allowance for enhancements.

15. When arriving at his Determination, however, Mr Jones netted down the gross figure based upon the Bloxham Road comparable to take account of the figures that he had been advised by a quantity surveyor (Mr Pillinger) for both the abnormals which would be required to be spent on preparing the Site for development, and the enhancements that a developer would be likely to spend in developing the Site in accordance with its planning permission.

16. On the basis of the Bloxham Road comparable, adjusted to take account of the abnormals and enhancements, Mr Jones determined that the market value of the Site was £4,075,000.

17. In passing, we note that Mr Pillinger's total figure for the abnormals and enhancements for the Site, upon which Mr Jones had relied, was £1,870,502. This included an element of 12% for contractor's preliminaries, overheads and profit. There was, however, an issue at trial as to whether Mr Pillinger had allocated all the 12% element to the enhancements rather than dividing it up *pro rata* between abnormals and enhancements. On the former view, the enhancements were £1,140,594 and the abnormals were £729,908: on the latter view, the enhancements were £1,052,031 and the abnormals were £818,471.

18. In addition to his comparables exercise, Mr Jones also performed a residual valuation of the Site as a cross-check, which came out at £3,634,219. By the time of the trial before the judge, it was conceded that Mr Jones had made a mistake in this residual valuation. Mr Jones had misunderstood one of the reports that he had obtained from Mr Pillinger and had in effect double-counted the costs of enhancements, which increased the construction costs and depressed the residual valuation of the Site. The evidence was that if Mr Jones had not made this mistake, he would have arrived at a residual valuation of the Site of between £4,560,000 and £4,646,000 (depending on whether the correct figure for enhancements was £1,052,031 or £1,140,594).

19. Mr Jones's case at trial, however, was that even if he had correctly imported the enhancements figure into his residual valuation, he would still have preferred to rely upon his comparables exercise as inherently more reliable and would have adhered to his figure of £4,075,000 for the market value of the Site.

20. Following Mr Jones's Determination, Banner Homes exercised the option in order to acquire the Site for development, paying a price of £3,529,500, being 90% of the market value of £4,075,000 as determined by Mr Jones.

The claim

21. Following Banner Homes's exercise of the option, Mr Bratt brought proceedings against Mr Jones for breach of contract and negligence.

22. In his claim, Mr Bratt contended that the true market value of the Site was £7,800,000 and that a careful valuer would have produced a valuation within a margin of 10% above or below that, i.e. between about £7,000,000 and £8,600,000. He also made a

number of allegations concerning specific errors in Mr Jones's Determination. Mr Bratt sought damages of 90% of the difference between £7,800,000 and the £4,075,000 that Mr Jones had determined to be the market value (less costs).

23. At trial, both sides accepted that it was appropriate for the judge to approach the case on the basis of the summary of the law given by Eder J in *Capita Alternative Fund Services (Guernsey) v. Drivers Jonas* [2011] EWHC 2336 (Comm) 2336 (*Capita*) at [145]:

> "(i) The process of valuing real property has strong subjective elements; it is an art not a science and not every error of judgment amounts to negligence. This leads to the concept of 'the bracket', or 'the permissible margin of error'.
>
> (ii) It is a necessary pre-condition to liability that the final valuation figure is shown to be 'wrong', that is, 'outside the bracket'.
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> (iii) Where the Court is considering whether a valuation in itself is negligent, the claimant must normally show, not only that the valuer fell in some way below the standards to be expected of a reasonably competent professional, but also that the valuation fell outside the range within which a reasonably competent valuer could have valued the asset. If the valuation is within the range, then the valuation will not be found to have been negligent even if some aspect of the valuation process can be criticised as having fallen below reasonably competent standards.
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> (iv) In each case the Court must assess what it regards as being the competent valuation and what it regards as being the size of the permissible range. In each case, both are findings that will depend on the particular facts of the case. The assessment of range should not be approached mechanistically.
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> (v) Where the valuation is made up of a number of different aspects, a different methodology may have to be adopted in relation to different aspects because of the nature of the particular valuation process with which the Court is dealing. In general, the bracket should be assessed by arriving at a bracket for each of the variables rather than only for those variables that are alleged (or found) to have been negligently assessed.
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> (vi) … for a standard residential property, the margin of error may be as low as plus or minus 5 per cent; for a valuation of a one-off property, the margin of error will usually be plus or minus 10 per cent; if there are exceptional features of the property in question, the margin of error could be plus or minus 15 per cent, or even higher in an appropriate case.
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> (vii) Even if the valuation is outside the range, the professional may escape liability if he can prove that he exercised reasonable

> skill and care. If the valuation is found to fall within the range, the claimant will still be entitled to succeed if it can demonstrate that it has suffered loss as a result of negligent advice given in the course of, or in addition to, the valuation process."
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> [Citations omitted]

24. There was, however, a marked difference between the parties as to the detailed approach which this summary of the law required. For Mr Bratt, Mr Rosenthal KC focussed on the result of Mr Jones's Determination rather than the specific defects in the method by which he had arrived at it. He contended that the true market value of the Site, according to the expert evidence he adduced at the trial, was £8 million, and that since Mr Jones's Determination of £4,075,000 fell well outside the 10% margin within which careful valuers might reasonably disagree, this shifted the burden of proving that he had exercised due skill and care to Mr Jones. Mr Rosenthal contended that since Mr Jones had not discharged that burden, he was liable.

25. In contrast, for Mr Jones, Mr Allen contended that to succeed, Mr Bratt needed to show **both** that one or more of the steps in the valuation methodology used by Mr Jones had not been in accordance with the practices regarded as acceptable by a respectable body of opinion within his profession (the so-called *Bolam* test, after the decision in *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582 at 587), **and** also that the result had been outside the range of values that could have been arrived at by a competent and careful valuer. He contended that, irrespective of any particular allegations of negligence, the Determination was within the reasonable margin for error, and so Mr Jones was not liable.

The judgment

26. The judge considered authorities that had been referred to in *Capita*, including *Merivale Moore* and the decision of Coulson J in *K/S Lincoln v. CB Richard Ellis* [2010] PNLR 31 (*K/S Lincoln*). The judge distilled two relevant principles at [162] as follows:

> "The authorities, as I read them, recognise two relevant principles so far as negligence claims against valuers are concerned:
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> (i) for a valuer, like any other professional, to be found to be liable for professional negligence it is a fundamental *Bolam* requirement that they be found to have acted otherwise than in accordance with practices which are regarded as acceptable by a respectable body of opinion in the profession, recognising that there is scope for differences of reasonable professional opinion, and that the process of professional valuation is an art as much as a science;
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> (ii) but it is, in any event, a precondition of liability that the valuer's valuation should fall outside the range permitted to a non-negligent valuer in respect of that particular type or kind of valuation."

27. The judge then placed reliance upon the summary by Dove J in *Barclays Bank plc v. TBS & V Limited* [2016] EWHC 2948 (QB) (*TBS*) at [64] as to how those principles should be applied. He summarised that approach as follows, at [165] (emphasis in the judge's original):

> "(i) The court must form its own view, based on the evidence before it, and its own evaluation, of the correct value as at the valuation date applying professional practice standards which applied at that date;
>
> (ii) Having formed its own view the court then has to consider what the appropriate margin of error applicable to the valuation judgment should be, in order to determine the bracket within which a non-negligent valuation would have fallen. This will depend upon the facts of a particular case, and guidance is provided by the categorisation adopted by Coulson J in *K/S Lincoln* at [183];
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> (iii) If the impugned valuation is within the relevant margin of error of the court's valuation, then it is within the bracket of potential non-negligent valuations and thus negligence would not have been established. Liability is to be established by reference to the results of the valuation, not purely and simply by reference to the details of how that result was arrived at;
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> (iv) If the valuation is beyond the margin of error in relation to the court's valuation and therefore outside the bracket, then the valuer's competence and the care used in his or her valuation is called into question. The court <u>will examine at this stage</u> the question of whether in reaching a valuation outside the bracket the valuer has acted "*in accordance with practices which are regarded as acceptable by a respectable body of opinion in his profession*", i.e. the *Bolam* type considerations referred to above."

28. Applying this approach, the judge first conducted his own determination of the value of the Site on the basis of the expert evidence. He essentially accepted that the best evidence as to the market value of the Site was Mr Jones's valuation based upon the Bloxham Road comparable. The judge made one adjustment of £550,000 to this figure in respect of Mr Jones's treatment of enhancements in relation to Bloxham Road, and another in respect of the rate of interest in relation to deferred consideration paid for Bloxham Road, and held that the correct market value of the Site as at 14 June 2013 was £4,746,860. The judge stated that he derived some comfort in relation to that figure from his own residual valuation, which he determined to be £4,550,000.

29. The judge then addressed the question of the appropriate bracket or margin to be applied to this valuation. He expressed his conclusion at [237]:

> "As to the brackets identified by Coulson J in *K/S Lincoln* at [183], I am mindful that it was there suggested that the margin of error will usually be plus or minus 10%, but that if there are

> exceptional features of the property in question, the margin of error could be plus or minus 15%, or even higher in an appropriate case. The only expert evidence on the point is from Mr Buckingham [Mr Jones's expert witness], who supports a margin of error of 15% on the basis of the Bloxham Road comparable being a good comparable. I am satisfied that, in the circumstances of the present case a margin for a non-negligent valuation of anywhere between 10% and 15% is entirely appropriate. In reaching this conclusion, I have taken into account, amongst other things, the following factors:
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> (i) The wide range of opinions expressed as to the market value of the Site as at 14 June 2013 in the present case, and the variety of issues that have arisen in the present case concerning the correct approach to the valuation of the Site, involving a number of questions of judgment, does, to my mind, point to a margin higher than the norm, albeit that it might not be possible to properly describe the present case as exceptional;
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> (ii) … there is scope for a significant margin of appreciation as to how provision ought to have been made for abnormals;
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> (iii) The cases do show that the margin applicable for a non-negligent valuation is likely to be higher in the case of a development plot with certain unique characteristics than a standard residential property – see, for example, *Dunfermline BS v CBRE Limited* [2018] PNLR 13 … I note that this case involved a valuation of a site for residential development where the experts had agreed on a margin of error of +/- 15%. This is consistent with the only expert evidence on the point in the present case, namely Mr Buckingham's evidence that the appropriate margin was 15%; and
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> (iv) A comparison with the residual valuation suggests that a valuation of £4,746,860 is more likely to be too high than too low."

30. The judge then summarised the result of his analysis at [238]:

> "Based on Mr Jones's valuation of £4,075,000, and the valuation that I have arrived at of £4,746,860, Mr Jones's valuation is within 14.15% of the "correct" valuation. Although 14.15% is towards the top end of what I have found to be the appropriate bracket, having regard to the above, I consider that I can, in the circumstances, safely conclude that Mr Jones's valuation in the Determination is within the margin of error allowable in respect of a non-negligent valuation. On this basis and having regard solely to the result rather than how one gets to the result, I consider that Mr Bratt has failed to establish his claim in negligence against Mr Jones because Mr Jones's valuation is within the appropriate margin or bracket."

31. The judge therefore dismissed the claim. In a coda to his judgment, the judge indicated that if he had found that Mr Jones's valuation had fallen outside the 15% margin, he would have been inclined to conclude that Mr Jones had acted without due skill and care in failing to get to grips with the issue of enhancements, and that this would have resulted in an increase in the Determination of the value of the Site of £550,000, with the result that Mr Bratt would have been entitled to damages of 90% of that sum, namely £495,000.

The appeal

32. Mr Bratt was granted permission to appeal by William Davies LJ on four grounds. The first two relate to the judge's approach to the law.

33. The first was that the judge applied the wrong legal test to determine liability. Mr Rosenthal contended, on the basis of *Merivale Moore* and [145(vii)] in *Capita*, that if a valuation falls outside the permitted margin or bracket, then that is determinative as to liability unless the valuer can prove that he was not negligent. He submitted that, if the valuer's figure was outside the bracket, the claimant does not need additionally to satisfy the *Bolam* test by showing that the valuer's methodology was negligent in any particular respect. Mr Rosenthal accepted, however, that on its own, this ground would not have the result that the appeal should be allowed. He accepted that Mr Bratt also had to succeed in attacking the judge's determination of the correct value of the Site or the size of the bracket under one of the other three grounds.

34. The second ground was that the judge was wrong to approach the question of the size of the bracket as a matter of fact to be determined on the basis of expert evidence. Mr Rosenthal contended that *K/S Lincoln* at [183], as reflected in *Titan Europe 2006-3 plc v. Colliers International UK plc* [2015] EWCA Civ 1083, [2016] PNLR 7 (*Titan*) at [6(5)], had held that the determination of the bracket was a question of law, and that the only potential relevance of expert evidence was as to the degree of difficulty of the valuation. He argued that there was nothing difficult about the valuation in this case, so that the appropriate bracket should have been plus or minus 10% rather than 15%.

35. The third ground attacked the judge's treatment of enhancements and abnormals in reaching his determination of the correct market value of the Site on the basis of the Bloxham Road comparable. It was contended that the correct value should have been £590,594 higher, which would have had the result that the Determination fell outside the permissible bracket.

36. The fourth ground was that in fixing the correct market value of the Site, the judge was wrong to rely solely on the Bloxham Road comparable, and should instead have taken into account two other comparables: Aynho Road and a second site at Milton Road, Addersbury (Milton Road). It was said that, if he had done so, the judge would have valued the Site at between £6,794,608 (based on the price per market plot of Milton Road) or £7,426,358 (based on the price per market plot of Aynho Road), which again would have had the result that the Determination would have fallen outside the permissible bracket.

Ground 1: the approach to claims against valuers

37. There was no dispute between the parties that the valuation of land is not a precise science, and that careful and competent valuers might reach different results without having breached their duties. The point was put in this way by Watkins J in *Singer & Friedlander v. John D Wood & Co* [1977] 2 EGLR 84 (*Singer & Friedlander*) at 85G:

> "The valuation of land by trained, competent and careful professional men is a task which rarely, if ever, admits of precise conclusion. Often beyond certain well-founded facts so many imponderables confront the valuer that he is obliged to proceed on the basis of assumptions. Therefore, he cannot be faulted for achieving a result which does not admit of some degree of error. Thus, two able and experienced men, each confronted with the same task, might come to different conclusions without anyone being justified in saying that either of them has lacked competence and reasonable care, still less integrity, in doing his work."

38. Watkins J also went on to describe the evidence that he had been given as to the bracket within which, without negligence, valuers might reasonably differ:

> "The permissible margin of error is said by Mr Dean, and agreed by Mr Ross, to be generally 10 per cent either side of a figure which can be said to be the right figure, i.e. so I am informed, not a figure which later, with hindsight, proves to be right but which at the time of valuation is the figure which a competent, careful and experienced valuer arrives at after making all the necessary inquiries and paying proper regard to the then state of the market. In exceptional circumstances the permissible margin, they say, could be extended to about 15 per cent, or a little more, either way. Any valuation falling outside what I shall call the "bracket" brings into question the competence of the valuer and the sort of care he gave to the task of valuation … With these views those who advise the plaintiffs agree, or at least do not dissent from."

39. Watkins J returned to pull these threads together a little later in his judgment, saying, at 86A:

> "As Mr Ross said, valuation is an art, not a science. Pinpoint accuracy in the result is not, therefore, to be expected by he who requests the valuation. There is, as I have said, a permissible margin of error, the "bracket" as I have called it. What can properly be expected from a competent valuer using reasonable skill and care is that his valuation falls within this bracket."

40. *Singer & Friedlander* was cited with approval in *Merivale Moore*. *Merivale Moore* was a professional negligence claim by a purchaser against surveyors instructed to provide an appraisal of a proposed purchase of a lease of a property in the West End of London for development purposes. In assessing whether the asking price was a good

investment, the valuer estimated the cost of development, and valued the completed development by determining the rental value that could be obtained and the yield to be applied to it to give a capital value.

41. Buxton LJ (with whom Nourse LJ agreed) said this at pages 515-516 in *Merivale Moore*:

> "It has frequently been observed that the process of valuation does not admit of precise conclusions, and thus that the conclusions of competent and careful valuers may differ, perhaps by a substantial margin, without one of them being negligent: see for instance the often quoted judgment of Watkins J. in *Singer & Friedlander* at 85G; and the House of Lords in [*South Australian Asset Management Corp v. York Montague* [1997] AC 191 (SAAMCO)] at 221F–G. That has led to the courts adopting a particular approach to claims of negligence on the part of valuers.
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> In the general run of actions for negligence against professional men,
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> > "it is not enough to show that another expert would have given a different answer … the issue … is whether [the defendant] has acted in accordance with practices which are regarded as acceptable by a respectable body of opinion in his profession: *Zubaida v Hargreaves* [1995] 1 EGLR 127 at 128A per Hoffmann LJ, citing the very well-known passage in *Bolam* at 587."
>
> However, where the complaint relates to the figures included in a valuation, there is an earlier stage that the court must be taken through before the need arises to address considerations of the *Bolam* type. Because the valuer cannot be faulted in any event for achieving a result that does not admit of some degree of error, the first question is whether the valuation, as a figure, falls outside the range permitted to a non-negligent valuer. As Watkins J. put it in *Singer & Friedlander*, at 86A,
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> > "There is, as I have said, a permissible margin of error, the 'bracket' as I have called it. What can properly be expected from a competent valuer using reasonable care and skill is that his valuation falls within this bracket."
>
> A valuation that falls outside the permissible margin of error calls into question the valuer's competence and the care with which he carried out his task: *ibid.* But not only if, but only if, the valuation falls outside that permissible margin does that inquiry arise. That is what I take to have been the view of Balcombe L.J., with whom the remainder of the members of this court agreed, in *Craneheath Securities v York Montague* [1996] 1 EGLR 130 at 132C, when he said:

> "It would not be enough for Craneheath to show that there have been errors at some stage of the valuation unless they can also show that the final valuation was wrong."

As it was put by HHJ Langan Q.C. in *Legal & General Mortgage Services v HPC Professional Services* [1997] PNLR 567 at 574F, in an analysis that I have found helpful, once it is shown that the valuation falls outside the "bracket":

> "the plaintiff will by that stage have discharged an evidential burden. It will be for the defendant to show that, notwithstanding that the valuation is outside the range within which careful and competent valuers may reasonably differ, he nonetheless exercised the degree of care and skill which was appropriate in the circumstances."

Various further considerations follow. First, the "bracket" is not to be determined in a mechanistic way, divorced from the facts of the instant case. We were shown a list of figures giving either the bracket determined, or the percentage divergence from the true value found nonetheless not to have been negligent, in a series of recent cases. I did not find that of assistance, save as a graphic reminder that it is not enough for a plaintiff simply to show that the valuation was different from the true value. Second, if it is shown even at the first stage that the valuer did adopt an unprofessional practice or approach, then that may be taken into account in considering whether his valuation contained an unacceptable degree of error. … Third, where the valuation is shown to be outside the acceptable limit, that may be a strong indication that negligence has in fact occurred. … Some caution at least has to be exercised in this respect, because the question must remain, in valuation as in any other professional negligence cases, whether the defendant has fallen foul of the *Bolam* principle. To find that his valuation fell outside the "bracket" is, as is held by this court in *Craneheath* and also, I consider, by the House of Lords in [*SAAMCO*], a necessary condition of liability, but it cannot in itself be sufficient."

42. In the result, in *Merivale Moore*, the Court of Appeal held that the valuer was not liable for his determination of the value of the completed development, because he had not been negligent in selecting his figures for rent and yield. However, the valuer's appeal was dismissed for reasons unrelated to the amount of his valuation. The valuer was held to have breached his duty of care by not including a warning to the prospective purchaser about the reliability of the yield figure he had used.

43. In the final paragraph of the passage cited at [41] above, Buxton LJ plainly held that the requirement that the valuer's figure should fall outside the permissible bracket was a "necessary but not sufficient" condition of liability. Buxton LJ also expressly stated that although the fact that the valuer's figure fell outside the bracket might be a "strong indication" that some negligence had occurred, nonetheless the question that would remain would be "in valuation as in any other professional negligence cases, whether

the defendant has fallen foul of the *Bolam* principle". That followed Buxton LJ's statement earlier in the extract, referring to Balcombe LJ in *Craneheath Securities v. York Montague* [1996] 1 EGLR 130, that "if, but only if" the valuer's figure fell outside the "permissible margin" would the need to inquire into the valuer's competence and care arise.

44. In our judgment, those were unambiguous statements that it was not enough to establish liability for a claimant to show that a valuer's figure is outside the bracket. *Merivale Moore* clearly accepted that, to establish liability, the claimant must also go on to prove that the valuer was negligent in accordance with the *Bolam* principles – i.e. to demonstrate that in some respect the valuation was carried out other than in accordance with the practices regarded as acceptable by a respectable body of opinion within the profession.

45. In support of his argument that *Merivale Moore* actually decided that, if the valuer's figure fell outside the bracket, this would be determinative of liability unless the valuer proved that he had exercised due skill and care, Mr Rosenthal placed reliance on Buxton LJ's endorsement of HHJ Langan QC's dictum in *Legal & General Mortgage Services v. HPC Professional Services* [1997] PNLR 567. As set out above, HHJ Langan had said that, if the valuer's figure fell outside the bracket this would "discharge an evidential burden", with the result that "it will be for the [valuer] to show that he exercised the degree of care and skill which was appropriate in the circumstances".

46. We agree with Buxton LJ's observation that the fact that a valuer's figure falls outside the bracket may be an indication that the valuer has been negligent. It cannot, however, reverse the legal burden of proving negligence. The simple point is that, in a case against a valuer, the legal burden of proving negligence in accordance with the *Bolam* principles rests at all times on the claimant, and never shifts to the defendant valuer. The reference to an evidential burden in this context is not, in our view, particularly helpful. An evidential burden generally describes the obligation of a party to adduce sufficient credible evidence which, if left uncontradicted and unexplained, could be accepted by the trier of fact as proof of the issue in question (see *Jayasena v. R* [1970] AC 618 at page 624). Whether a valuer has breached the *Bolam* principles is not a simple question of fact, and there may be various reasons why, without negligence, a valuer's figure falls outside the bracket – e.g. that they were entitled to rely on information from a third party that turned out to be inaccurate.

47. There are, as it seems to us, two distinct questions. The first, on the basis of *Merivale Moore*, is whether the challenged valuation fell outside the acceptable bracket as determined by the court. The second is whether the valuer's *Bolam* duty has been breached. Mr Bratt accepted that he could not succeed on this ground alone. Accordingly, there is no need to say any more about the burden of proving a breach of the *Bolam* principles, because, as appears below, he has not succeeded in showing that Mr Jones's Determination was outside the appropriate bracket.

48. For the purposes of this case, therefore, what we have said thus far disposes of ground 1 of the appeal, because we are bound by *Merivale Moore*. That case decided, as we have said, that a claimant in a valuer's liability case must prove both that the valuation was outside the acceptable bracket as determined the court, **and** that the valuer breached their *Bolam* duty.

49. There was, however, also some argument before us as to the supposed logical fallacy that arose from the *Merivale Moore* approach if it were a pre-condition to a claimant's success that a valuation was outside the bracket. That logical fallacy was referred to by the judge at [67]-[83] and [160]-[161] and in Lewison J's detailed analysis in *Goldstein v. Levy Gee* [2003] PNLR 35 at [39]-[69]. The logical fallacy in question is that a claimant can, on the basis of *Merivale Moore*, fail even if the valuers were in breach of their *Bolam* duty, if their valuation fell within the acceptable bracket as determined by the court. This state of affairs is seemingly justified on the basis that: (a) valuation is an art rather than a science, (b) that the scope of the valuer's duty is only to provide an estimate of value within a range, and/or (c) that no loss is sustained by the claimant unless the valuation is outside the bracket (see *K/S Lincoln* at [151]-[152]).

50. Having disposed of the "evidential burden" argument, it seems to us that this is not the appropriate case in which to resolve the "logical fallacy" question, since it calls into question the correctness of the decision in *Merivale Moore* that can only be determined (in another case in which it arises directly) by the Supreme Court.

51. Since, however, the point was argued, we will very briefly explain the problems that we see with the "pre-condition" approach that the parties effectively agreed and the judge adopted at [162(ii)] (see [26] above).

52. First, there are two passages in judgments from Lord Hoffmann in *SAAMCO* and in *Lion Nathan Ltd v. CC Bottlers Ltd* [1996] 1 WLR 1438 (*Lion Nathan*) that seem to us to cast doubt on the concept of a pre-condition to a valuer's liability.

53. In *SAAMCO*, Lord Hoffmann said this at pages 221-222:

> "[The defendants] say that the damage falling within the scope of the duty should not be the loss which flows from the valuation having been in excess of the true value but should be limited to the excess over the highest valuation which would not have been negligent. This seems to me to confuse the standard of care with the question of the damage which falls within the scope of the duty. The valuer is not liable unless he is negligent. In deciding whether or not he has been negligent, the court must bear in mind that valuation is seldom an exact science and that within a band of figures valuers may differ without one of them being negligent. But once the valuer has been found to have been negligent, the loss for which he is responsible is that which has been caused by the valuation being wrong. For this purpose the court must form a view as to what a correct valuation would have been. This means the figure which it considers most likely that a reasonable valuer, using the information available at the relevant date, would have put forward as the amount which the property was most likely to fetch if sold upon the open market. While it is true that there would have been a range of figures which the reasonable valuer might have put forward, the figure *most* likely to have been put forward would have been the mean figure of that range. There is no basis for calculating damages upon the basis that it would have been a figure at one or other extreme of

> the range. Either of these would have been less likely than the mean: see [*Lion Nathan*]."

54. *Lion Nathan* was a claim for breach of a warranty given by a vendor of shares as to the preparation of a profit forecast upon which a purchaser had relied. The Privy Council rejected the submission that it was in accordance with the contract for the vendor to put forward a forecast figure within the range of foreseeable deviation from a properly prepared forecast. Lord Hoffmann explained at page 1445:

> "There is no connection between the range of foreseeable deviation in a given forecast and the question of whether the forecast was properly prepared. Whether a forecast was negligent or not depends upon whether reasonable care was taken in preparing it. It is impossible to say in the abstract that a forecast of a given figure "would not have been negligent." It might have been or it might not have been, depending upon how it was done. Assume, for example, that the vendor had forecast $1.25m. and that the limits of foreseeable deviation would have been regarded as $50,000 either way. Assume that the forecast was unexceptionable in every respect but one: there had been a careless double counting of sales which, if noticed, would have reduced the estimate by $25,000. To that extent, the estimate has not been made with reasonable care. If on account of some compensating deviation the outcome is $1.25m. or more, the purchaser will have suffered no loss and the vendor will incur no liability. But if the outcome is less than $1.25m., their Lordships think that the purchaser is entitled to say that if the estimate had been made with reasonable care, the figure put forward by the vendor as the mean and upon which he relied in fixing the price, would have been $25,000 lower. To this extent, he has suffered loss by reason of the breach of warranty. It is nothing to the point that the outcome is still within what would have been predicted as the limits of foreseeable deviation. His complaint is that the whole range of possible outcomes would have been stated as $25,000 lower. The purchaser has accepted the risk of any deviation attributable to factors which were unforeseeable, unknown or incalculable at the time of the forecast. He has accepted the risk of such deviation whether its true extent would have been foreseeable at the time of the forecast or not. But he has not accepted the risk of *any* deviation which is attributable to lack of proper care in the preparation of the forecast. The only tolerable forecast is one which, on its facts, was prepared with reasonable care."

55. In these two cases, Lord Hoffmann thus seems to have affirmed that the basic requirement for a claimant is to show that a valuer or forecaster has been negligent. He seems to have rejected the idea that the range of figures that valuers might arrive at without negligence had anything to do with the standard of care required of a valuer, and thus to have rejected the idea that the only duty of a valuer is to produce a figure within the bracket. Both passages would seem to us to cast some doubt on the need for

a pre-condition to a valuer's liability. We should also mention that we do not think that the recent Supreme Court decision in *Manchester Building Society v. Grant Thornton UK LLP* [2021] UKSC 21, [2022] AC 783 casts doubt on the correctness of the passage we have cited from *SAAMCO*. It is perhaps also worth mentioning that these authorities also cast doubt on the correctness of Dove J's summary in *TBS*: "If the impugned valuation is within the relevant margin of error of the court's valuation, then … negligence would not have been established" (see [27] above).

56. Secondly, as we have already mentioned, one suggested analysis is that a claimant against a valuer cannot have suffered compensable loss unless the valuation is outside the acceptable bracket (see Coulson J in *K/S Lincoln* at [141] and [151]-[152], and Vos J's comment in *Dennard v. PricewaterhouseCoopers LLP* [2010] EWHC 812 (Ch) at [134]). We do not, however, think that the "loss" explanation is necessarily an accurate or complete one. It seems to be based upon the idea that for the purposes of assessing loss, it should be assumed that the valuer could properly have performed his contractual duties simply by producing a value within the bracket. Again, that does not sit easily with Lord Hoffmann's analysis in *SAAMCO* and *Lion Nathan*. Moreover, there is a large spectrum of factual situations in valuation cases. Even on the basis that *Merivale Moore* is correct, it seems to us impossible to hold that a claimant could never succeed in obtaining damages for breach of duty against a careless valuer whose valuation fell within the bracket. Indeed that was, in effect, the decision in *Merivale Moore* itself, by reason of the absence of a warning that ought to have been given.

57. For these reasons, we would reject the first ground of appeal, and would not extend the importance of the *Merivale Moore* bracket in the manner suggested by Mr Rosenthal. Neither we nor the judge were asked to depart from *Merivale Moore* (which we could not anyway have done). The judge was, therefore, right to hold that it was a pre-condition for Mr Jones to be liable in negligence that his Determination fell outside the bracket as determined by the judge. Even if the Determination had fallen outside the bracket, the burden would still have rested upon Mr Bratt to show that Mr Jones had acted negligently in some specific respect in accordance with *Bolam* principles.

Ground 2: the determination of the bracket

58. Mr Bratt's second ground of appeal is that the judge erred in treating the determination of the bracket as a question of fact to be determined on the basis of expert evidence. He contended that it is a question of law for the court.

59. In support of that contention, Mr Rosenthal relied upon the decision of this court in *Titan*. That was an appeal from a decision of Blair J in which Longmore LJ said at [6]:

> "At [127] of his judgment, Blair J recorded that the legal principles in relation to a valuer's negligence were not in dispute:
> …
>
> (5) The question of bracket is ultimately a question of law for the court's determination assisted by the views of expert valuers as to the degree of difficulty of the valuation under consideration. The case law suggests that for a standard residential property, the margin of error may be as low as plus or minus 5 per cent; for a

> valuation of a one-off property, the margin of error will usually be plus or minus 10 per cent; if there are exceptional features of the property in question, the margin of error could be plus or minus 15 per cent, or even higher in an appropriate case (see *K/S Lincoln* …)"

60. Longmore LJ was simply quoting the first instance judgment of Blair J, which itself had set out the agreed position of the parties before him. We must, therefore, go back to first principles to consider whether that was correct.

61. In *K/S Lincoln*, Coulson J said as follows at [180]-[183], under the heading, "The Margin of Error … (a) The Law":

> "180. There are a number of authorities dealing with the appropriate margin of error. The starting point is *Singer & Friedlander* at 85H-J where Watkins J. said:
>
> > "The permissible margin of error is said … to be generally 10 per cent either side of a figure which can be said to be the right figure … in exceptional circumstances, the permissible margin … could be extended to about 15 per cent, or a little more, either way."
>
> 181. The only case to which I was referred where a lower percentage was imposed was in *Axa Equity and Law Home Loans Ltd v Goldsack & Freeman* [1994] 1 EGLR 175, where a bracket of roughly plus or minus 5 per cent was fixed by the judge. That was a case involving residential property. There are other cases involving residential property where the experts agreed that a plus or minus 5 per cent range was appropriate: see for example, *BNP Mortgages v Barton Cook and Sams* [1996] 1 EGLR 239. I can certainly see that, for standard estate houses for example, a smaller bracket than 10 per cent may well be appropriate.
>
> 182. There are a number of cases in which a higher bracket has been identified. A bracket of 15 per cent up or down was adopted in *Corisand v Druce & Co* [1978] 2 EGLR 86 where the property in question was a hotel. And there are other cases, such as *Mount Banking Corporation Ltd v Cooper & Co* [1992] 2 EGLR 142 and *Arab Bank Plc v John D Wood Commercial Ltd* [1998] EGCS 34, where the relevant percentages were, respectively, 17.5 per cent and 20 per cent. However, in all of these cases, the relevant percentages were agreed between the experts. They were not the subject of consideration by the court because, unlike the present case, the margin of error/bracket was not itself in dispute.
>
> 183. It seems to me that, as a matter of general principle, the position to be taken from the authorities is as follows:

> (a) For a standard residential property, the margin of error may be as low as plus or minus 5 per cent;
>
> (b) For a valuation of a one-off property, the margin of error will usually be plus or minus 10 per cent;
>
> (c) If there are exceptional features of the property in question, the margin of error could be plus or minus 15 per cent, or even higher in an appropriate case."

62. Coulson J's starting point in *K/S Lincoln* was Watkins J's judgment in *Singer & Friedlander*. The full passage from Watkins J's judgment reveals clearly that he was not purporting to set out any legal test but simply reciting the evidence that he had received as to the margin for error in the case before him. In the full extract, Watkins J said:

> "The permissible margin of error is said by Mr Dean, and agreed by Mr Ross, to be generally 10 per cent either side of a figure which can be said to be the right figure, i.e. so I am informed, not a figure which later, with hindsight, proves to be right but which at the time of valuation is the figure which a competent, careful and experienced valuer arrives at after making all the necessary inquiries and paying proper regard to the then state of the market. In exceptional circumstances the permissible margin, they say, could be extended to about 15 per cent, or a little more, either way. Any valuation falling outside what I shall call the "bracket" brings into question the competence of the valuer and the sort of care he gave to the task of valuation … With these views those who advise the plaintiffs agree, or at least do not dissent from."

The report of the case reveals that Mr Dean was the expert witness for the defendants, and Mr Ross was the surveyor who had actually carried out the valuation for the defendants which was in issue in the case. The judgment in *Singer & Friedlander*, therefore, does not support the proposition that the determination of the relevant bracket is a question of law: on the contrary, it supports the proposition that it is a question of fact to be determined by the court on the basis of the evidence before it.

63. To similar effect, in *Merivale Moore*, Buxton LJ's first point in the extract set out above at [41] following his summary of the authorities, was that:

> "… the "bracket" is not to be determined in a mechanistic way, divorced from the facts of the instant case. We were shown a list of figures giving either the bracket determined, or the percentage divergence from the true value found nonetheless not to have been negligent, in a series of recent cases. I did not find that of assistance, save as a graphic reminder that it is not enough for a plaintiff simply to show that the valuation was different from the true value."

Buxton LJ was, therefore, clear that determination of the bracket should not be divorced from the facts of the particular case and should not be determined in a mechanistic way. Those views are only consistent with the determination of the bracket being a question of fact.

64. That conclusion is also supported by a fourth point made by Buxton LJ in *Merivale Moore* following the extract set out above:

> "Fourth, Mr Goldsmith strongly argued that since it fell to the plaintiff to establish that the valuation was outside the range that could be reached by any competent surveyor, the plaintiff must adduce (expert) evidence of what that range was. Such evidence has certainly been before the court, in specific terms, in a number of the cases: see for instance *Singer & Friedlander*; *[SAAMCO]* before Phillips J [1994] 2 EGLR at 118B; and *Nykredit v. Edward Erdman* [1996] 1 EGLR 123 at 123A. Where such evidence is available the judge's task in determining whether the actual result of the valuation fell outside the range to be expected of a competent valuer is clearly substantially eased. I am however not prepared to hold in general terms, or at least not prepared to hold on the basis of the issues debated in this appeal, that the adduction of such evidence is a necessary precondition to a finding of negligence on the part of a valuer. As at present advised, I think that it is still open to the judge in a suitable case to hold that the valuation is so far removed from what was the true value of the property that it must be regarded as a valuation that was outside the limits open to a competent valuer, without specific professional evidence being given of what those limits were."

Again, there is nothing in this passage that supports the contention that the setting of the bracket is a question of law. On the contrary, the observation that the judge's task will be "substantially eased" by the availability of expert evidence as to the range is only consistent with the issue being a question of fact.

65. Moreover, when Coulson J's comments in *K/S Lincoln* are read as a whole, it is apparent that he was not purporting to set out any principles of law for the determination of the bracket. Although, at [183], Coulson J set out what he described as a "general principle" to be derived from the authorities, the courts in many of the cases he referred to at [181]-[182] had accepted a bracket agreed between experts. Coulson J's principles were also expressed in imprecise terms, such as "the margin of error may be as low as …" and "the margin of error will usually be …". That kind of phraseology would not have been employed in setting a legal test.

66. In the instant case, Mr Rosenthal criticised the judge for adopting a bracket of plus or minus 15% of the "correct" value on the basis that this could only be justified if there were exceptional features of the valuation of the property. He relied on the fact that Mr Buckingham had accepted in cross-examination that there was nothing exceptional about the valuation of the Site. He distinguished *Dunfermline BS v. CBRE* [2018] PNLR 13, a case of a bracket of plus or minus 15% which was relied on by the judge, as being

one where no comparables were available, leaving the valuer to rely on residual valuations.

67. Mr Buckingham expressly rejected, in evidence, the suggestions that (a) the Site was unexceptional, and (b) a 10% bracket. He confirmed his report to the effect that a valuation based upon residuals could have varied by as much as 20%, and said that he had narrowed this down to 15% because of the availability of a good comparable. Mr Bratt did not adduce any contrary expert evidence.

68. As we have said, the judge at [237] based his determination of the bracket on Mr Buckingham's evidence. He took into account a number of factors that led him to the conclusion that a margin "higher than the norm" was appropriate, even though he accepted that the case might not be properly described as exceptional. These included the fact that there were a variety of issues that had arisen concerning the valuation of the Site that required the exercise of judgment, together with the differing views ("a significant margin of appreciation") as to how to provide for abnormals.

69. In our view, the judge carried out an entirely appropriate evaluation of the evidence, including the only available expert evidence. He was entitled to reach the conclusion he did. Nothing in *Dunfermline* required him to reach a different conclusion on the special facts of this case.

70. We would therefore dismiss the second ground of appeal.

Ground 3: enhancements and abnormals

71. The third ground of appeal relates to the judge's treatment of enhancements and abnormals in reaching his Determination. The judge based that Determination on the Bloxham Road comparable, which had been used by Mr Jones, but making two adjustments. One of these related to the treatment of enhancements.

72. As we have explained, when attempting to make a like-for-like comparison of the Site and Bloxham Road, Mr Jones had not grossed up the price paid for Bloxham Road to allow for any enhancements that might be made by the purchaser; but he had netted down the comparable figure to take account of enhancements that were intended to be made by the developer of the Site based on the contents of Mr Pillinger's reports. Mr Jones's evidence was that it would have been inappropriate for him to have grossed up the price paid for Bloxham Road in the absence of any evidence from Savills to suggest that the purchaser had taken any enhancements into account: but that he did have evidence from Mr Pillinger of the enhancements intended to be made in the development of the Site.

73. Mr Bratt's case was that Mr Jones should have assumed that equivalent enhancements would be made at Bloxham Road as at the Site, and that he should have grossed up the price paid for Bloxham Road to an equivalent extent. Alternatively, Mr Bratt argued that no adjustments should have been made for enhancements either way in respect of Bloxham Road or the Site, since a developer would simply assume that they could recover the costs of enhancements through an increase in the sale price for the completed properties, so the net result should have been neutral.

74. The judge dealt with these contentions in [219] of his judgment as follows,

> "I clearly need to be careful in accepting the explanation provided by Mr Jones, now, some years after the event. I consider that Mr Jones was probably wrong to, in effect, wholly ignore what Mr Pillinger had said about the recoverability of enhancements through an increase in price. However, Mr Pillinger was a quantity surveyor and not a valuer, and I consider that Mr Jones was entitled to take the view that enhancements would not necessarily be recovered through the purchase price. However, I consider that some provision properly was required, either to reflect the fact that there might have been enhancements at Bloxham Road, or that the whole of the enhancement cost would not be recovered through an increase in purchase prices. I consider that the appropriate course would have been for Mr Jones to have deducted something in the region of 50% of the enhancement costs provided by Mr Pillinger, rather than the whole amount thereof to reflect these considerations. There is no exact science in this figure of 50%, but I consider this to be the best way of reflecting the considerations that I have identified."

75. The result was that, in making his determination of the value of the Site, the judge deducted £550,000 on account of enhancements (which, as we have indicated, were either £1,140,594 or £1,052,031 depending upon how much of the 12% contractor's profit margin had been included). In adopting this approach of not assuming that all enhancement costs would necessarily be recovered in increased sales prices of finished properties, and taking into account about 50% of the enhancement costs in relation to the Site, the judge was following the expert evidence.

76. Mr Bratt's expert (Mr Davies) had accepted in cross-examination that there was nothing that obliged Mr Jones to assume that all costs of enhancements would necessarily be reflected in increased sales prices for properties, which would have taken the enhancement costs completely out of the equation for both the Site and Bloxham Road. Mr Davies also accepted that Mr Jones had no basis for assuming that the purchaser of Bloxham Road had made allowance for the costs of enhancements in its bid.

77. In his expert report, Mr Buckingham had very fairly expressed the view that Mr Jones's treatment of enhancements had distorted his comparable analysis and he accepted that Mr Jones he should not have taken into account all the enhancements in relation to the Site and none at Bloxham Road. Having inspected the Site and Bloxham Road, Mr Buckingham was of the opinion that the enhancements at the Site would be more expensive than at Bloxham Road, and he expressed the view that a reasonably competent valuer would have made an adjustment of around 50% of the costs in relation to the Site to reflect that difference (though recognising that different valuers might make adjustments between 25% and 75%).

78. Given that the judge had a clear evidential basis in the expert evidence for his approach to enhancements, we do not consider that his judgment can be criticised. There was nothing in the evidence that required the judge to accept that no adjustments should have been made for enhancements, and the adjustment that he did make was one that was supported by evidence. We, therefore, reject Mr Rosenthal's submission that the approach that the judge took was one that no reasonable judge could have taken on the evidence.

79. Mr Bratt also complained that the abnormals figure of £795,000 that Savills had told Mr Jones had been factored into the price paid by the purchaser of Bloxham Road did not include any element of profit and contingencies for the developer, whereas the figure for abnormals for the Site which the judge deducted to arrive at his valuation did include a 12% margin for developer's overheads and profits, so again the judge was not comparing like-for-like. As we understood the submissions, the contention was either that the judge should have increased the valuation of Bloxham Road by £890,400 rather than £795,000; or that if he did increase the price paid for Bloxham Road by £795,000 for abnormals, he should have only deducted £730,778 rather than £818,471 in respect of abnormals in respect of the Site.

80. We consider that this criticism of the judge is unwarranted. There was no pleaded allegation against Mr Jones in relation to this aspect of the comparables valuation. There was no clear evidence before the judge as to whether the figure provided by Savills did, or did not, include a profit element. Moreover, the judge made no finding either way on the point.

81. In any event, as we understand the figures, because of the way in which the comparable valuation was done, even if determined in favour of Mr Bratt, the net result would not have changed the judge's assessment of the correct valuation of the Site to a sufficient extent that the Determination would fall outside a bracket of plus or minus 15%.

82. We would therefore dismiss the third ground of appeal.

Ground 4: the other possible comparables

83. The fourth ground of appeal is that the judge ought to have taken into account, as comparables in his assessment of the correct value of the Site, the sales prices achieved for two additional properties at Aynho Road and Milton Road.

84. The judge dealt with this contention in [228]-[229] as follows:

> "228. So far as Mr Jones is concerned, I can understand why he might have regarded Bloxham Road as not only the best comparator in the hierarchy of comparators, but the only one that provided anything approaching a close comparator with the Site given its location in contrast to the village locations of the other relevant comparators. However, it is necessary to have regard to the fact that Mr Buckingham accepted under cross examination that he would not have focused entirely on the one comparator, albeit recognising that Bloxham Road represented a very helpful comparator, and that he would also have looked further than Mr Jones had done at Anyho Road, and Milton Road (which Mr Jones had not had regard to).
>
> 229. However, I consider that it is then necessary to consider whether, doing so, would have led Mr Jones to a significantly different result. Nobody has, in fact, carried out a comparison exercise as between the Site and Aynho Road or Milton Road on a £ per plot basis that distinguishes, as I consider that any comparison exercise ought to do, between market units and

> affordable housing units, and also adjusts for village location of the latter. Consequently, I have no proper evidential basis for coming to the conclusion that a comparison exercise so conducted would have demonstrated Mr Jones's exercise carried out solely by reference to Bloxham Road produced anything but a robust valuation of the Site consistent with prices being obtained in respect of other comparable sites once suitable adjustments were made, subject only to the issues in respect of enhancements and the interest rate applied in respect of the deferred payment that I have identified above."

85. Mr Rosenthal did not contend that the judge was wrong to have accepted Mr Jones's evidence that Aynho Road and Milton Road were far inferior comparables to the Site given that they were village locations. Nor did he suggest that the judge should have disregarded Mr Buckingham's evidence (which was to the effect that Mr Jones was entitled to take the approach that he did), or that the judge should have found that Mr Jones was acting negligently in relying only on Bloxham Road.

86. The appeal was thus advanced on the basis that, irrespective of what Mr Jones had done, the judge should himself have had regard to the sales of those two additional properties when determining the correct value of the Site. The only suggested basis for this contention was that Mr Buckingham accepted in cross-examination that he would have looked beyond Bloxham Road had he been conducting the valuation.

87. As the judge observed at [229], and Mr Rosenthal did not dispute, none of the experts had carried out such an exercise to assist the judge, and there was no evidence before the judge as to what the results of such an exercise should have been. The mere fact that there were relevant materials relating to Aynho Road and Milton Road in the appendices (and draft appendices) to Mr Jones's Determination does not support the conclusion that the judge was forced to undertake his own expert evidence-free exercise.

88. We do not see how the judge can be criticised, still less be found by this Court to have gone wrong, in deciding not to embark upon a valuation exercise that none of the experts had done. In the absence of a finding that the judge was wrong not to conduct such an exercise, the suggestion that this court should itself do so was equally misconceived. That contention was not improved by the further suggestion that this court could (on a basis that was not explained) determine a value by choosing between one of a number of different variables for the unit price of a market plot at Aynho Road or Milton Road which (it was submitted) would have the result that the "correct" value of the Site could be either about £6.8 million or £7.4 million. We would have no better basis than the judge to embark upon such an exercise.

89. We would, therefore, dismiss the fourth ground of appeal.

Disposal

90. In the result, we would dismiss the appeal on all grounds.