

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV NO. 2012 -01258

BETWEEN

INTERCOMMERCIAL BANK LIMITED

Claimant

AND

CHARLES B. LAWRENCE AND ASSOCIATES

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances:

Mr. St. B. M. Hylton Q.C., and Mr. P. Deonarine instructed by Ms. D. Maharaj for the Claimant.

Mrs. L. Maharaj S.C., and Mr. K. Walesby instructed by Ms. A. Rampersad for the Defendant.

JUDGMENT

1. This case is about the duty owed by a professional person, in this case, a valuer, to a third-party with whom there is no contractual relationship in circumstances where that third-party relies on advice or opinions given by that professional. In this judgement the terms: “valuer”, “valuator” and “valuation surveyor” are used interchangeably to refer to a professional person who does valuations.

2. In December 2008 the Claimant, the Intercommercial Bank Ltd, (“the Bank”) granted credit facilities in the sum of \$3,000,000.00 to Singapore Automotive Limited (“Singapore”). Security for the credit facility included a guarantee by a related company, Rafferty Development Ltd (“the Guarantor”) and a mortgage over a piece of land, comprising two parcels, owned by the Guarantor situate at Nos. 60 and 69, San Fernando Bypass Road, San Fernando (“the Land”). For the purpose of this judgement the northern most parcel of the Land is referred to as the northern parcel and the southern most parcel is referred to as the southern parcel.

3. In order to approve the credit facility and the security the Bank required the Guarantor to present to it a recent valuation of the Land. Pursuant to that requirement the Guarantor presented the Bank with a valuation dated 10th December 2008 (“the Valuation”) prepared by the Defendant, Charles Lawrence and Associates, with respect of whom, Charles Lawrence, is a valuer and a member of a panel of valuers approved by the Bank. The Valuation identified its purpose as being to ascertain the current open market value of the subject lands for mortgage and valued the Land at \$15,000,000.00.

4. In February 2009 by Deed of Mortgage the Bank advanced to Singapore the said \$3,000,000.00. Both Singapore and the Guarantor defaulted on the loan and as a result the Bank appointed a receiver and sought to enforce the security under the mortgage.

5. In an attempt to realise the Bank’s security, between the period March and April 2010, the Receiver advertised the property for sale. The highest offer obtained on such advertisement was \$2,000,000.00. Thereafter the Receiver commissioned and, in July 2010, obtained a

valuation from another valuer, Brent Augustus. Augustus valued the Land at \$1,900,000.00. The Bank then commenced this action in March 2012. At that time the sum of \$4,078,198.99 was due and owing on the mortgage inclusive of interest.

6. On the 25th January, 2013, during the currency of these proceedings, the Bank instituted legal proceedings (“the concurrent proceedings”) against its former Attorneys at Law for negligence in carrying out the title search to the Land. By the concurrent proceedings the Bank claimed that it suffered loss and damage as a result of its inability to sell the Land due to the title defect; pleaded that the sum due and owing under the mortgage inclusive of interest was \$4,976,688.21 and sought damages in that amount.

7. On the 17th March, 2014 the concurrent proceedings were settled. By the settlement, without any admission of liability, the former Attorneys agreed to pay to the Bank the sum of \$2,400,000.00 in full and final settlement of the Bank’s claim inclusive of interest and costs.

8. In its statement of case the Bank contends that there was a duty owed to it by the Defendant to exercise due diligence in making the representations contained in the Valuation. It alleges that in the circumstances the Defendant was negligent in that it failed:

1. to exercise that degree of skill and care ordinarily exercised by reasonably competent members of the profession;
2. to act in accordance with the practice of competent respected professional opinion;
3. to identify and/or indicate that there were encroachments on the said

property;

4. to take into account the effect of the tenants and/or squatters on the property and the genuine ability to obtain vacant possession;
5. to ascertain and/or indicate that the property was situated in an established low income residential location which would make attracting developers very difficult; and
6. to represent the true market value of the property.

9. By its amended defence the Defendant denies negligence; avers that it is a limited liability company with its proper name being C.B. Lawrence and Associates Ltd; denies knowledge of the arrangements between the Bank, Singapore and the Guarantor and avers that at all material times its instructions from the Guarantor were to ascertain the open market value of the Land for mortgage purposes and to value the property as a cleared site.

10. The Defendant denies that the Bank suffered damage as a result of the Claimant's negligence and rather contends that:

- (i) in making the loan or taking the mortgage the Bank acted imprudently and /or negligently;
- (ii) the valuation report received from Augustus is not independent or accurate and does not fall within the range of acceptable values at the date of the report;
- (iii) the Bank is estopped from asserting damages in these proceedings because of its pleas in the concurrent proceedings and

(iv) as a result the Bank's actions are oppressive and an abuse of process.

11. As a consequence, by way of counterclaim, the Defendant seeks a declaration that the Valuation is a fair and accurate report of the market value of the Land within the range of acceptable valuations at that date in accordance with the procedures and practices of professional valuers in Trinidad and Tobago having regard to the instructions received and assumptions made.

12. The issues for my determination are by and large mainly of law. As pleaded these are:

1. Who is the correct defendant
2. Is there a duty of care owed by a valuer in these circumstances and, if so, did the Defendant breach that duty of care and, if breached, did it cause loss to the Bank;
3. Is the Bank: (a) estopped from claiming that its loss was caused by the Defendant's valuation report; (b) guilty of conduct which is oppressive and an abuse of process;
4. If the Defendant was negligent is its liability reduced as a result of any negligence on the part of the Bank and
5. if negligent is the Defendant liable to the Bank in damages and, if so, in what amount?

13. In the main the relevant facts are not in dispute. Apart from Elangadu Mohan, an executive director of the Bank, and Lawrence evidence was adduced from two expert witness, both valuers, Augustus on behalf of the Bank and Roy Gumansingh on behalf of the Defendant.

The evidence from Mohan was to the procedures adopted by the Bank for mortgage loans generally and with respect to this particular loan. Although Mohan was subject to vigorous cross-examination, understandably, the Defendant led no contrary evidence as to the Bank's procedure. Insofar as the Defendant alleges negligence on the part of the Bank it is the evidence of this witness that forms the basis of their submissions in this regard.

14. The case as presented by the Bank is that the Defendant was negligent in that the Land was valued on a commercial basis where there was no basis to do so and that it failed to disclose important adverse factors in particular the existence of encroachments/squatters on the Land. In these circumstances the Bank submits that the Defendant failed to exercise that degree of skill and care ordinarily exercised by reasonably competent members of the profession. The question of the degree of skill and care to be exercised by a defendant in these circumstances falls squarely within the remit of the expert witnesses. In considering this question however there arises one issue of fact for my determination and it is whether there was at the time of the Valuation encroachments and/or squatters on the Land.

15. The evidence of Augustus that at the time of his site visits, 14th April and 23rd July 2010, there were encroachments and occupiers on the Land has not been challenged. In his original report Augustus refers to "8 encroachments (squatters)" the existence of which he confirms in his evidence in chief. Under cross-examination however he accepts that two of these encroachments were really boundary issues while the other six represented occupiers on the Land.

16. This unchallenged evidence coupled with other evidence adduced leads me to the conclusion that at the time of the Valuation there were in fact occupiers on the Land. Tendered into evidence as exhibits C1 and C2 were survey plans dated 30th December 1999. C1 deals with the northern parcel of land and shows structures identified by Augustus as encroachments also seen by him in 2010. In similar fashion C2 deals with the southern parcel of land and shows structures also identified by Augustus as being seen by him on his site visits. Indeed a comparison done by Augustus of the 1999 survey plans with the 2010 plans shows only two additional structures on the northern parcel of the Land as well the existence of some boundary encroachments.

17. The other piece of evidence comes from Lawrence himself. Under cross-examination it was suggested to him that there were occupants on the Land to which he ought to have referred in his valuation. His evidence in response was that he did mention that there were occupants and refers to that part of the Valuation in which he states that on the site stands some building structures.

18. I am satisfied that by this answer Lawrence in fact admits that at the time of his site visit he concluded that there were persons occupying the Land. I find as a fact therefore that at the time of the Valuation there were occupants on the Land and that fact was recognised by Lawrence at the time of his site visits.

Who is the correct Defendant?

19. This was an issue raised in the defence. It is not disputed that Lawrence is the

managing director of a company C.B. Lawrence and Associates incorporated on the 21st May 2008. It is also not in dispute that the Valuation, dated the 10th December 2008, was done by Lawrence under the name Charles B. Lawrence and Associates. Lawrence under cross-examination accepts that while operating as Charles B Lawrence and Associates he was the sole trader. He also admits that he received instructions from the Guarantor to do the valuation about one week before 10th December 2010. At this time therefore the company had already been incorporated.

20. The unchallenged evidence of Mohan is that it is the Defendant, Charles B Lawrence and Associates, and not the company that was on the panel of approved valuers for the Bank. I am satisfied that the only logical conclusion to be drawn from these undisputed facts is that, prior to the existence of the company Lawrence as a sole trader operated under the name of Charles B Lawrence and Associates. After May 2008, despite the existence of a limited liability company in the name of C.B. Lawrence and Associates, Lawrence, as a sole trader, continued to operate under the name of Charles B Lawrence and Associates and it is in that capacity that he prepared the Valuation.

21. In the circumstances I find that the correct Defendant, Charles B Lawrence and Associates, is before the Court and that for the purposes of this Valuation, Lawrence, as a sole trader, operated under that name. As a result references to the Defendant as the Defendant or as Lawrence are used interchangeably in this judgement.

Is there a duty of care and, if so, was that duty of care breached and, if breached, did it

cause loss to the Bank

(a) does a duty of care exist?

22. The question of the duty of care is a question of law based on facts that in these proceedings are not in dispute. It cannot be disputed that a duty of care to the client exists in respect of statements made and opinions expressed by a valuer in a valuation.

23. “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.....But the scope of the duty in tort is the same as in contract.”¹

24. The issue in this case is not whether a duty of care exists simpliciter with respect to the statements made and opinions expressed in the Valuation but rather whether a duty of care exists to a third party who relied on those statements and /or opinions. In other words does there exist on these facts:

“the essential characteristics of a situation giving rise, independently of any contractual or fiduciary relationship, to a duty of care owed by one party to another to ensure that the accuracy of any statement which the one party makes

¹ Per Lord Hoffman in *South Australia Asset Management Corp v York Montague Ltd and others* [1996]3 All E.R 365 at page 370.

and on which the other party may foreseeably rely to his economic detriment.”

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25. In this regard while a distinction must be made as to the existence of a duty of care and liability in damages I agree with the reasoning of Lord Bridge of Harwich in the case of *Cararo Plc v Dickman*³ when he acknowledges that in order to determine the scope of the duty reference must be had to the kind of damage from which the professional must take care to save the third-party harm. In other words what is required to be proved is not only that there was a duty owed but that the duty was with respect to the type of loss suffered. The first step therefore is to ascertain the purpose and circumstances under which the information was given. While it is accepted that the Valuation was not actually commissioned by the Bank, Lawrence admits that he knew that the Valuation was for mortgage purposes. This is in fact the purpose attributed to the Valuation on its face.

26. It would seem to me that the only conclusion to be drawn from the fact that the specific purpose of the Valuation was ‘to ascertain the current open market value of subject lands- for mortgage’ is that it was in the contemplation of Lawrence that the Valuation would be used for the purpose of obtaining a mortgage loan from a financial institution and that in the circumstances the opinions expressed in it would come to the attention of that financial institution and be used by them to secure money loaned.

² Per Lord Bridge of Harwich in *Cararo Plc. V Dickman* [1990] 2 A.C. 605 at page 619 letters E-F.

³ [1990] 2 A.C. 605

27. I am satisfied that in the circumstances, from the stated purpose of the Valuation the Defendant must have:

(i) been aware of the nature of the transaction contemplated by the Guarantor.

In this regard the fact that the Guarantor was merely a guarantor as opposed to a borrower makes, in my opinion, no difference to the nature of the transaction. At all material times the nature of the transaction remained a loan to be granted on the basis of the Land being used as security;

(ii) known that his opinion would have been communicated to a financial institution for the purpose of obtaining a loan; and

(iii) knew that it was likely that the financial institution would rely on that advice or opinion to determine whether or not to grant a loan and in what amount.

28. To my mind the fact that the Bank was such a financial institution allows for a sufficient degree of proximity between it and the Defendant to fuel that duty of care. These conclusions, in my opinion, are fortified by the fact that the Defendant was a valuer on the Bank's panel of authorised valuers. It cannot in these circumstances lie in the mouth of the Defendant to suggest no knowledge of a bank or the Bank's ability to lend its money on the basis of a security held by way of mortgage.

29. In fact, in his evidence in chief, Lawrence accepts that at the time of submitting the Valuation to the Guarantor he knew and believed that since the purpose of the report was for mortgage purposes the Guarantor might rely on same, might provide a copy of the report to a

mortgage lender and that the mortgage lender might rely on it as one of several factors in determining how it should secure the repayment of a loan in the event that the borrower defaulted in its payments.

30. Indeed, with respect to the persons to whom a duty of care is owed, in its submissions the Defendant accepts that a professional person, including a valuation surveyor, who makes reports upon which to his knowledge persons other than his clients will rely or upon which he reasonably contemplates that carelessness on his part may cause damage to a third party owes a duty of care to such third persons. This position is consistent with the authorities and I accept it as a correct statement of the law.

31. It seems to me that in the circumstances three criteria referred to by the Defendant as establishing whether a duty of care exists, that is: (a) that harm was reasonably foreseeable; (b) that there was a relationship of proximity and (c) that it is fair just and reasonable to impose a duty of care, has been established on the facts⁴.

32. The Defendant submits that while a duty of care is owed that duty is no greater than the duty owed to the client. I do not accept that submission. Once there is established that damage to a third party is reasonably foreseeable with respect to the type of loss suffered and that third party is in a sufficient degree of proximity then a duty of care arises with respect to that third party regardless of the extent of the duty owed to the client. The duty owed to a third party in these circumstances is not limited by the duty of care owed to the client.

⁴ Caparo Industries Plc v Dickman & others [1990] 2 A.C.605

33. I am satisfied therefore that a duty of care exists between the Defendant and the Bank that in valuing the Land the Defendant would exercise the degree of skill and care ordinarily exercised by reasonably competent valuers and act in accordance with the practice of competent respected professional opinion.

(b) Did the Defendant breach the duty of care owed to the Bank

34. The Bank's case is that the Defendant failed to exercise that degree of skill and care ordinarily exercised by reasonably competent members of the profession or act in accordance with the practice of competent respected professional opinion. In particular the Bank submits that there were two deficiencies in the Valuation: (i) it failed to disclose important adverse factors on the land and (ii) it valued the land as commercial when there was no proper basis to do so.

35. With respect to the Bank's allegation that the Valuation failed to disclose important adverse factors the real question for determination is whether the Valuation ought to have pointed to the existence of occupiers on the Land and, if so, how this ought to have been done. While it is clear on the evidence before me that the status of the occupiers, whether squatters or tenants, has not been identified I am satisfied that there is no practical distinction to be made between these two categories of occupiers. In my opinion both categories of occupiers, indeed any category of occupier, represents an impediment to the Land being considered a cleared site and it is this fact that is relevant to a lender.

36. As is to be expected in matters of professional negligence evidence as to the standard to be attained by a practitioner is to be obtained from other professionals in the field. In this regard the expert witnesses, Augustus and Gumansingh, both gave evidence. Insofar as their qualifications and experience are concerned there is no question that both of these gentlemen are experts in their field. Both identify themselves as chartered valuation surveyors and as members of the Royal Institute of Chartered Surveyors (“RCIS”). Indeed Gumansingh identifies himself as a fellow of the RCIS. Both experts have over 20 years experience in the field. Both provided reports on the value of the Land to the Court.

37. Apart from these reports the experts were required to answer a list of questions agreed by both sides. Their responses to the questions reveal that both experts concur that the standards to be applied to the Valuation are the standards contained in the RICS Valuation Standards (“the Red Book”). Both experts accept that these standards have been mandatory since at least 1991. Lawrence himself admits to being a member of the RICS and accepts that in the conduct of the Valuation he acted in accordance with the standard procedure and practice as published in the Red Book.

38. Both experts agree that in 2008, in circumstances where a valuer is instructed to report on the current market value of a property for mortgage purposes, the factors to be taken into account and the steps to be followed are as set out in the Red Book 6th Edition and in particular PS5.1 and PS5.2. The format adopted in the Red Book is to provide both the rule and

commentary which assists with the interpretation and application of the rule. The applicable rules and commentary are set out as an appendix to this judgement.⁵

39. The experts also agree that it is possible in 2013 to determine what was the value of the property in December 2008, when the Valuation was done, and in July 2010 when Augustus' valuation of \$1,900,000.00 was produced. Pursuant to that agreement both experts gave their opinion as to the value of the land at three dates: 2008; July 2010 and December 2013. It is to be noted however that, while Augustus was prepared to provide his opinion as to the value of the land as a commercial site as well as a residential site at the relevant dates, Gumansingh declined to value the land as a residential site. As well, for no apparent reason, Gumansingh declined to value the land at December 2008 but rather chose the date November 2008. I am satisfied that nothing turns on this latter difference.

40. According to Augustus: the value of the Land as a cleared site was: (a) at December 2008: Commercial -\$15,000,000.00 Residential- \$2,375,000.00; (b) in July 2010: Commercial - \$12,500,000.00 Residential- \$1,900,000.00 and(c) December 2013: Commercial-\$12,500,000.00 Residential- \$1,900,000.00. According to Gumansingh the value as a cleared site for commercial purposes only was \$14,000,000.00 in November 2008, \$12,500,000.00 in July 2010 and \$12,500,000.00 in December 2013.

41. It is clear therefore that, with respect to the value of the Land in 2008, all three valuers, Augustus, Gumansingh and Lawrence, more or less are ad idem on its value as a cleared site for

⁵ Appendix A.

commercial purposes. From the opinions of the valuers therefore it is clear that insofar as the Bank alleges that the valuation failed to represent the true value of the Land the real question for determination is whether the Land could in December 2008 have properly attracted a value based on commercial use as opined by both Lawrence and Gumansingh or based on residential use as opined by Augustus. Put another way the question is what on the evidence, including the opinions of the experts, is the optimum use for the Land for the purpose of assessing its value.

42. An appropriate starting point is the area of agreement between the experts. PS5.1 deals with Inspections and Investigations. The rule states: Inspections and investigations must always be carried out to the extent necessary to produce a valuation which is professionally adequate for its purpose.

43. Insofar as it is relevant the commentary states:

1. "In settling the terms of engagement the valuer must agree the extent to which the subject properties are to be inspected and the extent of any investigations to be made. Where a property is inspected the degree of on-site investigation that is appropriate will vary, depending upon the nature of the property; the purpose of the valuation and the terms of engagement agreed with the client."
2. "A valuerwill be familiar with, if not expert on, many of the matters affecting either the type of property or the locality. Where a problem, or potential problem, that could impact on value is evident, from an inspection of the property, the immediate locality or from routine enquiries, an

unconsidered assumption by the valuer that no such problem existed could be grossly misleading.”

3. “ A client may request or consent to an assumption that no problems exist. If, following an inspection, the valuer considers that this is an assumption which would not be made by a prospective purchaser it becomes a special assumption and should be treated as such (see PS 2.21). However, these matters can rarely be disregarded completely and the discovery of adverse on-site factors should be drawn to the attention of the client before the report is issued.”

44. PS 5.2 deals with Verification of information and states: “The member must take reasonable steps to verify the information relied upon in the preparation of the valuation and, if not already agreed, clarify with the client any necessary assumptions that will be relied upon.”

45. Insofar as it is relevant the commentary states:

“The valuer has a responsibility to state clearly the information that is relied on and, where appropriate, its source.”

1. “In each individual case the valuer must judge the extent to which the information supplied is reliable. If there is no option but to accept information that may not be reliable, an appropriate assumption will need to be set out in the terms of engagement.”

4. “Clients will expect valuers to express opinions and in turn, valuers will wish to express their opinions upon legal issues which affect their valuations. Valuers must therefore make clear in reports any information

which must be verified by the clients, or other interested parties, legal advisors before the valuation can be relied upon or published.”

46. It would seem therefore that in order to arrive at a valuation which is professionally adequate for its purpose the standards require that where the on-site investigation reveals a problem which may impact on value a valuer is required to identify the problem so as not to mislead the client⁶ and where necessary make further investigations⁷. This is the position, even where the client requests an assumption that the problem does not exist, if on inspection the valuer considers that this is not an assumption that a prospective purchaser would make. In these circumstances the assumption becomes a special assumption and must be treated as such⁸.

47. According to Augustus the question that must be asked by every valuer is would a reasonable person make the same assumption because of what he finds on the site. In the context of the rule and his evidence I understand Augustus to be saying that if the client requests the valuer to make an assumption and it is an assumption which a reasonable person on viewing the site would make then there is no need to treat this as a special assumption if it however remains an assumption if however it is not an assumption which would be made in these circumstances then the assumption required by the client must be treated in the valuation as a special assumption. Except for a statement made in an e-mail, to which I will refer later, Gumansingh is silent on the application of the rules. He merely recites the rules and the relevant commentary.

⁶ PS5.1 Commentary 2.

⁷ PS 5.1 Commentary 1.

⁸ PS5.1 Commentary 3

48. Although PS 2.1 has not been placed before me it is clear that the rule requires a valuer to treat a special assumption differently to an ordinary common or garden assumption. In the instance case the assumption required by the Guarantor was that the Valuation assume the Land as a cleared site. From the evidence it is clear that the site visits of both Lawrence and Augustus revealed that the Land was not a cleared site because of the existence of occupiers on it. Using the test of the prospective purchaser required by the rule, on the evidence presented of the occupation of the Land in 2008, I am satisfied that a prospective purchaser visiting the land would not have made the assumption that the Land was a cleared site. Such an assumption would therefore have been required to be identified as a special assumption in the Valuation.

49. According to Augustus under cross- examination the fact that there were occupiers on the Land while not preventing the valuer from giving a value of the Land as a cleared site requires the valuer to make it clear to the client whatever obstacles or problems are encountered on the site and how that might affect the value. I accept this as a correct interpretation of the rule and commentary.

50. Under the cross-examination of Augustus there was some suggestion raised by the questions that this was a duty or responsibility owed only to the client. I do not accept that suggestion. It is clear from the examination of the relevant cases that the requirement to provide a valuation which is professionally adequate for its purpose extends to all persons within a sufficient degree of proximity and whom it is foreseeable may rely on the valuation to their economic detriment. In this case the Bank.

51. In the context of this case Gumansingh puts the duty of the valuer in a more practical way. In an e-mail dated the 19th June 2012 in response to questions put to him by his Attorneys he states:

“A valuation for mortgage purposes is usually done on the open market basis and as a cleared site. But a valuer must inform the lender in the valuation if there are squatters or encroachments on the property. In most cases a property with squatters is not considered to be a good security and are not held as a mortgage.”

52. Indeed Lawrence, under cross-examination, himself accepts that he was aware that the Valuation would be used by another party, a lender, and that the only way that he could communicate anything to that lender was to include it in the report. According to Lawrence, however, his duty in this regard only extended to a disclosure of occupants who were squatters. I do not accept this as a reasonable position. It is clear to me that for the purpose of the site being considered a cleared site the relevant factor is occupation whatever the status of the occupants. Of course had the further on-site investigation been done by Lawrence, as it ought to have been done, the status of the occupiers would have been identified.

53. I am satisfied that, in accordance with his responsibilities as established by PS 5.1 and PS 5.2 and given the purpose of the Valuation and the instruction to value the land on the assumption that it was a cleared site, upon recognising that there were occupiers on the Land the Defendant was required to (a) make further on-site investigations as to the nature of the occupation; (b) in the Valuation clearly identify the problem of occupiers so as not to mislead

and (c) treat the assumption of the Land being a cleared site as a special assumption and identify it as such in the Valuation.

54. In the Valuation the only possible reference to any occupation of the Land was the words: “on Site stands some small building structures.” Lawrence in his cross-examination says that it is by this that he recorded the presence of occupiers on the Land. From his evidence I can only assume that he made no further inquiries or investigations in order to ascertain the status of these occupiers. To assume otherwise would be unfair to the Defendant. To submit in these circumstances that there is no evidence that these occupiers were in fact squatters is in my opinion a bit disingenuous. Lawrence, as the valuer making this observation, had in my opinion a duty to make further on-site investigations to ascertain the nature of the occupation. It is also clear from the exhibits C1 and C2 that the structures on the land in 1999 amounting to six in number, were on both parcels of land and varied in size. From these exhibits I am satisfied that a description of land as merely having some small building structures on it does not properly represent the extent of the problem as must have been seen by Lawrence on his site visit.

55. Further it would seem to me, with all due respect to Lawrence and his evidence that these words referred to the presence of occupiers on the Land, that, given the position of the words in the Valuation, to the unsuspecting reader rather than refer to occupants they are more easily interpreted as merely indicating that the valuer is not valuing those small building structures but rather only the Land as a cleared site.

56. At the end of the Valuation under the heading 'the above opinion assumes' the Defendant states:

- (1) the Information received as to the Area and tenure of the Land being correct.
- (2) A Good Marketable Title can be shown.
- (3) Town and Country Planning and all other Statutory Approvals would be granted for the construction of the Commercial Development of Subject Lands.
- (4) Vacant possession and free from all encumbrances is available.
- (5) The Property enjoys a legal right of way to and from the Public Road.
- (6) The property enjoys right of Drainage.
- (7) The Property not falling under the Provisions of the Rent Restriction Act of 1981.
- (8) No unduly Restrictive Covenants or any onerous or unusual outgoing running with the Land.

57. While these are clearly assumptions upon which the Defendant relied to arrive at the open market value it seems to me these items could not be intended to be or interpreted as identifying special assumptions. Indeed they do not purport to do so. I am satisfied that despite the fact that there is listed as an assumption that vacant possession and free from encumbrances is available this does not discharge the Defendant from the requirement of identifying the assumption of the Land being a cleared site as a special assumption. From a reading of the relevant commentary, even in the absence of PS2.2, it is clear that the term 'special assumption'

is a term of art referring to assumptions which would not be obvious or expected to the non-expert observer and must be treated in a manner different to regular assumptions.

58. As well in my opinion the fact that the words: “However only the Land element is being considered in this valuation report as a cleared site” in capitals, bolded and underlined found immediately after the acknowledgement of the presence of small building structures does not satisfy the requirement of identifying the special assumptions.

59. I am satisfied that in the conduct of the Valuation the Defendant failed to disclose important adverse features of the Land and in particular to identify and/or indicate that there were occupiers on the Land in accordance with the practice accepted by competent respected professionals in the field.

60. In considering the question of whether the proper basis for the valuation was for the use of the Land for commercial purposes and in examining the evidence it must be borne in mind that the issue is not whether Augustus was correct in coming to a determination that the Lands were to be valued at \$2,375,000.00 but rather whether in determining the optimum use of the Land for valuation purposes it was appropriate to base the valuation on commercial use as opposed to residential use. In this context I am to determine which expert opinion is more reasonable on the evidence placed before me. Similarly comparisons of the methodology used by either expert to arrive at the value placed on the Land is not relevant to my determination of this issue.

61. Before dealing with the opinions of the experts as to the best use of the Land it is necessary to deal with a submission made by the Defendant to the effect that there was evidence before me that the instructions from the Guarantor to Lawrence was that the Land was to be used for commercial purposes. There is no such evidence before me. In the first place Lawrence's evidence in chief as to his instructions are clear, accord with the plea in his defence and are repeated in the Valuation. His instructions were to ascertain the open market value of the Land for mortgage purposes as a cleared site. Under cross-examination Lawrence claims that he was told by the Guarantor that he was seeking approvals for commercial development. That evidence, if accepted, can only be taken for what it says and nothing more. It certainly cannot in my opinion be interpreted to mean that the Defendant received instructions that the property was to be used for commercial purposes.

62. It is perhaps appropriate here to refer to the Valuation insofar as it seeks to establish a value based on commercial use. In the Valuation the Defendant refers to three factors which it would seem he took into consideration in arriving at his decision to value the Lands for commercial use. These are what he refers to as: locality; saleability and development stages and approval. I understand 'locality' here to be referring to the surrounding neighbourhood.

63. Under the heading 'LOCALITY' the Valuation states that the area is a commercial area with a heavy flow of vehicular traffic. The Valuation goes on to state under the heading 'COMMENT': "There is a **HIGH** demand for lands in this area, due to the increase in demand for Commercial Activities in and around, and moreover since Land Values depend chiefly on location there is always a market for a supply of Land Values to satisfy the demand in the

particular area, particularly if those lands are priced within the range of **\$100.00 to \$150.00 per square foot** in this area. Saleability therefore is the determining factor here for Value.”

64. Under the heading: ‘DEVELOPMENT STAGES AND APPROVALS’ it states: “These lands have been developed changing its use from Agriculture to Commercial Purposes. The Value stated hereunder is subject to approvals granted by the Relevant authorities both the Town and Country Planning Division and the Local Health Authority.”

65. Under cross-examination Lawrence seeks to qualify the statement made in the Valuation by claiming that by the use of the words ‘These lands’ he was in fact not referring to the Land but rather lands in the area generally. I do not accept that this is an interpretation that can properly be placed on the phrase. In my opinion it is clear that what is being referred to is the Land and that this is the only interpretation that is possible to be placed on the statement made by any third party reading the Valuation.

66. From the evidence of the experts it is clear that in order to arrive at a market value a valuator must come to a conclusion as to the optimum use of the Land. The experts come to different conclusions in this regard. The question here is whose opinion is, on the evidence more acceptable.

67. Both experts agree that a relevant criteria is the location of the Land. The location of the Land is not in dispute. In particular it is not in dispute that running along one side of the Land is the San Fernando Bypass, itself a highway which provides access to all the major arterial

routes leading in and out of San Fernando. There are also running alongside other boundaries of the land two roads, Rushworth Street and Navet Road which themselves provide access to the Bypass.

68. Augustus uses three criteria in coming to the conclusion that the optimum use of the Land is residential as a development site: the existence of what he refers to as historical planning permission for residential use; the locality and location of the Lands and the lack of proper access. With respect to locality Augustus states that the immediate area is characterised by a mixture of established low middle income shacks and single storey timber homes. He says that the property is within easy access of schools and other social amenities.

69. Augustus deals with road access in his valuation report and under cross-examination. His conclusion in his report is that there is limited access to and from the Land is based on the facts of no access being available from the Bypass and that the northern boundary (Navet Extension) and the southern boundary (Rushworth Street) are located extremely close to their respective intersections with the San Fernando Bypass. He states in that report that in the absence of any direction from the Highways Division of the Works and Transport Ministry access is therefore only permissible from the very narrow streets of Newbold and Navet Extension to the north. As such, he advises, that it will be prudent for any developer to be cautious as there may be implications on the density of any future development of the subject land and part of the Land may be lost to additional road infrastructure requirements.

70. Under cross-examination he confirms the statement in his report. According to him from his knowledge of modern planning requirements no direct access would be allowed to the Bypass from the Land. Although he admits that this is ultimately a matter for the Planning and Highway authorities his evidence in this regard was not directly challenged either by cross-examination or by contrary evidence. Under cross-examination it was established that the only access along the Bypass directly onto to lands bounded by it was at the Fire Station at the end of the road.

71. As well according to Augustus the presence of one of the occupiers along that boundary also limits the Rushworth Street access. According to him from his knowledge that person, operating a food retail store, had been on that location for thirty to thirty-five years. The existence of this person on the Land on its boundary with Rushworth Street is confirmed by the survey plans of both 1999 and 2010 and Augustus' evidence in this regard.

72. With respect to what he refers to as historical planning permission for use of the land for residential purposes Augustus relies on a notice of a grant of outline planning permission to develop land dated the 1st May 2008. According to his valuation report this document was presented to him as purporting to relate to one of the parcels of land. The document shows that permission had been granted in May 2005 to erect a building on a parcel of land situate at Navet Extension Road Mon Repos San Fernando. While in his report pointing to an inconsistency between the land described in the grant and the Land Augustus relies on this approval as establishing historical planning permission for residential use for the said Land. Unfortunately there is no proper description of the land the subject of the approval in the document.

73. Gumansingh on the other hand comes to the conclusion that the best use for the Land is commercial. According to him in his statement dated the 27th January 2014 he is of the opinion that the Land should be valued as vacant land with potential for commercial development as its highest and best use. The basis for this opinion he gives as: ‘(a) general elementary valuation principle: value is the worth of a commodity expressed in financial terms taking into account its highest and best approved use; (b) valuation is the art or science of estimating the true value of a given property. It is done by a valuation surveyor who has the proper qualifications, knowledge and experience in valuing a property in a particular area and (c) in HCA 677 of 1973 Justice PLU Cross confirmed the RICS Appraisal & Valuation Manual that a value of a property is calculated based on the availability of its approval and the effective demand for its approved use in that particular area’. It must be noted that an examination of the judgement of Cross J. in the case at reference does not reveal any reference to the RICS Appraisal & Valuation manual.

74. It is very difficult to understand how exactly these considerations form the basis of the opinion arrived at by Gumansingh. In any event it would seem to me that taken at its best Gumansingh seems merely to be saying that the optimum use of property must be assessed by a qualified valuer with knowledge and experience in valuing properties in the particular area and that the valuer is required to consider is the highest and best approved use of the property.

75. Gumansingh comes to the conclusion that use for commercial purposes was the best optimum use because of the general land use pattern in the immediate area and the fact that because of its location abutting the Bypass the property would have tremendous free commercial advertising value. In addition he relies on the following information:

- (i) a statement made to him via the telephone by an unidentified person at the information/enquiry section of the Town and Country Planning Division that permission for commercial use may be granted for property located at the north- western area at the junction of the San Fernando bye-pass and Rushworth Street;
- (ii) information given pursuant to enquiries that the owner of the Land had intended to establish a motor-car sales shop on the property;
- (iii) his being told by several persons(mostly his clients) after the property was advertised that they were interested in acquiring the property for commercial use.

76. In addition he states that residential–use is not the highest or best economic use because of the location, shape of the Land, the presence of a wide concrete drain running through it and limited access for home owners and visitors. Gumansingh concludes his answers by stating: “In conclusion in my considered opinion it is not feasible and practical to apply residential use value to this property because it was acquired to establish a motor Vehicle sales shop with related car-parking places.”

77. His assessment of the surrounding land use and the physical restrictions to residential use apart it is clear that Gumansingh bases his opinion on information which is clearly hearsay and with respect to which no evidence has been led. It is clear that the statement cannot be treated as establish the truth of what was told him. It is equally clear to me that even if I accept

that this information was given to him he has not satisfied me as to its reliability particularly given the lack of particulars as to the source of the information.

78. The real dilemma however is how ought I to assess his conclusions in the light of his evidence that this information the reliability of which has not been proved was a major component in his arriving at his opinion that the best optimal use for the Land was commercial. Of particular concern to me in this regard is his final conclusion that in his considered opinion it is not feasible and practical to apply residential-use value to this property because it was acquired to establish a motor Vehicle sales shop with related parking places.

79. It seems to me that the only way to properly deal with this dilemma is to disregard his evidence with respect to the information allegedly received from other persons and in assessing the value to me of his opinion take into account only those matters which are clearly within his own knowledge. This leaves me with what he says is the general land use pattern in the immediate area; the fact of its location allowing free commercial advertising value and the restrictions to residential use posed by the shape and conditions on the Land.

80. Insofar as Augustus' opinion is concerned while two of the factors relied on by him are based on his own observations he also relies on the grant of planning permission. Given the evidence adduced in Augustus' cross-examination while I am prepared to accept that the planning permission most likely relates to land in the general area I am not convinced that the permission is with respect to any part of the Land. At best therefore the grant suggests that

permission has been granted in the past to develop lands in the general area for the erection of a building for multi-family residential purposes.

81. On the one hand therefore I have the opinion of Augustus based on the locality and location of the Lands, the lack of proper access which makes it unsuitable for commercial purposes and the fact that permission had been granted for other lands in the general area to be developed for multi-family residential purposes. And on the other hand the opinion of Gumansingh based on his assessment of the general land use pattern in the immediate area; the fact of its location allowing free commercial advertising value and the restrictions to residential use posed by the shape and conditions on the Land.

82. Both experts come to differing conclusions with respect to the impact of the locality or the general land use pattern in the general area. From the plans put into evidence and in particular C1 it would seem that the user of the lands on the north- western boundary of the northern parcel of land is residential while the opposite boundary is clearly the Bypass. This seems to support the evidence of Augustus when he states in that the immediate area is characterised by a mixture of established low middle income shacks and single storey timber homes. Indeed the Defendant admits in its defence that the Land is situate adjacent to a low cost housing area.

83. Gumansingh on the other hand with respect to the land use in this area of the Bypass merely states that it is predominantly mixed commercial. In fairness to Gumansingh however he does say in his first report that in coming to his conclusion as to the market value to be placed on

the Land he took into consideration recent comparable land sales in the immediate area. He provides information on two of these sales. Both of these, however, he states are to be found in areas zoned for mixed commercial and residential use. Unfortunately there is no evidence that either of these lands are located off the Bypass or that they are in close proximity to the Land. More importantly the only inference to be drawn from the evidence and in particular the cross-examination of both Gumansingh and Lawrence is that both of them were prepared to certify the optimum use as commercial despite neither knowing whether the Land is in an area zoned for commercial use.

84. It would seem to me that if I were required to prefer an opinion of one of the experts I would come down in favour of that of Augustus with respect to the best optimum use of the Land. On the evidence placed before me I am satisfied that the lands in the immediate vicinity are being used for residential purposes. His evidence as to the unsuitability of the access to the Land if it were to be used for commercial purposes makes sense and there is some evidence of permission being granted for the lands in the area, albeit not in the immediate vicinity, to be used for multi-family residential purposes.

85. On the other hand I have no evidence of actual commercial enterprises in the immediate vicinity of the Land or of the Land being in an area zoned for commercial use. With respect to the restrictions to residential use posed by the shape and conditions on the Land relied on by Gumansingh it seems to me that these restrictions would apply whatever the use made of the land and are more relevant to the actual value to be placed on the land than the optimum use.

86. As well at the end of the day Augustus struck me as being the more candid. For example even though he was relying on the grant of permission in his report he pointed out the inconsistency with the description of the land. Gumansingh on the other hand despite the order that certain questions be answered refused to value to Land for residential use and gave no explanation for such refusal. Despite his acceptance that PS 5.1 and 5.2 applied to the Valuation he failed to apply the facts to the requirements of the rules. Indeed despite these requirements in his report presented to the Court with respect to the occupants on the Land he merely says: “There are a few structures on this combined site. However I am to provide a valuation opinion on this property as a vacant site.” If there was any justification for his dealing with the problem of occupiers in this manner he certainly has not said so. At the end of the day it would seem to me that Augustus was the more impartial, unbiased and helpful to the Court. I prefer his opinion.

87. At the end of the day the question is whether there was a proper basis for the Defendant to value the land as commercial. In this regard not only are the opinions of the experts relevant but so is the basis upon which the Defendant determined that the Land ought to be valued as commercial. The Defendant bases his opinion in the main on the fact that the Land has been developed changing its use from agriculture to commercial purposes. There is however no evidence of this. In that regard I am satisfied that insofar as the Defendant based his conclusion that the optimum use for the Land was commercial. This was based on the fact that the Land had been developed changing its use from agriculture to commercial purposes. In the absence of such evidence this was not a valid basis for arriving at the conclusion and in fact its inclusion in the Valuation was wholly misleading.

88. I am satisfied that on the evidence before me there was no proper basis for valuing the Land as commercial. Indeed if we return to the three criteria that Gumansingh calls the basis of his opinion in his statement of the 27th January 2014 he seems to confirm that in arriving at the optimum use a valuer is required to consider the highest and best approved use of the property. At the end of the day there is no approval for the use of the Land for commercial purposes.

89. In the circumstances I am satisfied therefore that a duty of care exists between the Defendant and the Bank that in valuing the Land the Defendant would exercise the degree of skill and care ordinarily exercised by reasonably competent valuers and act in accordance with the practice of competent respected professional opinion. I am satisfied that in valuing the Land the Defendant was in breach of that duty of care in that (i) he failed to identify and/or indicate that there were occupiers on the land in accordance with the practice accepted by competent respected professionals (ii) he failed to make proper on-site investigations with respect to the nature of the occupation and (iii) he valued the Land as commercial when there was no basis for doing so and in doing so he failed to represent the true market value of the property.

90. At the end of the day the Defendant was negligent with respect to the manner in which he dealt with the assumptions requested by the client; his on-site observations and the manner by which he arrived at the open market value. The latter breach specifically goes to the value placed on the property by the Defendant. In these circumstances the Defendant has failed to satisfy me that the Valuation is a fair and accurate report of the market value of the property within the range of acceptable valuations at that date in accordance with the procedures and

practices of professional valuers even having regard to the instructions received and the assumptions made by him.

(c) Did the Defendant's breach cause loss to the Bank

91. The Defendant submits that:

- (i) the Bank relied on other factors in deciding to advance money on mortgage to Singapore and any reliance upon the valuation report was nominal was not for the purpose of deciding whether or not to lend but for the predominant purpose of determining how much the Bank should lend.
- (ii) assuming but not admitting that there was a breach of duty by the Defendant no adverse consequences attributable to a deficiency in the Defendant's valuation flowed from the Bank advancing monies on the Land;

92. In determining whether the loss to the lender was caused by the valuation it is not necessary for the lender to show that the valuation was the only cause of it lending the money but rather that it was one of the causes. It is sufficient that it was an effective cause.⁹ The Bank is therefore not required to prove that the information contained in the Valuation was the only information it relied on to loan the money but merely that it was one of the considerations albeit an important one.

93. The evidence of Mohan with respect to the Bank's requirement that the borrower

⁹ Banque Brussels Lambert SA v Eagle Star Insurance Co Ltd & other [1995] 2 All ER 769

provide a valuation of the security before the loan could be approved is clear. Since what the lender has to prove is merely that the negligent statement only played a real and substantive but not necessarily a decisive part in the decision to grant the loan under normal circumstances there would be no question but that the failure by the Defendant to provide a proper Valuation in accordance with the practice of competent respected professional opinion would result in loss to the Bank. The problem here is the fact that there was also a defect in the security, in that the title to the land was defective, not attributable to the Defendant's negligence.

94. An appropriate starting point here is the defects in the Valuation. The Valuation was defective in two ways. The Defendant (i) failed to identify the presence of occupiers on the Land and make proper on-site investigations to ascertain their status and (ii) wrongly valued the property on a commercial basis. The second defect deals solely with the question of how much money ought to be advanced on the security. In my opinion the first defect goes to the question of whether money should be advanced at all on the basis of the security provided.

95. The evidence in this regard comes from Mohan when he says in his evidence in chief: "Given IBL's internal policy against the acceptance of lands with encroachments as security if the existence of squatters had been brought to the attention of IBL at the time when the loan was sought by Singapore Automotive the said Land would not have been accepted as security. The remaining security would not have been sufficient and the loan facility would not have been granted."

96. The position taken by Mohan is confirmed as valid by Gumansingh in his email when he categorically states that in most cases “a property with squatters is not considered to be a good security and are not held as a mortgage.” As stated earlier the fact there is no evidence as to the status of the occupiers is in my opinion of no moment. What is relevant here is the fact that the Land was occupied by a number of people. In any event as I have found there was a responsibility on the Defendant to conduct further on-site investigations to ascertain the status of the occupiers.

97. In the circumstances I am satisfied that had the Defendant met the duty of care owed by him with respect to the existence of occupiers on the Land the Bank would not have entered into the arrangement with Singapore and consequently not suffered the loss. For these reasons I am of the opinion that the Defendant’s second submission also fails.

Is the Bank (a) estopped from claiming that its loss was caused by the Defendant's valuation report; (b) guilty of conduct which is oppressive and an abuse of process

98. Both issues revolve around the existence of the concurrent proceedings. As I understand the Defendant’s submission with respect to the estoppel it is that since the Bank’s claim for all the loss suffered was included in the concurrent proceedings the settlement of the concurrent proceedings without reserving its rights to pursue this Defendant disabled and estopped the Bank from pursuing this claim.

99. Further since at the time of its pleadings the Bank knew (a) that it had commenced the

concurrent proceedings but failed to disclose same and (b) that the title to the security was fraudulent and not merely defective and (c) that the bid it received for the purchase of the property was subject to a good root of title which it could not provide the bringing of these proceedings amount to a misuse of the Court's procedure and an abuse of the process of court.

(a) Estoppel

100. Perhaps a good starting point is the case of Jameson and another v Central Electricity Generating Board¹⁰ relied on by the Defendant. While the facts in that case are somewhat more complicated than those of the instant case in that case, as in this one, there were concurrent proceedings brought against joint tortfeasors. In the Jameson it was accepted that the plaintiff was entitled to bring concurrent proceedings against joint tortfeasors once the plaintiff did not recover more by way of damages than the amount of the loss. The issue there was whether (i) the terms of settlement in the earlier case precluded a pursuit of the later case and (ii) if the effect of the settlement is to discharge the liability of the other tortfeasor then when does this have effect, at the time of the agreement or upon payment¹¹.

101. The second issue does not concern us. At the end of the day all the Law Lords, except one¹², concurred that the terms of the particular agreement the plaintiff's claim had been satisfied by the earlier proceedings. Lord Clyde however went further to hold that where the terms of the

¹⁰ (1999) 1 All ER 193

¹¹ per lord Hope of Craighead at page 199 paragraphs h-j

¹² Lord Lloyd dissenting.

settlement were left open and unclear then as a matter of public policy a settlement with one of the several parties who are jointly and severally liable should involve a release of the others¹³.

This was not a view expressed by the other concurring members.

102. The main judgement was given by Lord Hope of Craighead. In the course of the judgement he deals with the issue in this manner:

“ The liability which is in issue in this case is that of joint tortfeasors, because the acts of negligence and breach of statutory duty which are alleged against Babcock and the defendant are not the same. So the plaintiff has a separate case of action against each one of them for the same loss. But the existence of damage is an essential part of the cause of action in any claim for damages. It would seem to follow as a matter of principle that once the plaintiff’s claim has been satisfied by any one of the several tortfeasors his action for damages is extinguished against all others.”¹⁴

103. This is the principle in law carried forward into the later cases referred to before me¹⁵. Insofar as it is relevant to the instant case it is clear that the Court accepted that in circumstances where the plaintiff had a separate cause of action against two different parties even though the loss was the same it is permissible to pursue two separate actions as long as the plaintiff’s damages or loss has not been satisfied. Once the full amount of the plaintiff’s loss have been

¹³ At page 213 letter f

¹⁴ page 202 letters a-b

¹⁵ Heaton v AXA Equity & Law Assurance Society; Jillian Francis v Xtatik Limited

satisfied however the plaintiff's claim is extinguished against all the other joint tortfeasors.

104. The critical question is whether the claim has been satisfied¹⁶ In Jameson's case this question was a question of fact to be determined. The majority of the court came to the conclusion that it did. In order to determine this fact a judge:

“may examine the statement of claim in the first action and the terms of settlement in order to identify the subject matter of the claim and the extent to which the causes of action which were compromised have been included within the settlement. The purpose of doing so will be to see that all the plaintiff's claims were included in the settlement and that nothing was excluded from which it could properly form the basis for a further claim against the other tortfeasors. The intention of the parties is to be found in the words of the settlement. The question is one as to the objective meaning of the words used by them in the context of what has been claimed.”¹⁷

105. It would seem to me that in the circumstances the mere fact that there was a settlement in the concurrent proceedings does not preclude the Bank from pursuing these proceedings. What must now be conducted is an examination of the claim and resulting settlement in the concurrent proceedings in order to determine whether in fact the claim against this Defendant has been extinguished.

¹⁶ at page 203 letter b

¹⁷ per Lord Hope at page 205 letter g-h.

106. The first point of departure with the facts in Jameson's case is that the claim in the concurrent proceedings as well as this one is for liquidated damages. The result being that there is no need here to embark on an exercise of trying to determine the loss to the Bank. The loss is already quantified. In the concurrent proceedings the claim was for the sum of \$4,976,688.21 representing the loss to the Bank as a result of Singapore's default as of the 10th January 2013. This loss included interest up to that date. The claim before this court at the commencing of this suit was for the sum of \$4,078,198.99 representing the loss to the Bank as a result of Singapore's default inclusive of interest up to the 1st day of March 2012.

107. Both causes of action are founded in negligence. With respect to the concurrent proceedings it is the negligence of Attorneys in conducting a title search. In the instant case it is the negligence of the Defendant in the conduct of the Valuation. It is clear to me that in both claims although the causes of action are different the loss alleged, the monies due under the mortgage in each claim is the same.

108. It cannot be disputed that the entry of a consent order for \$2,400,000.00 does not satisfy whole of the Bank's loss under the mortgage. The Defendant relies on the fact that the consent order states that it is in full and final settlement of the claim herein. And so it should. It would seem to me that by entering into the consent in these terms the Bank was confirming that insofar as there was a claim against the Attorneys in the concurrent proceedings the settlement was in full and final satisfaction of that claim. I do not accept the Defendants submission that the order should be interpreted to be in satisfaction of the whole of the Bank's loss.

109. On the face of the statement of claim in the first action and consent order it is clear that all that was settled was the Attorney's liability to the Bank and there was still outstanding the sum of in excess of \$2,000,000.00 of the loss claimed by the Bank. I am satisfied that in these circumstances the cause of action against the Bank was not intended to be compromised nor was it compromised by the terms of settlement in the concurrent proceedings. In the circumstances the Defendant does not succeed on the estoppel point.

(b) abuse of process

110. While I accept the Defendant's submission to the effect that the doors of abuse of the process claims are not closed and each case depends on the particular facts I agree with the submissions of the Bank that there is no merit in this submission. The position may have been otherwise if the concurrent proceedings had not been disclosed at all but they were disclosed, the relevant documents all provided and the Defendant given the opportunity to meet any case disclosed by them including any submissions with respect to the effect of any defects in title. In the circumstances that have transpired during the course of these proceedings I am of the opinion that there is no abuse of process or oppression of the part of the Bank. This submission also fails.

Is the Defendant's liability in negligence reduced by virtue of any negligence on the part of the Bank

111. The short answer here is no. In essence this is a plea of contributory negligence the burden of which is on the Defendant. By this claim the Defendant seeks to reduce the damages awarded to the Bank. Noticeably the defence make many allegations of negligence on the part of the Bank. The submissions presented however are not as wide or as varied. I propose only to deal

with those allegation that are covered by the particulars of negligence pleaded. No evidence is led by the Defendant in this regard and the Defendant relies solely on the evidence of Mohan.

112. Basically the Defendant submits that the Bank contributed to its loss by failing:

- (i) to provide direct instructions to the Defendant;
- (ii) to follow its own lending procedures;
- (iii) to observe that the property was only purchased two months earlier for \$450,000.00;
- (iv) to conduct proper investigations with respect to both Singapore and the Guarantor with respect to their bank accounts and their suppliers; and

that it disbursed money to Singapore knowing that it had a poor track record in repaying loans.

113. Insofar as the Defendant alleges negligence on the part of the Bank in failing to provide direct instructions to the Defendant I am satisfied that this does not arise as an issue on the evidence. It is clear and indeed the Defendant accepts that the practice is for the Borrower to provide a valuation for the proposed security. The Defendant has not alleged that there is any established practice in support of the allegation.

114. Insofar as the Defendant alleges that the Bank did not act as a prudent lender in disbursing the funds to Singapore there is no evidence that in performing its responsibilities under the mortgage the Bank acted any differently than any other Lender. While hindsight may be 20/20 vision it does not provide a platform for a claim in negligence. Similarly with respect to the failure of the Bank to follow its own lending procedures and inspect the property while this

may have been so it cannot be disputed that the Bank was entitled to rely on the observations and assertions of the only expert in the field, the valuer.

115. It is not in dispute that there is a significant difference between the purchase price and the market value of the Land as provided for in the Valuation. It would seem to me that it does not lie in the mouth of the Defendant to suggest that the Bank should have gone behind the opinions expressed by him as the acknowledged expert. In any event he himself gives a reason for the difference which is not necessarily indicative of negligence.

116. In the circumstances I am of the opinion that the Defendant has not proved any negligence or careless conduct on the part of the Bank sufficient to reduce any damages awarded against him.

Damages

117. The Defendant submits that before its damages can be quantified the Bank must satisfy the Court as to what was the true value of the property. I do not accept this submission. In this regard I agree with the submissions of the Bank that this is a 'but for case'. But for the Valuation the Bank would not have entered into the loan arrangement. In the circumstances this claim "calls for a comparison between the plaintiff's position had he not entered into the transaction in question and his position under the transaction. That is the basic comparison."¹⁸ On the facts of the instant case there is no need to move from the basic comparison.

¹⁸ per Lord Nicholls in *Nykredit Bank v Edward Erdman Group* [1998] 1 All E.R. 305 at page 309 letter c.

118. The Defendant also submits that the Bank has failed to provide any calculations or breakdown so as to quantify their claim. I do not accept that submission. The evidence of Mohan is clear in this regard. Further at the request of the Defendant the Bank provided accounts. The fact that under cross-examination Mohan was unable to answer certain questions to explain the accounts may have more to do with the manner in which the cross-examination proceeded than his inability to justify the accounts. Whatever the position the accounts were provided and the Defendant has not challenged their accuracy.

119. I am satisfied that the amount of the Bank's total loss is to be found in the evidence. I accept the Bank's submission that this amounts to the sum of \$4,742,440.00.13 as at 24th February 2014 with interest accruing at the rate of \$914.17 per day.

120. In accordance with the principle that a Claimant not recover more by way of damages than the amount of the loss and in accordance with the principle that the object of an award of damages is to place the injured party as nearly as possible in the same financial position as before the loss¹⁹.

121. The Bank's damages in this claim are quantified as follows: The sum of \$4,742,440.13 (amount owed at 24th February 2014) plus the sum of \$19,196.57 (representing the daily interest of \$914.17 for 21 days) minus the sum of \$2,400,000.00 (the sum awarded in the concurrent proceedings on the 14th March 2014) together with interest on the last sum at a rate of 15.75%

¹⁹ Jameson at page 193 letters h-j

per annum to date.

122. The Defendant shall therefore be liable to pay to the Claimant the sum of \$2,361,636.70 with interest at the rate of 15.75% per annum from the 14th March 2014 to date. For the reasons indicated earlier above the counterclaim is dismissed.

Dated this 16th day of October, 2014.

Judith Jones
Judge

Appendix A

PS5

Investigations

PS Inspections and investigations

5.1 Inspections and investigations must always be carried out to the extent necessary to produce a valuation which is professionally adequate for its purpose.

Commentary

- 1 In settling the terms of engagement the valuer must agree the extent to which the subject properties are to be inspected and the extent of any investigations to be made. Where a property is inspected the degree of on-site investigation that is appropriate will vary, depending upon the nature of the property; the purpose of the valuation and the terms of engagement agreed with the client.
2. A valuer meeting the criteria in PS 1.5 will be familiar with, if not expert on, many of the matters affecting either the type of property or the locality. Where a problem, or potential problem, that could impact on the value is evident, from an inspection of the property, the immediate locality or from routine enquiries, and unconsidered assumption by the valuer that no such problem existed could be grossly misleading.
3. A client may request or consent to, an assumption that no problems exists. If, following an inspection, the valuer considers that this is an assumption which would not be made by a prospective purchaser it becomes a special assumption and should be treated as such. (See PS 2.2). However, these matters can rarely be disregarded completely and the discovery of adverse on-site factors, which may affect the valuation should be drawn to the attention of the client before the report is issued.
4. Where it is agreed that inspections and investigations may be limited it is likely that the valuation will be on the basis of restricted information and PS 2.4 will apply.
5. Many matters which become apparent during the inspection may have an impact on the market's perception of the value of the property. These can include:
 - (a) the characteristics of the surrounding area, and the availability of communications and facilities which affect value;

- (b) the characteristics of the property;
- (c) the dimensions, and areas of the land and buildings;
- (d) the construction of any buildings and their approximate age;
- (e) the uses of the land and buildings;
- (f) the description of the accommodation;
- (g) the description of installations, amenities and services;
- (h) the fixtures, fittings and improvements;
- (i) any plant or equipment which would normally form an integral part of the building;
- (j) the apparent state of repair and condition;
- (k) environmental factors;
- (l) abnormal ground conditions, historic mining or quarrying, coastal erosion, flood risks, proximity of high voltage electrical equipment;
- (m) contamination ;
- (n) potentially hazardous or harmful substances in the ground or structures on it, for example heavy metals, oils, solvents, poisons or pollutants that have been absorbed or integrated into the property and cannot be readily removed without invasive of specialists treatment, such as excavation to remove sub-soil contaminated by a leaking underground tank or the presence of radon gas;
- (o) hazardous materials;
- (p) potentially harmful material present in a building or on land but which has not contaminated either. Such hazardous materials can be readily removed if the appropriate precautions and regulations are observed, for example the removal of fuel (gas) from an underground tank or the removal of asbestos;
- (q) deleterious materials;
- (r) building materials that degrade with age, causing structural problems, for example high alumina cement, calcium chloride or woodwool shuttering;
- (s) any physical restrictions on further development, if appropriate.

6. Other information may include:

- improvements to leasehold properties. When valuing leases and reversions, where the property originally included in the letting may have been altered or improved, care needs to be taken to ascertain what is to be valued. The valuation of the particular interest may not be simply what is seen and measured on the ground. If the valuer is unable to inspect the lease or, due to the absence of documented licenses, the

extent of alterations or improvements cannot be confirmed, the valuer should proceed on the basis of stated assumptions;

- planning (zoning) controls. Planning control will vary between states and the extent of the enquiries that need to be made will be governed by the valuer's knowledge of the area. The valuer must consider the nature of the property, the purposes of the valuation, the extent of the property and the size of the undertaking, in determining the extent to which the regulatory measures which can, or might affect it, should be investigated;
- the incidence of local, or state property taxes;
- information on any substantial outgoings and running costs and the level of recovery from the occupier;
- information relating to any quotas imposed or other trading restrictions that may be made by the state in which the property is located;
- information revealed during the normal legal enquiry processes before a sale takes place.

7. While the valuer is under a duty to take reasonable care to verify any information provided or obtained, the limitations on this duty must be clearly stated.

PS Verification of information

5.2 The member must take reasonable steps to verify the information relied upon in the preparation of the valuation and, if not already agreed, clarify with the client any necessary assumptions that will be relied upon.

Commentary

1. The valuer has a responsibility to state clearly the information that is relied on and, where appropriate, its source.
2. In each individual case the valuer must judge the extent to which the information supplied is reliable. If there is no option but to accept information that may not be reliable, an appropriate assumption will need to be set out in the terms of engagement.
3. When preparing a valuation for financial statements the valuer should be prepared to discuss the appropriateness of any assumptions that were made with the client's auditor, other professional advisor, or regulator.
4. Clients will expect valuers to express opinions and in turn, valuers will wish to express their opinions upon legal issues which affect their valuations. Valuers must therefore make clear in reports any information which must be verified by the clients, or other interested parties, legal advisors before the valuation can be relied upon or published.