Case No: A3/2015/0043/CHANF

Neutral Citation Number: [2016] EWCA Civ 359
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**HH Judge Dight**
**HC-2013-000168**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/04/2016

**Before :**

**LORD JUSTICE MOORE-BICK**
**LORD JUSTICE MCFARLANE**
and
**LORD JUSTICE BRIGGS**

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**Between :**

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| **LSREF III WIGHT LIMITED** | **Claimant/ Respondent** |
| **- and -** | |
| **GATELEY LLP** | **Defendant/ Appellant** |

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**Michael Pooles QC and Paul Mitchell QC** (instructed by **Berrymans Lace Mawer Llp**) for the **Appellant**
**Roger Stewart QC and Nicholas Trompeter** (instructed by **Ingram Winter Green Llp**) for the **Respondent**

Hearing date : Wednesday 9 March 2016

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# Judgment

**Lord Justice Briggs :**

Introduction

1. This is an appeal and cross appeal from the order of HHJ Dight sitting as a Deputy Judge of the High Court, Chancery Division, made on 12 December 2014 after the quantum only trial of a professional negligence claim against the appellant firm of solicitors Gateley LLP. The firm had been retained by a subsidiary of Anglo Irish Bank, which I will call "the Bank", to provide a report on title in relation to property being offered by the Bank's borrower, a single purpose vehicle company called Method Investments Limited ("MIL") as security for a development loan facility in the maximum sum of £1.1m, to be used mainly for the development as commercial premises with residential flats above them of a building in Rutland Street, Leicester ("the Property").

2. For present purposes, the relevant part of the security offered consisted of a first legal charge ("the Legal Charge") over a newly granted 199 year lease of the Property ("the Lease") to MIL by the then freehold owners of the Property, a Mr Owen and a Mr Van Oppen, who was the prime mover behind the development project and beneficial owner of MIL. The Bank's then valuers assessed the value of the Property at £275,000.

3. Gateley's report on title, delivered shortly before the grant of the loan facility in September 2007, was negligent because it failed to draw to the Bank's attention the existence and serious consequences of clause 35.1(c) of the Lease. It provided for the Lease to be forfeited where the Tenant, if a corporation, suffered any of a number of specified insolvency events, including administration, receivership, winding up, striking off or dissolution. The effect of that provision was seriously to impair the Legal Charge as a security, because its enforcement would be likely to require, or at least to occur at the same time as, one of those insolvency events affecting MIL, thereby triggering a forfeiture. Even if the Bank obtained relief from forfeiture under section 146(4) of the Law of Property Act 1925 as a mortgagee, in the form of a grant of a new lease, realisation of the security by the sale of the Property would still require the purchaser to take a lease of it containing the same forfeiture clause. It is no surprise therefore that, when the Bank turned its mind to enforcing its security in late 2012, and this serious defect in the marketability of the leasehold title first came to its attention, Gateley promptly admitted liability in negligence and breach of its contract of retainer.

4. As the judge said (judgment paragraph 2), his task at the trial was therefore limited to deciding what if any damages had been caused by Gateley's negligence, and whether, as Gateley alleged, the Claimant had failed to mitigate its loss. The Claimant LSREF III Wight Limited had taken an assignment of the Bank's rights under the facility, the Legal Charge and the retainer in May 2014 during the currency of these proceedings. The Claimant is a special purose vehicle formed for the purpose and owned by Lone Star Funds, a private equity firm.

5. Gateley's case that the Bank, and latterly the Claimant, had failed to mitigate its loss was based on the assertion that they had failed to negotiate a variation of the Lease with the landlord. By the time of the trial in December 2014, that case was based upon the fact that the freeholder (then Mr Owen alone) had by August 2014 indicated

his willingness to agree a variation of the Lease to remove the insolvency forfeiture provision on payment of £150,000, that this variation would increase the value of the Lease by double or treble that amount and that the payment of £150,000 could be added by the Claimant to the amount recoverable by enforcement of the Legal Charge as security. More generally, Gateley's case at the trial was that, if the defect in the marketability of the Lease as security was so easily remediable at that price, then the Claimant would be able by sale of the Lease as varied to make a full recovery of the amount lent (inclusive of the payment of £150,000) so as to have suffered no transactional loss by reason of the Bank, its predecessor, having lent on defective security.

6. The judge's determination of these issues, set out in an admirably clear *ex tempore* judgment may be summarised as follows:

    a) he concluded that the Bank (and therefore the Claimant) had suffered its loss at the commencement of the transaction, in September 2007.

    b) He decided that the amount of that loss attributable to Gateley's negligence was represented by the diminution in the value of the Lease as a security attributable to the insolvency forfeiture provision, measured at that time. Having heard expert valuers for both parties, he concluded that this amounted to £240,000.

    c) He rejected Gateley's case that the Claimant had failed to mitigate its loss, for seven specific reasons to which I will have to return. In summary, he regarded the obtaining of a variation of the Lease as such a complicated, risky and uncertain exercise that it was not possible to say that the Claimant had acted unreasonably in failing to pursue it.

    d) He therefore awarded damages of £240,000 to the Claimant with interest at 2% per annum from September 2007.

7. Mindful that this court might be persuaded to take a different view about the appropriate date for assessment of the loss, the judge helpfully resolved a difference of opinion between the experts about the diminution in the value of the lease attributable to the insolvency forfeiture provision as at the date of trial. He found that the amount of the diminution had by then increased (largely due to the fact that the Property had by then been redeveloped as planned) from £240,000 to £497,250.

8. Within a short period following judgment which, despite the intervening Christmas break, lasted only slightly over five weeks, the Claimant succeeded in obtaining a variation of the Lease by the removal of the insolvency forfeiture provision, at a cost of £150,000 payable to Mr Owen, using the damages ordered to be paid. The transaction involved putting MIL into administration, and it was followed by a marketing of the varied Lease of the fully developed Property. This eventually culminated in an auction in December 2015, at which the Property was sold by the administrators of MIL for £645,000, although the sale has yet to complete, due to difficulties in obtaining the new freeholder's consent to an assignment to a company, rather than to the successful bidder. The facts about the post-judgment variation of the Lease and the subsequent sale of the Property have emerged from the admission, by consent, of fresh evidence from both parties to the appeal.

9. Gateley's case on its appeal, advanced with commendable economy by Mr Michael Pooles QC was that:

    a) The judge had been wrong to assess the alleged loss at the valuation date. It should have been assessed, since it was still un-crystallised, at the trial date.

    b) By December 2014 the Claimant had plainly failed, unreasonably, to mitigate its loss by remedying the defect in the marketability of the Lease at a cost of £150,000 which, by then, Gateley had offered to lend, so as to fund the exercise pending the sale of the Property.

    c) Had this been done, then on the judge's valuation of the interest in the Property represented by the Lease as varied, the Claimant would have recouped the whole of its transactional loss by realisation of its security, as well as the £150,000 necessary to obtain the removal of the insolvency forfeiture clause.

    d) Accordingly, the appeal should be allowed, and the action dismissed with costs, here and below.

10. I shall have to address in more detail the Claimant's submissions in response, developed by Mr Roger Stewart QC at greater length than those of his opponent. Nonetheless they may be summarised as follows:

    a) The judge was entitled to assess the loss at the transaction date, the date of assessment being a fact-sensitive matter for judicial choice in each case, with which an appellate court should not interfere in the absence of an error of principle.

    b) By the same token, the judge was entitled to conclude as he did on the issue of mitigation, that being also a multi-factorial question on which the appellate court should be slow to interfere with the judge's decision.

    c) But in any event (and in this Mr Stewart relied on the Claimant's cross appeal) if the Claimant ought to have mitigated its loss, the evidence shows that it suffered an irrecoverable cost of £150,000 plus associated expenses in obtaining the variation of the Lease, for which it is entitled to look to Gateley for compensation.

    d) For that purpose, this court is entitled to have regard to what is now known about the subsequent history of the sale of the Property by the administrators, which demonstrates that the Claimant will not in fact recover its cost of obtaining the variation of the Lease, even if entitled to add that cost to the amount recoverable under its security.

Disposition

11. For the reasons which follow, I would resolve the issues raised by this appeal and cross appeal as follows:

a) I consider that the judge did make an error of principle in confining his assessment of loss to the transaction date rather than the trial date, although I would not (had it mattered) have criticised his identification of the amount of the loss for which Gateley was responsible as the diminution in the value of the Lease as security measured at the transaction date.

b) Although I do not consider that the judge allowed his transaction date analysis to stand in the way of a review of the mitigation issue (on facts which occurred long afterwards), I consider that the Claimant had unreasonably failed to mitigate its loss by December 2014. I would have reached that conclusion regardless of the fact that the Claimant did exactly that shortly after trial.

c) Nonetheless I consider that Gateley is liable for the full cost which the Claimant in fact incurred in curing the defect in the Lease, albeit after trial, in the sum of £157,100.

d) In my view this court is entitled to have regard to all the undisputed facts now available, in concluding as I do that, regardless whether or not it is entitled to add that cost to the amount secured, the Claimant has no other recourse for recouping that outlay sufficient to stand in the way of doing so by way of a damages claim against Gateley.

e) I would therefore allow the appeal, and allow the cross appeal, so as to substitute the sum of £157,100 as the damages with interest thereon at the rate determined by the judge, but from 27 January 2015, the date when the cost of perfecting the Claimant's title was actually incurred.

The Facts

12. No part of the judge's careful findings of primary fact is challenged, nor indeed his resolution of the valuation issues, which were the only factual questions seriously in dispute at the trial.

13. The Bank's lending offer, made and accepted in June 2007, was to provide a maximum of £1.1m, as to more than £900,000 for the development of the Property, with £200,000 as equity release for other developments. It was to be drawn down in stages as the development proceeded. The security structure included the Legal Charge over the Property (itself valued at £275,000 in August 2007), a legal charge over another property owned by the developer called Western Road, valued at £650,000, and a personal guarantee from Mr Van Oppen for £220,000. Thus the aggregate value of the security only slightly exceeded the amount committed by way of loan facility, but it was no doubt expected that the Property would increase substantially in value as the result of the application of the loan monies towards its development.

14. The Lease was granted to MIL, and the Legal Charge to the Bank created, both on 27 September 2007. It is unnecessary to set out the terms of the lengthy insolvency forfeiture provision, because it is common ground that it constituted a grave defect in the marketability of the Property (by comparison with a lease which contained no

such provision) about which Gateley should have, but did not, report to the Bank. Gateley's report on title pre-dated the grant of the Lease, and was made by reference to a draft of it. Bearing in mind that Mr Van Oppen was then a co-owner of the freehold, it is a matter for speculation whether, had the insolvency forfeiture provision been identified as a defect, it would simply have been removed from the draft, or whether the lending transaction would have foundered. But it makes no difference for present purposes.

15. The judge found that the value of the interest in the Property created by the Lease was, in August 2007, only £30,000, whereas at the same date it would have been worth £275,000 with no insolvency forfeiture provision. This corresponded with the residual valuation of the Property upon which the Bank relied at the time, and from which neither expert dissented at trial. The diminution in value was therefore £245,000 (£275,000 minus £30,000) but the judge rounded it down for the purpose of damages assessment to £240,000. There was, on the judge's findings about value, plainly a deficiency in the aggregate value of the security against the amount which the Bank had committed itself to lend, albeit that the full commitment was only to be called upon over time. The initial lending was only £173,000 odd, in fact drawn down before the grant of the Lease.

16. There were after August 2007 a series of variations of the terms of the Bank's facility by which the amount available to be borrowed was modestly increased, and the date for repayment extended. Nothing turns on the detail of these variations.

17. In June 2008 the Western Road property was sold, and the net proceeds of sale of £483,000 were applied by MIL in reducing the amount by then outstanding to the Bank. Meanwhile, the fall in local property values which accompanied the 2008/09 financial crash falsified the parties' expectations as to the value of the Property likely to be generated by its redevelopment, undermined the viability of the development scheme, and placed Mr Van Oppen in increasing financial difficulties.

18. Notice of default was served by the Bank in November 2011, and the defect in the security over the Property attributable to the insolvency forfeiture provision came to the Bank's attention at about the same time.

19. An admission of liability was made by Gateley in January 2013, and these proceedings issued in August 2013. Mr Van Oppen had by then assigned his joint interest in the freehold to Mr Owen, claiming never to have been more than a trustee for him. Mr Van Oppen was adjudicated bankrupt in late 2013. Thus, by the time of the institution of the proceedings, the Property remained the Bank's only valuable security for repayment by MIL of its debt, which then stood at a sum in excess of £650,000.

20. Gateley contacted Mr Owen during the summer of 2014, to find out what he might be prepared to accept for a variation of the Lease removing the insolvency forfeiture provision. The Claimant had by then acquired the Bank's interest, and its investment management advisers Hudson Advisers UK Ltd ("Hudson") ascertained from a meeting with Mr Owen in mid August that he was, at that time, minded to accept £150,000 plus his conveyancing costs, for agreeing the necessary variation of the Lease. Thereafter the possibility of a deal along those lines with Mr Owen became the subject of intense open correspondence between solicitors for the Claimant and

Gateley, culminating in a proposal on behalf of Gateley made on 1 December 2014, shortly before the trial, to settle the claim by advancing £150,000 to the Claimant to fund a variation of the Lease with detailed provisions (including a QC clause) about whether any of it should be repaid to Gateley in the event of the Claimant being able to add that cost to the amount due under its security, whilst setting an overall limit on Gateley's liability of £150,000 plus the costs of any variation to be agreed with Mr Owen, and the cost of the proceedings.

21. None of this led to the resumption of serious negotiations between the Claimant and Mr Owen. Rather, the Claimant used part of the damages awarded on 17 December 2014 as the basis for negotiation with Mr Owen, beginning on the day upon which judgment was delivered.

22. The result was that, when the trial commenced, the Claimant still held a defective security, and the extent to which the insolvency forfeiture provision then diminished its value was the subject of expert evidence. Although on the judge's analysis as to the appropriate date for assessment of damages, this issue did not have to be resolved, he nonetheless did resolve it, no doubt for the very sensible purpose of minimising the risk of a retrial if this court should take a different view about the assessment date. The judge's analysis, at paragraphs 49–56 of the judgment, was that a leasehold interest in the Property unaffected by the insolvency forfeiture provision had a then market value of £837,250 but a value subject to that defect of only £340,000. By that date, the Claimant's outstanding advance and cost of funds (calculated on the basis which reflected its transactional loss) was £653,820. The full contractual indebtedness under the loan facility (including penalties, default interest and other items not representing its transactional loss) was £785,000 odd. The diminution in value attributable to the insolvency forfeiture provision was £497,250. Had the judge accepted the Claimant's expert evidence, that would have disclosed a diminution in value of £340,000.

23. Subsequent events, revealed by the additional evidence admitted by agreement, disclosed that the Property was marketed by the administrators of MIL in April 2015, that offers were received in sums ranging between £450,000 and £826,000 by May 2015. The offer of £826,000 was accepted subject to contract but fell through, as did a lower offer from a different purchaser of £810,000. In the event the Property was offered at auction one year after the judgment and sold for £645,000, and a 10% deposit received. That sale, which is conditional upon landlord consent to the assignment of the Lease, remains uncompleted but represents the best evidence currently available of the market value of the Lease of the Property.

24. Solid transactional evidence such as that represented by the December 2015 auction is of course better than anything based upon the evidence of experts about a Property for which there had been no direct transaction for many years, and none at all since its redevelopment. Nonetheless it is possible, although in my view unlikely, that the value of the Property declined during the year following the trial, but to a degree that cannot be ascertained with any reliability. Meanwhile the Claimant's unpaid advance plus cost of funds has increased to £658,956. We were not told what was the current contractual debt, but it is safe to assume that it now exceeds £800,000.

Analysis

25. The basis for quantification of recoverable loss suffered as the result of lending money upon negligent advice is now very well settled. The ground breaking decisions of the House of Lords in *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 and *Nykredit Mortgage Bank Plc v Edward Erdman Group Limited* [1997] 1 WLR 1627 establish that, at least in relation to negligent valuation advice, the court must undertake two successive tasks. The first is to ascertain whether the lender has suffered any loss from entering into the transaction. For that purpose it generally adopts the accounting analysis laid down in *Swingcastle Limited v Alastair Gibson* [1991] 2 AC 223, by comparing the lender's outlay plus its cost of funds since lending with the amount recovered or (if the security is yet to be realised) recoverable by the enforcement of its security rights. This is the lender's transactional loss. The second stage is to ascertain what part of that loss is properly attributable to the adviser's negligence, and this depends upon ascertaining to what extent the value of the security falls short of that which it would have been if the valuer's advice had been correct.

26. The two stage process is best summarised in the following passage from Lord Nicholls' speech in the *Nykredit* case at page 1631H, where he described the first stage calculation of the transactional loss as "the basic comparison" and the second stage as the estimation of the "deficiency in the security":

> "For what, then, is the valuer liable? The valuer is liable for the adverse consequences, flowing from entering into the transaction, which are attributable to the deficiency in the valuation. This principle of liability, easier to formulate than to apply, has next to be translated into practical terms. As to this, the basic comparison remains in point, as the means of identifying whether the lender has suffered any loss in consequence of entering into the transaction. If he has not, then currently he has no cause of action against the valuer. The deficiency in security has, in practice, caused him no damage. However, if the basic comparison throws up a loss, then it is necessary to inquire further and see what part of the loss is the consequence of the deficiency in the security.
>
> Typically, the answer to this further inquiry will correspond with the amount of the loss as shown by the basic comparison, for the lender would not have entered into the transaction had he been properly advised, but limited to the extent of the overvaluation. This was the measure applied in the present case. Nykredit suffered a loss, including unpaid interest, of over £3m. Of this loss the amount attributable to Erdman's incorrect valuation was £1.4m, being the extent of the over-valuation."

27. In the case of a claim against valuers, it is easy to describe the deficiency of the security, as did Lord Nicholls in the passage quoted above, as "the extent of the overvaluation". That means, of course, the amount by which the property was overvalued at the date when the valuation was provided. Generally speaking, this calculation therefore has to be performed as at the date of the transaction, rather than as at the date of the trial, so as to exclude that which is in principle irrelevant, namely rises and falls in the market for that property following the valuation date.

28. It is equally well settled that the same essential principles apply to the quantification of loss caused by a negligent report on title by solicitors: see ***Lloyds Bank Plc v Crosse & Crosse*** [2001] PNLR 34. By parity of reasoning, if a relevant diminution in the value of security offered for a loan attributable to a defect in marketable title upon which the solicitor has failed to advise can be quantified as at the date of the transaction (which is usually broadly the same as the date of the report on title), then again that stage 2 quantification of the amount of the loss for which the solicitor is liable must generally be ascertained as at the transaction date, for all the reasons which militate in favour of that date in the case of a negligent valuer. In both cases, the lender will have advanced its money on the strength of an assumption about the value of the security which it would not have made if careful advice had been given.

29. But these considerations do not require that stage 1 of the process be carried out as at the date of the transaction. On principle, and as a matter of commonsense, the court will not wish to blind itself from knowledge of relevant facts which have occurred thereafter. By "relevant" I mean facts which demonstrate what, if any, has been the lender's transactional loss. As Lord Nicholls said in the *Nykredit* case, there will be cases where a deficient security (i.e. one worth less than the valuer or solicitor's advice suggested that it was worth) is nonetheless sufficient to fund a full repayment of the lender's advance and cost of funds. In many cases the borrower will simply not default, so that a deficient security causes the lender no loss whatever.

30. Generally speaking, the lender's transactional loss will be most easily identified once it has crystallised by realisation of the security and the application of the proceeds of its sale to the reduction of the outstanding debt. As was decided in the *Nykredit* case, this does not of course mean that the lender had suffered no transactional loss until it realises the security. Where the transactional loss has not been crystallised by realisation and sale, a loss may nonetheless be identified as the result of comparing a) the amount of money lent by the lender, plus interest at a proper rate, and b) the value of the rights acquired, including the borrower's covenant and the security: see per Lord Nicholls at page 1631 D-F.

31. The disinclination of the court to blind itself by quantifying an un-crystallised loss as at the transaction date is fully explained by Lord Hoffmann in the *SAAMCO* case, at pages 220-221, in response to a submission by (the then) Mr Jonathan Sumption QC that the court should ascertain the transactional loss at the transaction date. He said:

> "The trouble is that it throws out not only the bathwater of the extraneous and coincidental but also the baby of the subsequent events which were the very thing against which the lender relied upon the valuation to protect himself."

Later, at 220G he continued:

> "Mr Sumption attempted to justify a valuation at the date of breach of duty by saying that it would be wrong if the damages could be different according to when the trial was held. Leaving aside the retort that this is bound to be a consequence of his concession on the value of the personal covenant, I think that there is no such general principle. On the contrary, except in cases in which all the loss caused by the breach can be quantified at once, the calculation of damages is bound

> to be affected by the extent to which loss in the future still has to be estimated at the date of the trial. In actions for personal injury, it is common for a trial on the quantum of damages to be deferred until the plaintiff's medical condition has stabilised and the damages can be more accurately assessed. There is however a limit to the time for which the parties can wait. So the assessment of damages will often be different from what it would have been if the trial had taken place later. This result can be avoided only by postponing the trial until the plaintiff is dead or (as Mr Sumption's theory would entail) confining the damages to the loss which at the time of the accident he appeared likely to suffer, irrespective of what actually happened. Neither of these solutions has appealed to judges or legislators."

32. As in the *Nykredit* case, the Claimant in the present case had not crystallised its transactional loss by the time of the trial. It may even be (if the auction sale falls through due to the absence of landlord consent) that its loss has still to be crystallised, although the uncertainties as to its amount are now, as the result of the auction sale, much less than they were at the time of the trial in December 2014. Nonetheless the present case demonstrates how uncertainties as to transactional loss may narrow over time. In this case it would be little more than speculation in late 2007 what the value of the Property would be, with or without the defect in the Lease, at the time when (if at all) the Legal Charge needed to be enforced. The Property might or might not have been developed, market prices might have risen or fallen, and the fortunes of the borrower MIL and the guarantor Mr Van Oppen might have risen or, as they had in fact, fallen. At that time, it could not even be said how much of the loan advance might be recouped by the sale of the then much more valuable security over the Western Road property which (in the event) sold for much less than it had been valued at the time of the transaction.

33. Thus it is that, in my judgment, where the transactional loss of someone who has lent money on negligent advice remains un-crystallised at the date of trial, it will be a rare case in which a quantification of that loss would be better calculated by reference to any earlier date than the trial date. As Lord Nicholls said in the *Nykredit* case at page 1633C:

> "Realisation of the security does not create the lender's loss, nor does it convert a potential loss into an actual loss. Rather, it crystallises the amount of a present loss, which hitherto had been open to be aggravated or diminished by movements in the property market.
>
> I can see no necessity for the law to travel the commercially unrealistic road. The amount of a plantiff's loss frequently becomes clearer after court proceedings have been started and while awaiting trial. This is an everyday experience"

Of course, if the lender's transactional loss is crystallised by a realisation of the security prior to trial, there is generally no need to postpone the quantification of that loss to a later date. All that the court needs to do is to quantify it then (which will usually be a simple process of accounting uncomplicated by valuation issues) and then add interest at an appropriate rate.

34. The judge had well in mind the decision in the *Nykredit* case that the fact that a lender's transactional loss has yet to crystallise by the trial date does not mean that it cannot then be quantified. At paragraph 42 he said:

> "It seems to me that although the quantum of the Claimant's loss against the defendant's solicitors has not crystallised, that does not mean that I should begin to speculate on whether they might one day not make a loss. One does not know what tomorrow may bring; whether this property will shoot up in value, or whether it will, for reasons of market movement, become worthless."

He was also right to conclude that, as at the date of the transaction, the Bank had probably suffered a loss, because the then value of its combined securities was less than the amount which it had committed itself to lend.

35. Nonetheless, this did not in my judgment absolve the judge from the need to quantify the transactional, but still un-crystallised, loss of the Claimant as at the trial date. The fact that a lender may be shown to have suffered some immediate loss on the transaction date says very little about whether that will prove to be its real transactional loss.

36. Leaving aside mitigation, and bearing in mind that the judge helpfully valued the Claimant's security rights as at the date of trial, it would probably have been of little consequence that he did not then continue to a full quantification of the Claimant's transactional loss. At that date the sum advanced plus cost of funds was £653,820 and the judge valued the Property, on the basis of the defective Lease, at only £340,000 so that the transactional loss was plainly way in excess of the amount which he attributed to Gateley's negligence, namely £240,000.

37. But if the judge was wrong about mitigation, then a re-calculation of the transactional loss becomes critically necessary. We pressed Mr Pooles as to whether he submitted that the judge's transaction date approach mattered otherwise than in connection with the mitigation issue, and he made no submission that it did. He said only that it coloured the judge's approach to mitigation. I am not persuaded that in fact it did do so, because the judge gave seven succinct reasons for his negative conclusion on mitigation, none of which seemed to me to have been based in any way upon an erroneous approach to the quantification of the Claimant's transactional loss.

38. Before turning to the judge's reasons for concluding that the Claimant had not failed to mitigate its loss, I must briefly address Mr Stewart's submissions about the law relating to mitigation. His main point, as I have already recorded in my summary, was that the question whether there has been a failure to mitigate in any particular case is a multifactorial question upon which an appellate court should be slow to interfere with the analysis of an experienced judge. He went so far as to submit it was really just a question of fact, relying on *Sotiros Shipping Inc v Sameiet Solholt (the "Solholt")* [1983] 1 Lloyd's Rep 605, *Standard Chartered Bank v Pakistan National Shipping Corporation* [2001] CLC 825 and *Langsam v Beachcroft LLP* [2012] EWCA Civ 1230.

39. I readily accept that mitigation issues are heavily fact sensitive, multifactorial questions, upon which an appellate court will indeed be slow to interfere unless an

experienced judge has gone clearly wrong, and it is beyond question that Judge Dight has a wealth of experience in property disputes. Nonetheless, the question at the end of the day is whether there has been an unreasonable failure to mitigate, and the application of a reasonableness test does, in the final analysis, require an objective analysis which requires something more than just fact-finding.

40. Mr Stewart advanced a much more fundamental submission, namely that even if it might be said that the Claimant ought to have done a deal with Mr Owen, nonetheless as a matter of law the Claimant would not be obliged to credit Gateley for any consequential benefit. It would, in traditional language, be *res inter alios acta* or, in modern translation, "collateral": see per Sales LJ in *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629, at 53. He submitted that where the Claimant who faces a loss for which he is prima facie entitled to recover damages from the defendant, does something which brings him a benefit, he is not required to bring that into account against his damages claim unless the benefit can be said to have been caused by the defendant's breach. For that purpose he relied upon the statement of the applicable principles by Popplewell J in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain* [2014] EWHC 1547 (Comm), at paragraph 64, treated by this court as "helpful" on appeal in the same case at [2015] EWCA Civ 1299 and "illuminating" in the *Swynson* case per Longmore LJ at paragraph 17.

41. Valuable though that analysis may be in comparable cases, I am mindful, as was Popplewell J, of the warning of Lord Wilberforce in *Parry v Cleaver* [1970] AC1, at 41H to 42B:

> "As the learned justices in the High Court are careful to state, it is impossible to devise a principle so general as to be capable of covering the great variety of benefits from one source or another which may come to an injured man after, or because, he has met with an accident. Nor, as was said by Dixon C.J. in *Espagne's* case (1961) 105 C.L.R. 569, is much assistance to be drawn from intuitive feelings as to what it is just that the wrongdoer should pay. Moreover, I regret that I cannot agree that it is easy to reason from one type of benefit to another. "

The present case is very far removed from the benefit under consideration in the *Fulton* case or, for that matter, in the *Swynson* case.

42. Here, the damage to the Claimant consisted of an unusual provision in the Lease which, by 2014, constituted its only security for repayment, which could be completely cured by the payment of £150,000 (plus conveyancing costs) to the landlord Mr Owen. The benefit to be derived from such a payment precisely coincided with the damage caused by the breach, because it offered a complete cure for it.

43. Mr Stewart submitted that the large passage of time between the occasion of the breach in 2007 and the potential for its cure in 2014 coupled with the fact that payment for a variation of the Lease was not part of the ordinary course of the Claimant's business, meant that both the payment and the large benefit eventually derived from it in 2015 were for the Claimant's account. In my judgment neither of those factors (nor any of the even less persuasive factors upon which Mr Stewart

relied) come near to displacing the obvious and very close connection between the cost and benefit of varying the Lease and the damage caused to the Bank and later to the Claimant by taking the Lease in its unvaried form. Those factors were wholly insufficient for the transaction by which it was varied to be collateral, or *res inter alios acta*. That does not of itself answer the question whether the Claimant unreasonably failed to achieve a variation of the Lease by way of mitigation before trial. But it unquestionably amounted to mitigation, once undertaken, immediately after trial, and would have been mitigation if done before the trial.

44. I turn therefore to address the judge's seven reasons for concluding that the Claimant did not fail to mitigate the loss constituted by the presence of the insolvency forfeiture provision in the Lease. But I start by reminding myself that, on the judge's analysis, payment of £150,000 plus costs would have improved the value of the security by almost £½m or almost £350,000 if the cost of the variation is netted off. On the Claimant's own valuation at trial, the benefit was £340,000 or slightly less than £200,000 if the price of the variation is netted off. Mr Owen's readiness to agree the variation at that price was, although no doubt not unlimited in time, still there at the time of trial, as events were to demonstrate.

45. The judge's first reason was that, as he put it, Mr Owen was an unknown quantity. There was no certainty that he would deal at the stated price, or at all, and he was in a strong negotiating position. While it is true that Mr Owen had made it clear that it could not be assumed that his offer would remain open for ever, it had been available, without alteration in amount, for several months by the time of the trial. It had not been withdrawn. The fact that Mr Owen might change his mind does not seem to me to be a reasonable ground for not seeking to pursue a negotiated variation of the Lease at the offered price. As far as I can ascertain, the real reason for the Claimant's reluctance was its preference to obtain damages first, without pursuing a negotiation with Mr Owen, and without therefore having to give credit for the benefit of a successful outcome. Subsequent events demonstrate that, when the Claimant did pursue negotiation with Mr Owen, a deal at £150,000 rapidly ensued.

46. Nor, as it seems to me, was Mr Owen in a particularly strong bargaining position. This appears to have been derived from the judge's view that there were serious obstacles to the Claimant obtaining relief from forfeiture, were it to appoint receivers or administrators over MIL, on the ground that the appointment of receivers would have constituted a deliberate breach of the insolvency forfeiture provision: see paragraph 75 of the judgment. Notwithstanding Mr Stewart's best efforts to explain, I have found that analysis difficult to understand. Neither the Claimant, nor the Bank was a party to the Lease, or bound by a covenant in it not to appoint receivers or administrators. Nor did the relevant provision contain a covenant by MIL not to enter into some insolvency process. It merely provided for a forfeiture (subject to the statutory right to seek relief) if such an event befell MIL. Since the forfeiture of a 199 year lease at a mere ground rent would generate an enormous windfall for the landlord, I can see no reason why the court should have refused relief from forfeiture on the application of the Claimant as mortgagee, although the judge was correct to say that relief in the form of a grant of a new lease would still have contained the offending clause. In my view, the £150,000 being offered by Mr Owen was a fair reflection of a far from impregnable bargaining position.

47. The judge's second reason was that, the burden being on Gateley to prove an unreasonable failure to mitigate, it had not called "evidence of sufficient quality to overcome that hurdle". Again, I have found this difficult to understand. Gateley had demonstrated to the judge's satisfaction that the benefit to be derived from a negotiated variation of the Lease for £150,000 was almost £½m. He had indeed preferred Gateley's expert's opinion, to that effect, over the Claimant's evidence that the benefit was only £340,000. The evidence that Mr Owen had been prepared to accept £150,000, subject to contract, was apparent from the correspondence, and it seems difficult to imagine that Mr Owen could have been expected or persuaded to state his bargaining position orally, on oath, in the witness box.

48. Thirdly, the judge drew attention to the fact that a variation of the Lease would require some form of participation by MIL itself. His instinctive reaction (with which I agree) was that, standing back, it would be unlikely that MIL could or would resist the variation at £150,000, but the judge was persuaded by counsel for the Claimant that there was no firm evidence to that effect.

49. In my judgment, the evidence is tolerably plain. If the Claimant and Mr Owen were prepared to do a deal at £150,000, MIL's assent as lessee could be obtained by the Claimant putting MIL into receivership or administration, under the protection of a side agreement with Mr Owen that he would not use that as a pretext for a forfeiture. We were told by counsel that this is, in fact, what later occurred, after trial. But even without that benefit of hindsight, the Claimant and Mr Owen between them held all the necessary cards. The Claimant certainly had, and Mr Owen claimed to have, a sufficient status as creditor of MIL to compel it to go along with an agreed variation of the Lease at £150,000, whether by the threat, or the actuality, of insolvency proceedings designed to take control of its affairs out of the hands of its directors.

50. The judge's fourth and fifth reasons were that, neither the terms of the Legal Charge nor the common law offered certainty that, if it paid £150,000 for a variation of the Lease, the Claimant could add that sum to the amount secured by the Legal Charge. Like the judge, we were treated to a detailed analysis of the terms of the Legal Charge. That question seems to me to be something of a red herring. By mid 2014, the Claimant was owed £785,000 odd under the terms of the loan facility, of which £653,820 was its then accumulated advance and cost of funds. The then value of its security subject to the insolvency forfeiture provision was only £340,000, so that it faced a shortfall in excess of £300,000 if it realised its security without first obtaining a variation of the Lease. Even if it could not add the £150,000 to the amount secured, the Claimant's own valuation advice was that the variation would increase the value of the security to something between £670,000 and £795,000, amply sufficient to recover both its outstanding advance and cost of funds, and any surplus in value of the security above £650,000, up to £780,000 could be recovered because of its additional contractual entitlement to penalties and default interest. On any view therefore, and regardless whether it could add the £150,000 to its security, the Claimant stood to double its money by doing the deal with Mr Owen. On the judge's own view as to the almost £½m benefit to be derived from the variation, the Claimant would have improved its position from a £340,000 recovery to a £785,000 recovery (a benefit of £445,000, at a cost of £150,000). In other words, it would have almost trebled its money.

51. This analysis is also sufficient to deal with the judge's sixth (and as he acknowledged) smaller point, namely that there might still be a significant shortfall on the account, if the Claimant was entitled to add the £150,000 to its security. That may be so, but in such an event, the Claimant would still have more than tripled its money by obtaining the variation from Mr Owen.

52. The judge's final point was that the scheme for obtaining a variation of the Lease proposed by Gateley was "complicated and potentially open-ended". He said that the Bank was a lender and the Claimant an investor, and that both were entitled to regard the security as almost ready money, and should not be expected to undertake a risky and uncertain course, with contingent liabilities, and have to wait to see if those liabilities materialised, and then look to Gateley for an indemnity. If by that the judge meant that Gateley's offer to settle the proceedings on the terms which I have summarised was not unreasonably refused, I have some sympathy with it. But the question is whether the Claimant unreasonably failed to attempt a £150,000 deal with Mr Owen in circumstances where, as later events have shown, that attempt would rapidly have led to success.

53. In my judgment, none of the judge's reasons, singularly or in the aggregate, justify the conclusion that the Claimant had not unreasonably failed to mitigate its loss. The offer was there, the benefit was double or treble the outlay, it has not been suggested that the Claimant lacked the funds with which to do the deal (even if it chose not to borrow them from Gateley) and the Claimant was a sophisticated investor in distressed assets about whom it could not possibly be said that such a deal would be outside the ordinary course of its business. I would, therefore, reverse the judge's conclusion on this issue.

54. What then are the consequences? Mr Pooles submitted that, on the judge's valuation of the Property as at the trial date, mitigation by the obtaining of a variation of the Lease by that date would have ensured that the Claimant recovered the whole of its transactional loss (that is the outstanding advance and cost of funds of £653,820) so that it would in fact have suffered no recoverable loss, and fully recouped its cost of dealing with Mr Owen. If the judge had reached the opposite conclusion about mitigation in December 2014, then I think Mr Pooles must be right in that analysis. The Claimant's loss would not have crystallised but, assessed as at the trial date, it would have held good marketable title to the Property, worth (on the judge's estimation) £837,250, which would have been more than enough to recover both its transactional loss and £150,000 (plus conveyancing costs of the variation on top). If unable to add the cost of the variation of the Lease to the amount secured, then the headroom offered by MIL's additional contractual indebtedness might have been insufficient to cover the whole of the £150,000 plus costs.

55. However that may be, the judge did not in fact assess the Claimant's loss at the trial date, both because he did not regard it as the appropriate date, and because he reached what in my judgment was the wrong conclusion on mitigation. Meanwhile the Claimant's transactional loss remained uncrystallised.

56. The parties have consented to this court being provided with sufficient uncontentious evidence about the continued progress of the Claimant's loss towards crystallisation. It may not even now quite be crystallised due to the non-completion, as yet, of the

auction sale of the Property. Nonetheless this court is much better placed than was the judge to calculate the Claimant's transactional loss.

57. In circumstances where the trial judge did not conduct an assessment of the Claimant's transactional loss as at the trial date, it would in my judgment be wrong for this court now to carry out an artificial historical assessment as at that date, based purely on the judge's findings about the then value of the security, if it would thereby blind itself to what it knows about relevant subsequent events. The auction sale has, if nothing else, established a market value for the Property at £645,000, well below the judge's best estimate in December 2014. For reasons already explained, I do not consider that this can be attributed to a fall in property values during 2015. The Property was marketed with reasonable speed after the variation of the Lease at the end of January 2015, and I do not accept Mr Pooles' last minute attempts to criticise the marketing process, for the purpose of trying to establish that the Claimant failed to achieve best value. At the most, it might be said that the Claimant should have mitigated its loss some five months sooner than it did, but there is no basis for any assumption that this delay caused a devaluation of the security in its hands.

58. The proper course in my view is to assess the Claimant's transactional loss now, on the basis of all the reliable information known to this court.

59. The starting point is that the Claimant has now fully mitigated that part of its loss attributable to Gateley's negligence, namely the diminution in the value of the security attributable to the presence of the insolvency forfeiture provision. That has, quite simply, been removed, so that any shortfall in recoveries now experienced on the sale of the Property is a risk which the Claimant undertook, and not a consequence of Gateley's advice being wrong.

60. Nonetheless, the question remains whether the Claimant should be entitled to its cost of mitigation together with interest from January 2015, when that cost was incurred. Mr Stewart submits that the cost is £150,000, £7,100 legal fees in connection with the variation, together with administration expenses and associated legal fees amounting to a further £47,500 already incurred, and a further £18,000 to be incurred by the conclusion of the administration of MIL.

61. I would not include the administration expenses and associated legal fees as part of the Claimant's cost of mitigating the loss caused by the defect in the security. True it is that to facilitate the variation of the Lease MIL was placed in administration, so that the administrators could execute the deed of variation on its behalf. But administration or some other insolvency process (such as receivership) at a similar cost would have been necessary in any event for the beneficial realisation of the security. It forms an undoubted part of the calculation of the Claimant's transactional loss but not a part of its cost of fully rectifying the defect in its title to the security for which the Gateley is responsible.

62. Calculations proffered by Mr Stewart during the hearing (with which Mr Pooles did not quarrel in detail) suggest that the Claimant's total outlay, including the original advance, cost of funds, cost of and expenses of the variation, cost of administration and realisation of the security amounted to £908,025, against which the security may be assumed to be likely to realise £645,000, leaving a net transactional loss of £263,025. Put more narrowly, the Claimant's advance plus cost of funds of £658,956

exceeds the assumed value of the Property, leaving nothing available for recouping its cost of mitigation.

63. The result is, in my judgment, that there is nothing to displace the ordinary principle that a Claimant which reasonably mitigates its loss by incurring cost and expense in doing so may recover its cost of mitigation as damages.

64. If my Lords agree, I would therefore allow the appeal, allow the cross appeal, and substitute for the judge's award of damages an amount in the sum of £157,100 (being the price and associated legal costs of the variation of the Lease) together with interest thereon from 27 January 2015, at 2% per annum from that date (being the rate chosen by the judge).

Postscript

65. Following the hearing counsel drew our attention, but without further submissions, to *Bacciottini v Goatlee and Goldsmith* [2016] EWCA Civ 170, handed down on 18 March. Despite interesting factual similarities, I do not consider that it affects the appropriate legal analysis of this case.

**Lord Justice McFarlane**

66. I agree.

**Lord Justice Moore-Bick**

67. I also agree.