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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **05/08/2015**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

BETWEEN:

HELM HOUSING LIMITED

Plaintiff;

and

MYLES DANKER ASSOCIATES LIMITED

Defendant.

HORNER J

FRAMEWORK OF JUDGMENT **Paragraphs of judgment**

A. INTRODUCTION

[1] In these proceedings Helm Housing Association ("Helm", formerly known as Belfast Improved Housing) seeks damages from Myles Danker Associates Limited ("MDA") for loss and damage Helm claims to have suffered from the purchase of lands comprising .85 acres at 15-21 Great Georges Street, Belfast ("the site") in the spring of 2007 for the sum of £6,525,000. The site is now on the market for circa £1,000,000. It is not disputed that Helm would not have purchased the site but for a valuation supplied by MDA and that the Department of Social Development ("DSD") would not in the absence of a report from MDA valuing the site at £10,000,000 have provided the necessary funding for Helm. The parties agreed in accordance with Order 1 Rule 1(A) the court should determine on the basis of the expert valuers' evidence whether the valuation of the site by MDA at £10,000,000 fell within a tolerance of 10% on either side as contended for by Mr Lockhart QC on behalf of the plaintiff or 15% on either side as contended for by Mr Brannigan QC on behalf of the defendant. This proposal had the potential to save many days of court time. If the court determined, for example, that the valuation fell within the accepted tolerances, there would be no need to hear any evidence about whether MDA had carried out the valuation negligently.

Mr Callan and Mr Hopkins were the valuation experts retained by the plaintiff and defendant respectively. The court is indebted to the legal teams and their respective experts for the manner in which this case has been contested. The court has had the benefit of detailed written and oral arguments from both counsel and has heard the evidence of both experts who are each highly regarded in this field. I have taken all the claims and counterclaims made by each side into account in reaching my final decision. However in the interests of keeping this judgment to manageable proportions, I have not rehearsed each and every argument made by either party, although each can be assured that they have been carefully weighed in the balance.

B. BACKGROUND FACTS

[2] It is important to set out in some detail the background to this dispute. I do so without having heard any of the witnesses in this case, other than the two experts. Therefore my decision is based on contemporaneous written records and the experts oral testimony. It may be subject to revision when I have heard further testimony. I have reached no definite view whether adverse or favourable about any person's behaviour at this stage. I do not intend to do so until I have had the opportunity of hearing their oral testimony. To that extent, any opinion I express about the evidence must remain a provisional one until each side has adduced all its evidence.

[3] The main characters in this drama are:

(i) Helm, a housing association, which supplies social housing for families, flats for single persons and bungalows as well as sheltered housing for the elderly. It also provides a wide range of supported housing for people with special needs which it manages through various partnerships. At all times material to this action it was looking for a site in North Belfast where there existed a significant social housing need for family accommodation.

(ii) MDA is a well-known firm of Surveyors and Valuers. Stuart Danker ("SD") carried out this valuation assisted by his professional colleagues and Co-Directors, Audrey McStraw and Neal Morrison, both experienced valuers.

(iii) Turley Associates ("Turley") are experts in the fields of planning law and provided advice to MDA and to the Ulster Bank in respect of the preparation of a valuation report on the site for the Ulster Bank in December 2006.

(iv) Strategic Planning is another firm of planning experts who provided a report on the planning potential of the site to MDA in March 2007 to assist in MDA's preparation of the valuation prepared for Helm.

(v) JNP Architects are a firm of architects who prepared drawings for a proposed scheme of three apartment buildings between 11 and 14 storeys high comprising a total of 200 units on the site.

(vi) The Eric Cairns Partnership ("ECP") is a firm of estate agents in Northern Ireland with special interests in selling apartments. It provided advice on the prices likely to be obtained for the sale of apartments on the site.

[4] In the summer of 2006 the site immediately adjacent to the subject site known as the Ruskin site was sold to Big Picture, a firm in which Mr Barry Gilligan, a well-known property developer had an interest. The site was not exposed to the open market. The purchase price was £3,500,000. There is a dispute about the basis upon which Big Picture purchased the site. There does not appear to be any dispute that Big Picture was intent on improving the planning approval for the site which at that stage was for 48 apartments in a four storey building and 18 terraced houses each comprising three storeys. This was for social housing. On 22 May 2013 Big Picture eventually obtained planning permission for 217 units which were to be used for social housing.

In December 2006 the Lavery Diamond site on the Lagan side of the motorway and rail link adjacent to the index site was agreed at £15.7m between the owners and the

Department for Regional Development ("DRD") who acquired it for a road improvement scheme.

These sites respectively achieved values of £3.125m (per acre) in July 2006 and £5.12m (per acre) in December 2006. However, both these transactions, being off market are of limited value. The price per acre achieved in the latter part of 2006 for the sale of the site was £7.67m (per acre), a significant uplift on the value when compared to these two other transactions. The Mascott site which is also adjacent to the site was being assembled at this time. However given that this was a site assembly, I accept that it is difficult to compare each individual portion which made up the Mascott site.

A valuation was carried out of the Mascott site by Mr Lavery of CBRE at around this time. A retrospective valuation was carried out by Mr Crothers of the Ruskin site for litigation purposes some years later. These were not open market transactions. They provide minimal assistance to the court in determining the preliminary issue.

[5] Just after this transaction Brown McConnell Clark McKee ("McConnells") on the instructions of the owners, Robert Craig & Sons (Engineering) Limited (the Vendor) placed the site on the open market. The asking price was £2,500,000. After what can only be described as something akin to a feeding frenzy in which a number of prominent developers and speculators in Northern Ireland participated, Lacuna Developments Limited ("Lacuna") controlled by the well-known developers, David Best and his son Anthony Best came out on top when its bid of £6,525,000 was accepted on 6 October 2006. It is not known how Lacuna or the other prospective bidders valued the site. It was sold as it was but with the reasonable expectation of planning permission being obtained for residential development.

[6] There followed discussions between Lacuna and Helm. It was proposed that Lacuna would design and build out the site for Helm. On 21 October 2006 Lacuna wrote to Helm putting forward a proposal of 182 apartments with 70 car parking spaces. Lacuna also proposed a private scheme for 200 apartments. Lacuna set out the names of those assisting them in the development proposal and included in that list is MDA. The letter is positive about the prospects of securing planning permission. MDA denies that it was in any way assisting Lacuna or that it was a member of Lacuna's team and claims that its name was included in this list without its permission. This is an issue that will have to be explored at the trial as it is not possible to reach any view on the limited evidence presently available.

[7] It appears that on 11 December 2006 Helm agreed provisionally with Lacuna to purchase the site for £10,270,000 based on an apartment scheme of 158 apartments subject to contract and full statutory approval. Turley, the planning experts, on 15 December 2006 purported to advise the Ulster Bank on the planning possibilities

of a scheme for 138 apartments and 21 car parking spaces. However this was pursuant to a scheme designed by Halliday Ramsey, Lacuna's architects for BIH (now Helm). This scheme was for 158 apartments, that is 138 two-bedroomed apartments and 20 three-bedroomed apartments. The valuation to the Ulster Bank which purported to be a market valuation took into account this scheme. However it is not clear why Turley's opinion related to a 138 unit scheme. This appears to be a simple error. Again it will be necessary to consider oral testimony on this issue before reaching a concluded view.

[8] On 14 December 2006 MDA was instructed by the Ulster Bank to provide a valuation of the site. The valuation was requested on an open market value basis or open market value with its interpretative commentary in its existing state and the letter states that the customer is Lacuna SPV, a special purchase vehicle for Lacuna which turned out to be the Mehlor Partnership.

[9] On 14 December 2006 ECP produced for Helm a schedule setting out suggested sales prices of the apartments as at December 2006 for a scheme comprising 145 units and a single 7 storey building. Turley provided a planning appraisal which was subsequently given to Helm. This as I have recorded above, looked at a scheme of 138 apartments with 21 car parking spaces and 8 storeys. It considers that there should be no difficulty in obtaining residential planning permission but raises issues about:

(i) The number of storeys that would be permitted on the site. But it notes the planners had reacted positively to a taller building. This was on the basis of information provided by Lacuna, it would appear. It is not clear how reliable this intelligence was.

(ii) The number of parking spaces given as standard is one space per dwelling. It comments that it cannot advise on this issue without more knowledge of the Department's attitude and precedents elsewhere.

[10] On 21 December 2006 contracts were exchanged in relation to the sale and purchase of the property between the Vendor and Lacuna/Mehlor Partnership with completion scheduled for 27 April 2007. It is not clear whether the purchase agreement was conditional on the onward sale to Helm. It will be necessary to see all the contract documents. It accepted that the agreement is a "back to back" one with Lacuna "flipping on" the site which it had now agreed to purchase for £6,525,000, for the substantially increased sum of £9,750,000 to Helm. It is common case that the senior management of Helm knew this, although not the Board of Directors. Mr Moore, the Chairman of Helm, says that the involvement of Mr Best as "a middle man" was not brought to the attention of the Development Committee. He does say however that the purchase would still have completed.

[11] On 9 January 2007 MDA produced a valuation for the Ulster Bank, Lacuna's funder. This records, inter alia, that the current market value of the site as an opportunity development site is reasonably presented in the sum of £10,500,000. The valuation appears to be on a residual basis only. It values the approximate gross development value ("GDV") at £33,400,000 that is an average of just over £185,000 for each of the apartments which were then intended to be built. At this stage the indicative scheme was for one large apartment building comprising 178 units over at least 9 storeys. However MDA had no planning report from any expert whatsoever which purported to deal with the prospects of planning permission being given for 178 units. This is an omission that may also require to be explored during the trial. There is no record in the report of the agreed sale of the site on the open market before to Lacuna for the sum of £6,525,000 after a bidding war. There is in fact a complete failure to consider any comparable evidence including the sale of the index site, in respect of which contracts were only just in the process of being exchanged. It seems to be based exclusively on this new proposal to demolish the existing buildings and develop the site out. It notes that the scheme was produced with "an end user in mind i.e. a housing association for social housing where the need for car parking is of a minimal requirement". It should be noted that:

(i) Mr Hopkins made no attempt to stand over the £10,500,000 valuation of MDA in January 2007.

(ii) This was a market valuation. It was not one which was based on any Special Assumption.

(iii) There was a proposal that 135 car parking spaces were to be provided on the site for a scheme of 178 apartments which is used to calculate residual value. No explanation is provided as to how or why MDA have chosen a 178 apartments scheme apart from, perhaps, a discussion with the architects which is not recorded. There is no planning expert evidence to justify a valuation based upon such a proposal at that stage. Indeed Turley's report related to a 138 or 158 unit scheme and contained some important caveats.

It may be significant that it was very much in Lacuna's interests, as Mr Hopkins quite frankly accepted, to obtain as high a valuation as possible because the loan to value assessed by the bank would probably dictate whether the Bests, the moving parties behind Lacuna, would have had to offer personal guarantees in order to secure a loan. With an apparent equity of £4,000,000 vouched by the valuation, history suggests that during this period a bank was unlikely to have thought personal guarantees were necessary. Accordingly, it was very much in the interests of those running Lacuna to have the valuation for the bank as high as possible.

[12] On 6 February 2007 Lacuna said that it did not want to design and build a scheme but wanted to sell the land directly to Helm. On 19 February 2007 Helm

asked Gareth Johnson of Lisneys, experts in the valuation of property, to value the site and provided him with the necessary site details. He was given Turley's planning advice so. At that time Lacuna was suggesting to Helm that it had another prospective purchaser prepared to pay £10,000,000. The planning appraisal from Turley accompanying the request had been altered, the number of apartments having been changed from 138 to 158. No explanation has yet been proffered for this change although as discussed, this may be an error on Turley's part in that they omitted to consider the 20 three bed-roomed apartments. Mr Johnston's preliminary view was that:

(i) A private sector development of 203 units in three blocks of 12 storeys with 90 car parking spaces in the basement should be approved.

(ii) However, he considered that more car parking would be required to serve a 100% private sector development and this was more likely to be of the order of 150 spaces. He valued the apartments given what he considered was a secondary site as being worth £160,000 and £175,000. He considered that planning permission for 200 apartments would be possible. He estimated the value of the scheme as being £10,000,000, that is £50,000 per unit. He did note that the location was untested and many developers would be wary. He required time to check comparable site sales and to make other general checks. In the circumstances he would need to prepare a formal valuation according to the RICS appraisal and valuation standards. He estimated it would take him two weeks and cost £8,000 + VAT. He made it clear that what he had provided could not be relied upon and that "the usual investigations will be required".

It is important not to lose sight of the fact that this was a very rough and ready view which Mr Johnston was expressing and which he did not intend should be relied upon.

[13] On the same date Mark Adrain, the Director of Developments of BIH (now Helm), noted re the site:

> "Negotiated price for site acquisition with David Best of Lacuna Developments. Agreed a price of £9,750,000 (include a discount given the earlier agreement) subject to contract."

[14] On 2 March 2007 Mr Adrain wrote to Mr SD of MDA in the following terms:

> "Further to our recent telephone conversation, I am writing to confirm our request for a valuation of the above site. I attach a location map for your

> information. BIH has been offered the site on a straight purchase basis ensuring that we take all the risk relating to statutory approvals. We **hope** to develop a scheme of 150-200 at a height of 12-14 storeys. **Please provide a valuation for the site as if it were put on the market today given that no approvals exist.** If you require more detailed information please contact me." (Emphasis added)

On 5 March 2007 SD replied stating:

> "You indicate a **potential** development of 150/200 apartments over 12/14 floors. I would require a copy of your indicative drawings showing site plan, floor plans, elevations, cross sections and a schedule of internal floor areas per apartment. A statement from your architect or planning consultant as to the key issues relating to planning in general and heights in particular, including negative aspects. As the basis of this evaluation is the residual valuation methodology, I would require also as much cost information as possible to arrive at residual/site value." (Emphasis added)

He agreed to do it for a fee of £7,500 + VAT because of the "long professional relationship" enjoyed between Helm and MDA.

[15] On 13 March 2007 Mr Alan Hamilton MRICS, a valuer, sent to Mr Adrain of Helm at his request what purported to be a RICS Red Book valuation, valuing the site at £9.75m. He described this as good value. He charged the princely sum of £200 for this opinion. It is common case that this "Report" did not fulfil the requirements of the RICS Red Book.
ECP produced a schedule of prices in March 2007 for a mixed used scheme on this site providing differential values for the units depending on whether they were for social housing or private use.

[16] MDA provided the new valuation report on 23 March 2007. This report bears an obvious similarity to the earlier report produced for the Bank as much of the narrative remains the same. This report states the current market value of the site as a development opportunity is now reasonably represented in the sum of £10,000,000. It refers to the valuation being based on a report from Strategic Planning, planning consultants, and discussions with JNP Architects. There is no mention in the report either of the sale of the site on the open market to Lacuna for £6,525,000, or of the valuation MDA provided to the Bank at £10,500,000. The report does not identify any other transactions involving comparable sites which have been sold in the vicinity in the recent past.

It draws attention to car parking and says at paragraph 3.2:

> "The scheme is produced for the specific end user in mind ie a housing association for social housing occupying two of the blocks, (where the need for car parking is of a minimal requirement), plus a third block for selling to the private sector in which car parking is expected to be accepted by the Planning Service at a level of one space per unit."

It also draws attention at paragraph 4.2 to the residual valuation method and states:

> "The residual method sometimes produces theoretical values which are out of line with prices being achieved in the market place. We have therefore attempted to find market evidence in order to compare our results. We are also aware of the general limitations of the residual method in view of the large number of assumptions which require to be made, and experience shows that profit margins vary from developer to developer and from time to time."

Finally it refers to the granting of planning approval for 200 apartments as being a "viable commercial proposition" but it does acknowledge that there will have to be further negotiations undertaken by the Planning Service to ensure that permission is granted in such a manner as to maximum the site's development potential.

[17] Following this valuation and in reliance upon it, Helm then purchased the site for £9,750,000 by way of a sub-sale. It is suggested by Mr Hopkins in his report at paragraph 45 that the profit made by Lacuna was split 50/50 with the original Vendor. However this appears to be wrong and Lacuna seems to have made in excess of £4m from its onward sale to Helm. As previously recorded, it is accepted that the valuation carried out by MDA was relied upon by the DSD and that Helm would not have been able to go ahead with the purchase in the absence of such a valuation from MDA because the DSD would not have provided the necessary funding to Helm.

[18] In August 2007 the property market in Northern Ireland collapsed. The site is now worth perhaps a tenth of the price which Helm paid for it. Helm has been the subject of strong criticism from the DSD for its behaviour in agreeing to purchase a site which was being "flipped", and which gave Lacuna a windfall profit of over £3 million.

C. THE PROPERTY MARKET IN NORTHERN IRELAND: 2006 TO 2007

[19] During the months leading up to August 2007, including those under consideration, it appeared that a collective madness had descended upon Northern Ireland and its property market. Off market sales of land were common, "flipping" was a recognised practice of speculator and developer alike, credit was apparently limitless, speculation was rife and the property market appeared to be out of control. Weatherup J in Bank of Ireland (UK) plc v Brian Patterson & Ors p/a Patterson Miller [2014] NIQB 140 said:

> "Traditionally development land was bought by builders and developers who required some sort of assurance that they could secure planning permission for their preferred schemes. They undertook appraisals to ensure that they could develop the land profitably. However, as the bull market gathered pace different breeds of purchasers entered the market and economic and development fundamentals were abandoned in the rush to acquire land. Novice developers entered the market as did pure speculators who viewed land as a commodity to be traded and who lacked the desire and skills to develop the land. Demand far outstripped supply and prices rose dramatically. In tandem with rising prices other features of the market were that purchasers and lending institutions became very relaxed about risks such as location or planning permission. There was an assumption that housing prices would continue to increase so that even if the land could not be profitably developed today it could be in the not too distant future. Development appraisals based on current house values often did not support the price paid for land. Many purchasers were investors and not developers. Thus valuations were carried out in abnormal market conditions. There was said to have been '*a disconnect*' between the prices paid for development land and the fundamental economics of development."

[20] Speculative bubbles are a well-recognised phenomenon. In the 17th Century Holland was gripped by tulip mania. Charles McKay commented in the Extraordinary Popular Delusions on the Madness of Crowds:

> "A golden bait hung temptingly out before the people, and one after the other, they rushed to tulip-marts, like flies around a honey pot … Nobles, citizens, farmers, mechanics, sea-men, foot-men,

> maid-servants, even chimney sweeps and other old clothes women dabbled in tulips … Houses and lands were offered at ruinously low prices, or assigned in payment of the bargains made at the tulip-mart …"

There can be no doubt as the experts both candidly accepted that preparing an expert valuation in such conditions can be a trying exercise.

D. LEGAL PRINCIPLES

[21] The correct legal principles to be applied when assessing such expert valuations were discussed in the case of Bank of Ireland (UK) plc v Brian Patterson & Ors p/a Patterson Miller by Weatherup J. There is no dispute between counsel that Weatherup J's summary at paragraph [27] of his judgment captures the correct legal principles:

> "*The legal principles*
>
> [27] In Webb Resolutions Ltd v E. Surv Ltd [2012] EWHC 3653 (TCC) Coulson J set out the legal approach. For present purposes the relevant principles may be stated as follows -
>
> First, Jackson and Powell on Professional Liability states that in common with other professional persons and in the absence of an express term in the contract the standard required of a surveyor is that of the ordinary skilled man exercising the same skill as himself. He is variously described in the cases as 'reasonably skilled', 'competent', 'prudent' or an 'average surveyor' (para. 5).
>
> Secondly, the use of the word 'prudent' does not put a gloss on or make more onerous the ordinary duty at common law because prudence is one of the tests against which the duty of a professional at common law has been measured. As a matter of dictionary definition 'prudence' means wisdom or knowledge or skill in a particular subject or area and does not necessarily mean conservative or erring on the side of caution (para. 11). The Oxford English Dictionary includes sound judgment in practical affairs, to be circumspect, to be sensible.

> Thirdly, the defendant was not obliged to carry out valuations on a resale basis. In the absence of special instructions it is no part of the valuers duty to advise on future movements in property prices. The belief among buyers and sellers that prices are likely to move upwards or downwards may have an effect on current prices and to that extent such belief may be reflected in the valuation. However the concern is with current prices only (para.13).
>
> Fourthly, the right approach is to focus on the result, that is to say the valuation itself. It does not follow that, if a valuation was outside the reasonable margin, the valuer was automatically negligent, however it spotlights the way in which the original valuation was performed and provides a prima facie case for the valuer to answer (para.23).
>
> Fifthly, there is a permissible margin of error or bracket. In cases concerned with complex calculations for investment purposes where variable figures are used in set formulae it is usual for the bracket to be assessed by reference to each of those variables. For residential valuation there ought to be just one bracket, calculated by reference to the correct valuation figure (para.25)."

[22] He followed on with some pertinent comments of his own. At paragraph [29] he said:

> "[29] A number of observations may be made that bear on issues debated in the present case.
>
> First, the measure of valuation was market value as defined by RICS.
>
> Secondly, the valuer should determine the current value of the property. The valuer is not projecting future prices or future trends in relation to the property. However the present value will take account of the current movement in prices. For example an overheating market, such as the market in the present case was described, may lead the valuer to a belief that a plateau has been, or is about to be reached, or has passed, or indeed that prices have

> fallen or will fall, but in each case such movement will be reflected in the current value. The valuer is not predicting what the price will be on some other occasion.
>
> Thirdly, valuers are exercising their skill and judgment in assessing the current value of the property. The exercise is not just a reflection of any offer that has been made for the property. If that were so the surveyor would only be concerned with the genuineness of the offer.
>
> Fourthly, the parties have to act knowledgeably and prudently. Prudence does not necessarily indicate caution but it does suggest some circumspection.
>
> Fifthly, the valuation of a development site is a more complex matter than the valuation of a single dwelling. An appraisal of the economic development prospects for the development site may be taken into account. Where it is believed that the market in development sites is predicated on future increases in value that would ultimately render development profitable that belief would be reflected in the current value.
>
> Sixthly, if the market were considered to be irrational that would be a matter to be taken into account in measuring current value, so that, for example, the misplaced confidence of bidders in an ever increasing market would be reflected in the assessment of the current value of the property.
>
> Seventhly, the variables relating to comparable sites are factors to be taken into account in assessing current value. Variations cannot be disregarded on the basis that future increases will cover any variable that might diminish current value. For example, the character of the location and the absence of planning permission will be taken into account in assessing current value."

[23] Both counsel agreed that it did not matter if a valuer produced a negligent valuation if his valuation came within the permissible limits. There has been some controversy about the width of these limits. Some authorities suggested that they

are as low + or - 5%. Some authorities suggested that they are + or - 10%, some + or - 15% and some + or - 20%.

[24] In K/S Linken & Ors v CB Richard Ellis Hotels Ltd (No 2) [2010] EWHC 1156 (TCC) Coulson J said:

> "E4 The Margin of Error
>
> (a) The Law
>
> 180 There are a number of authorities dealing with the appropriate margin of error. The starting point is Singer and Friedlander Ltd v John D Wood & Co [1997] 2 E.G.L.R. 84 at 85H-J where Watkins J said:
>
> > 'The permissible margin of error is said … to be generally 10 per cent either side of a figure which can be said to be the right figure … in exceptional circumstances, the permissible margin … could be extended to about 15 per cent, or a little more, either way.'
>
> 181 The only case to which I was referred where a lower percentage was imposed was in Axa Equity and Law Home Loans Ltd v Goldsack & Freeman [1994] 1 E.G.L.R. 175 , where a bracket of roughly plus or minus 5 per cent was fixed by the judge. That was a case involving residential property. There are other cases involving residential property where the experts agreed that a plus or minus 5 per cent range was appropriate: see for example, BNP Mortgages v Barton Cook and Sams [1996] 1 E.G.L.R. 239. I can certainly see that, for standard estate houses for example, a smaller bracket than 10 per cent may well be appropriate.
>
> 182 There are a number of cases in which a higher bracket has been identified. A bracket of 15 per cent up or down was adopted in Corisand v Druce & Co [1978] 2 E.G.L.R. 86 where the property in question was a hotel. And there are other cases, such as Mount Banking Corporation Ltd v Cooper & Co [1992] 2 E.G.L.R. 142 and Arab Bank Plc v John D Wood Commercial Ltd [1998] E.G.C.S. 34, where the

> relevant percentages were, respectively, 17.5 per cent and 20 per cent. However, in all of these cases, the relevant percentages were agreed between the experts. They were not the subject of consideration by the court because, unlike the present case, the margin of error/bracket was not itself in dispute.
>
> 183 It seems to me that, as a matter of general principle, the position to be taken from the authorities is as follows:
>
> a) For a standard residential property, the margin of error may be as low as plus or minus 5 per cent;
>
> b) For a valuation of a one-off property, the margin of error will usually be plus or minus 10 per cent;
>
> c) If there are exceptional features of the property in question, the margin of error could be plus or minus 15 per cent, or even higher in an appropriate case."

[25] In Capital v Drivers Jonas [2011] EWCH 236 Eder J said:

> "(vi) As summarised in K/S Lincoln v CB Richard Ellis at paragraph 183, for a standard residential property, the margin of error may be as low as plus or minus 5 per cent; for a valuation of a one-off property, the margin of error will usually be plus or minus 10 per cent; if there are exceptional features of the property in question, the margin of error could be plus or minus 15 per cent, or even higher in an appropriate case. However, a range of 14.5% to 23% has been described as "absurd" (see Staughton LJ in Nykredit Mortgage Bank plc v Edward Erdman Group Ltd [1996] 1 EGLR 119 @ pp 120/121). "

[26] In rejecting the apparent agreement between experts to allow a 15% margin, Coulson J held in Blemain Finance Ltd v E Surv Limited [2012] EWHC 3654 at paragraph 83:

> "83. Furthermore, as was demonstrated here, a margin of 15% up or down would make about £1

> million difference to the valuation. Mr Adams-Cairns himself described that as a 'ridiculously high range'. I agree. Whilst 15% margins may be appropriate for truly one-off properties, this was not a property which, in my view, could justify a margin of more than 10% up or down. In the absence of any justification for the 15%, or any third party material to support it, I consider that the appropriate margin was 10%."

[27] In this case the valuation under consideration was a one-off valuation for a single site without any obvious exceptional features. There was a reliable comparable transaction provided by the sale of the index site a few months before. There were other comparable transactions available, although these were off market and of much more limited weight. This was not and should not have been a complex matter. Accordingly, I consider that the issue before this court is whether or not the valuation of the site falls within the broad range of plus or minus 10%, that is £9,000,000/£11,000,000.

E. THE EXPERT EVIDENCE

[28] Mr Callan, the expert witness for the plaintiff, made a number of trenchant criticisms of the defendant. These included the following:

(i) There was a failure to disclose MDA's involvement with the site when it valued it for the Ulster Bank, Lacuna's funder, in December 2006.

(ii) There was no reference to the sale of the site to Lacuna for £6.525m. This was an egregious error as this was an obvious and relevant open market transaction where the site had been exposed in full to the market.

(iii) There was a failure to consider other comparable evidence from the Ruskin site which was an off market sale and the Lavery Diamond sale which was an agreed figure to represent the value of the land which was being acquired by the Department of Regional Development for a road scheme.

(iv) There was a failure to carry out a market valuation. What was done instead was to value a building scheme for 200 units of mixed private and social housing in respect of which there was no planning permission. No adjustments were made for the high level of risk in obtaining this planning permission.

(v) The values given to the apartments were excessive and did not reflect the obvious secondary nature of the location.

[29] Mr Callan was subject to a detailed and well thought out cross-examination by Mr Brannigan QC who challenged him on many different issues which included:

(i) His experience and the fact that he had little involvement in property valuation at this time, which Mr Callan accepted. Mr Callan's evidence was to the effect that banks and developers were reluctant to instruct him as they feared that his more pessimistic opinions would hinder possible deals.

(ii) He had ignored the valuations of Mr Johnston, who he agreed was a more than competent valuer and Mr Hamilton, whom he had unfairly disparaged. Mr Callan maintained that both of these gentlemen were not carrying out Red Book valuations according to the RICS standards and that only the most limited of weight could be given to their "valuations".

[30] Mr Hopkins, the expert witness for the defendant, gave his evidence in a careful and considered manner. He made a number of points. These included:

(i) MDA should have disclosed the fact that it had previously valued the site for the Ulster Bank. He said that although this was a regrettable omission, he did not consider that it affected the issue which the court had to decide, namely whether the valuation was within the accepted margins.

(ii) The sale of the site was not a reliable comparable because of the "exponential growth in property values". Accordingly the only reliable way to value the site was using the residual method.

(iii) The valuation of the site was to reflect the construction of 200 units on it and MDA had "proceeded on that basis without contradiction by Helm".

(iv) The James Clow apartments at the Granary Building and Merchant Building, which are close to the site but on the other side of the motorway and on the banks of the Lagan, were directly comparable in value to the apartments proposed for the site.

(v) The reports of Mr Johnston and Mr Hamilton could be relied upon.

(vi) The sale of the Ruskin site was on the basis of a planning permission for 48 apartments and 20 three-bedroomed townhouses and had to be

devalued on that basis. He had not taken the Lavery Diamond site transaction into account.

[31] Mr Hopkins was cross-examined by Mr Lockhart QC for the plaintiff. During the course of his cross-examination a number of issues were explored to which his responses were:

(i) Mr Hopkins did not accept that MDA had erred in any way in valuing the site on the basis of a mixed scheme for 200 units. This was what MDA was asked to do and the residual method was the appropriate method of valuing this type of land.

(ii) He did not consider it relevant that it was for a mixed scheme of private and social housing. The valuer was considering 200 units. He did accept that the valuer should have checked with a planning expert to see whether or not it would have made any difference to the requirements for parking spaces if this was an exclusively private development.

(iii) He did not consider the sale of the site in 2006 to be relevant. The same applied mutatis mutandi to other transactions including those involving the Ruskin site and the Lavery Diamond site.

(iv) He denied that he had overvalued the units in this site. He had used what he considered was direct comparables which included James Clow apartments. He did not consider the index site to be an obvious secondary location.

[32] It can be seen from the expert evidence that a number of themes emerged. These included:

(i) The basis of the valuation carried out by MDA.

(ii) The way in which the valuation was carried out.

(iii) The relevance, if any, of the sale of the index site and other transactions in the near vicinity.

(iv) The mixed scheme proposed by Strategic Planning and JNP Architects.

(v) The location of the site.

F. DISCUSSION

(i) Basis of valuation

[33] It is clear beyond any doubt that MDA should have disclosed to Helm that it had valued this site for the Ulster Bank, Lacuna's, funder in December 2006. It was a serious error on the part of MDA not to have disclosed this valuation as it was duty bound to do under Appendix 1.1 of the RICS Red Book which deals with conflict of interest and in particular paragraph 2.7 which states:

> "However, the following are examples of where it will usually be necessary for the valuer to either make an appropriate disclosure, or where it is considered that any conflict might arise could not be resolved in a satisfactory way, to decline to act:
>
> …. valuing a property previously valued for another client."

[34] No doubt this issue will be explored when SD gives his evidence. Helm will undoubtedly wish to understand why disclosure was not made, especially as the Ulster Bank was funding Lacuna's purchase of the site and it was very much in Lacuna's interest for the valuation of the site to be as high as possible. There is also the unresolved issue of how MDA's name came to be on Lacuna's development team and whether this was disclosed to the bank. As I have said I can make no finding on these issues as I have not heard all the evidence. However what is clear is that the failure of MDA to make a disclosure of this potential conflict of interest was a serious omission given the strictures of the Red Book and displayed a fundamental disregard for RICS's rules and standards.

[35] The RICS through the Red Book gives instructions about the standards the valuer is to follow. Sometimes these instructions are mandatory, such as Practice Statements and Commentaries on those Practice Statements and sometimes they are advisory such as Guidance Notes: see paragraph 6 entitled "Compliance with these Standards".

[36] Chapter 2 deals with the "Agreement of Terms of Engagement". This makes it clear that a valuer before any report is issued must agree the terms on which the valuation will be undertaken. This requires agreement on the basis, or bases of valuation: see PS 2.1(F).

At the commentary to PS 2.1 at paragraph 6 it states:

> "The member will need to discuss and agree the extent of the investigations and Assumptions that are appropriate to the circumstances and purpose of the Valuation and ensure that any Assumptions or Special Assumptions that will be included in the Report are recorded in the Terms of Engagement."

[37] At PS 2.3 it states that in respect of any Special Assumptions which are necessary in order to adequately provided the client with the valuation, these "must be agreed and confirmed in writing to the client before Report is issued". Furthermore it goes on to say that Special Assumptions in any event may "only be made if they can reasonably be regarded as realistic, relevant and valid, in connection with the particular circumstances of the valuation".

Paragraph 2 of the commentary gives an example of a Special Assumption, namely that a planning permission "had been granted to develop land".

[38] The requirement to ensure that any Assumptions or Special Assumptions are agreed and accepted by the client in advance or otherwise of no legal standing is set out at paragraph J of Appendix 2.1. Paragraph 2(d) of Appendix 2.2 deals with Assumptions and the need to set out what Assumptions are going to be made in carrying out the valuation. In Appendix 2.3 which deals with Special Assumptions it refers to planning consent which will need to be granted for the development of the property as a Special Assumption.

Chapter 5 states that the report itself must deal with all matters agreed between the client and the valuer in respect of the Terms of Engagement and that the minimum valuation will include "any Assumptions, Special Assumptions, reservations, any special instructions or departures". At PS 5.3 it states:

> "Where a Report makes a valuation based on the basis of a Special Assumption, Special Assumption shall be set out in full, together with a statement that has been agreed with the client."

[39] I have spent some time setting out the requirements of the RICS in ensuring that the Terms of Engagement are agreed and that the basis of valuation is clear to both sides. The reason for this is obvious, namely to prevent disputes subsequent to the valuation by what the valuer was actually being asked to do. There has been considerable time expended on this issue in this particular case. Much of the debate is centred on whether or not this was a market value (the same concept exactly as "open market value") namely "the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted

knowledgably, prudently and without compulsion" or whether it was the valuation of a 200 residential unit scheme.

[40] The letter of instruction is absolutely clear. The task of MDA was to provide a valuation for the site "as if it were put on the market today given that no approvals exist." The "hope" is to develop a scheme of 150-200 apartments. The letter of instruction does not ask the valuer to make this a Special Assumption. In response MDA promises to provide "the current market value of the property as a development opportunity site".

[41] Mr Hopkins claims that this changed and that on MDA being provided with the report for Strategic Planning and the drawings from JNP Architects, that it was required to provide a valuation of 200 residential unit scheme in accordance with "indicative development scheme only".

[42] The report summary itself says in respect of market value:

> "Based on a report prepared by Strategic Planning, Planning Consultants, and discussions with JNP Architects. In addition to an assessment of various appraisals relating to potential schemes, we are of the opinion that the current market value of the property as a development opportunity site is reasonably represented in the sum of £10,000,000."

At the back of the report there is an appendix which sets out the basis of the valuation and this records that it is open market value as defined above and in accordance with the fifth edition of the RICS Appraisal and Valuation Standards.

[43] Nowhere in the report of Strategic Planning does it state that planning permission for 200 units will be forthcoming. It raises significant caveats in respect of car parking provision, the need for a convincing argument to be made about the scale of the proposed development and the access to and egress from the site which may well require input from a roads engineer. Such concerns even in the febrile atmosphere of Spring 2007 should have been given special attention. Instead they seemed to be ignored. There is no way that the market value in this report is based on a Special Assumption or any Assumption that there will inevitably be planning permission for 200 private residential units in the future. It is unclear, to put it as kindly as possible, what "various appraisals relating to potential schemes" were taken into account by MDA in reaching a market value of the site of £10,000,000.

[44] Also in the appendix under the title "Town and Country Planning" MDA state:

> "Information provided in relation to Town and Country Planning matters, is the result of informal enquiries made with the Department of the Environment Planning Service which we have assumed is correct."

It is entirely unclear what enquiries were made and what responses were received. At the present time it is still not known whether or not the scheme proposed for the site would have been acceptable, whether the car parking provision was acceptable, whether the scale was acceptable, whether the access and egress arrangements would have been successful. All these matters remain unknown and are not resolved in any report which was available to MDA.

[45] There are many things in this case which are unclear. However, on one matter there can be no doubt. Given that this was a Red Book valuation, it had to be treated on the basis that MDA was assessing the market value of the site without any Assumption, whether Special or otherwise, as to the number of residential units which this site could accommodate. If MDA intended to carried out a valuation of a 200 unit private scheme then that had to be included in the terms of engagement agreed with Helm and the Special Assumptions necessary for such development has to be expressly set out. Appendix 1 of the report would also have required amendment.

(ii) Methods of Valuation

[46] The RICS does not give instructions as to what method of valuation valuers should use. It does give guidance in Information Papers as to what constitutes best practice. Then ultimately there are no hard and fast rules and valuers are dependent on exercising their own reasonable professional judgment.

[47] There are different methods of assessing market value. There is the comparable method where other similar transactions are looked at and adjustments made to allow the index site to be compared. These adjustments can relate, amongst others, to the date of the comparable transaction, the location of the comparable property etc. As Weatherup J pointed out in Bank of Ireland (UK) PLC v Brian Patterson and Others Practising as Patterson Miller, in the overheated market which existed in 2006 and 2007 there can be "a disconnect between the prices paid for development land the fundamental economics of development". Speculators drive up prices paid for development land and these transactions then fuel other increases when they are used as comparables.

There is another well recognised method of valuing development land. That is the residual method. This involves "the assessment of the value of the scheme as completed and the deduction of the costs of development (including the developer's profit) to arrive at the underlying land value": see Valuation Information Paper No:

12 from RICS. The residual approach requires the valuer to make a number of assumptions any of which can affect the final outcome. MDA recognised the weakness in the residual method which is that it is particularly susceptible to error if incorrect figures are used, for example, to calculate the GDV of a site. Obviously there will be a 33 and a third per cent increase of the GDV if 200 units is used to calculate the GDV as opposed to 150 units. While MDA professed to be aware of the risk of using theoretical values out of touch with the market place and although they claimed to look at comparable schemes, it is clear that they never made any attempt to determine whether or not they had erred in their calculations by looking at what had actually happened on the market. MDA looked neither at the sale of the index site a few months before or of the transactions involving the Ruskin site or the Lavery Diamond site. The RICS say in its Information Paper states:

> "In practice it is likely that a valuation should utilise both approaches, and the degree to which either, or both, are relevant depends upon the nature of the development being considered, and the complexity of the issues."

At 7.1 the information paper states:

> "Where a comparative approach has been followed the land value is determined at an early stage. However, the valuer may wish to check the result against simplified residual valuation, or consider if any of the factors explicit within a residual valuation (such as specific planning or site characteristics), have not been appropriately reflected in any adjustments that the valuer has made to the comparables."

At 7.3 it states:

> "If at all possible an attempt can be made to compare the result with such market evidence as may exist because the residual method sometimes produces theoretical results that are out of line with prices being achieved on the market."

[48] In this case MDA made a number of errors. Firstly, they chose a residual method. They then proceeded on the assumption that planning permission would be granted for 200 residential units when the expert evidence was hedged with caveats. In addition they used values for the finished units which did not reflect the location (see below) and they used a planning lead-in time of 3 months which was inadequate.

[49] If MDA had used the comparable method even as a check, rather than as the first resort which seems to be the wiser course, they would have seen that they had gone horribly wrong, their assessment being totally out of kilter with the market, and in particular the sale of the site a few months before. For some unknown reason, which will have to be explored at trial, they blithely ignored and continued to ignore the sale of the index site to Lacuna for £6.525m.

[50] There was reference during the trial to the so called "rule of thumb" that a residential unit was worth £50,000 and that this could be used to calculate the value of the development site. Mr Johnson considered that on the basis that the site could lawfully accommodate 200 units, that it was then worth £10m. It was suggested on behalf of MDA that this was a useful check (although whether MDA used this as rather more than a check remains to be tested), even though it was necessarily a broad brush one. However, as a check, it was undermined by two matters. Firstly, most importantly, there was no planning permission for 200 private residential units or indeed for any units. If the site could only accommodate 150 private units, then it was worth £7.5m on this approach. Secondly, it did not adequately reflect the marginal nature of the site. Obviously such a "rule" would require adjustment to reflect a location which suffered from a number of significant and obvious disadvantages.

(iii) The relevance of the sale of the index site

[51] The site was exposed to the market in October 2006. Lacuna was the successful bidder at £6.525m. There were under-bidders at £6.4m and £6.3m. Its sale price which was legally agreed only in December 2006 when contracts were exchanged and became unconditional in March 2007, provides the best evidence of market value. The suggestion that it could be ignored because it was out of date is without merit. This sale should have formed the basis of any valuation subsequently carried out. This is especially so as some limited support for this valuation can be found in the off market sale of the Ruskin site or the agreement reached with Road Service for the Lavery Diamond site. They certainly suggest that the valuation of MDA was grossly excessive. However, Mr Callan was correct in saying that these off markets sales should be treated with caution. Instead the sheet anchor of any valuation exercise carried out in March 2007 should have been the sale of the index site on the open market the Lacuna. Any valuation of the site in March 2007 should have been secured to this fundamental foundation which was based not on theory but on open market evidence. To have omitted any reference to this sale either in December 2006 valuation to the bank or in the March 2007 valuation to Helm is completely inexplicable and displays a complete failure in understanding how market value should be assessed. It was good practice to use residual valuation as a check in this particular case. However the residual valuation had to be carried out using reliable and robust information.

[52] As already recorded, paragraph 4.2 of its report MDA highlighted the weakness in the residual method and the danger of obtaining values which were "out of line with the prices being achieved in the market place". Having highlighted the weakness of the residual method of valuation, MDA then proceeded to disregard their own advice. The sale of the index site whether it was in October 2006 when the bid was accepted or in December 2006 when contracts were exchanged, was highly relevant in that it reflected the market's view as to the value of the site on the open market. Of course, there would have to be an adjustment to take into account the increase due to a rising market between the date when agreement for the sale of the site was agreed and the date of the valuation. This should not have been a difficult task. The experts in their discussions did not seem to have any difficulty in reaching some sort of consensus on this issue.

(iv) Private Housing and Social Housing

[53] It is important to remember that housing associations are primarily in the business of providing social housing not of developing sites for the onward sale of residential units at a profit. They cannot, by agreement, compete against each other. Some of them do have arms which do develop private housing but basically they are in the business of providing social housing. The point is that it is irrelevant how many apartments designated for social housing can be developed on this site or any other site in assessing market value. The key issue is the number of private units which can lawfully be developed on the site. For example, it matters not that 140 plus units of social housing could be developed on this site. That is completely irrelevant. The housing associations are competing with private developers and accordingly the only issue that arises is the number of private apartments that can be developed on a particular site. The same logic applies to the value of the units. It is the value of the apartments on the open market for private sale which must be taken into account. Their value for social housing is irrelevant.

[54] There was no evidence before the court about whether at this time a mixed development comprising social and private apartments was likely to work. Neither Mr Callan nor Mr Hopkins are planning experts. According to the minutes of the meeting of experts, Mr Callan accepted that MDA was correct to assume planning permission for 200 no apartments. He did qualify this subsequently by saying that he did not accept there was any guarantee of such a number of apartments ever being developed on the site. Mr Hopkins was of the view that MDA was perfectly entitled to value the site on the basis of being able to accommodate 200 apartments. However it is clear that the ratio of parking spaces to units demanded by Planning Service was all things being equal 1:1. There is also no doubt that this ratio can be and is relaxed in certain circumstances. This particular development was to have approximately 200 apartments. Of these approximately 140 were to be social housing comprised of two blocks and the other 60 private units were to be housed in a different block. There were to be 110 car parking spaces, 20 of which were on surface parking and the remainder accommodated underground.

[55] The planning appraisal report indicates it might be possible to reduce the 1:1 ratio (which would obviously have prevented development going ahead) by arguing that car ownership will be lower than standard car ownership because of the number of social housing units. It is suggested that this issue should be explored further before any submission of a planning application. Further the report concludes:

> "Considering that the site is within an Area of Parking restraint ratio one space per dwelling is acceptable. Again, there may be scope to reduce this provision further …"

This should provide little comfort to anyone seeking to accommodate the parking demands of a 200 private apartment development.

[56] At the very least a reasonably competent valuer would have obtained specific planning advice on the following issues:

(i) Does the inclusion of social housing on this site reduce the number of parking spaces that will be required by the Planning Service?

(ii) If the answer is yes, what are the number of parking spaces would be required for a wholly private development on this site?

(iii) On that basis, for how many private units will planning permission be granted on the site?

It is a material omission that this issue was not taken up by MDA. Mr Hopkins agreed with the court that it should have been. It is also an issue on which both Mr Callan and Mr Hopkins should have sought expert guidance. The valuation of MDA does not address this issue and as a consequence is irredeemably flawed.

(v) **The Location**

[57] The site comprises what used to be an engineering works. It is now cleared of all buildings. It comprises some 0.8 acres. It fronts Great Georges Street which forms the busy connecting road between the M3 Westlink and the M2 Westlink. The site is cut off from the river by the rail and road link and from the city centre by Great Georges Street. This is a very busy arterial road which would present an obstacle for pedestrians seeking to access the city centre. The site, which effectively forms an island, will present obvious challenges for a roads engineer. I note that Strategic Planning in its report recommended the retention of a roads engineer prior to the submission of the planning application. MDA did not seek any advice from a roads engineer in attempting to value of the site.

[58] I visited the site together with other sites in the vicinity. The location of this site and the Ruskin site are similar and directly comparable. The Lavery Diamond site is better positioned being closer to the river. The site of the James Clow apartments is significantly better enjoying as it does views of the river, better access to the city centre and considerably better access arrangements both for motor vehicles and pedestrians. The subject site is very much a secondary location. It can fairly be described as marginal. It is impossible to conceive of a private development here (never mind a mixed development of private and social housing) attracting prices of the same order as those achieved for the onward sale of the James Clow apartments. As Gareth Johnson pointed out a lower pricing level than most other more established areas would be required.

[59] Having received all the evidence and having taken into account the detailed arguments advanced by both sides and being acutely aware of the length of this judgment, it is my view that the contemporaneous opinion of Mr Johnston as to the value of the apartments best reflects the obviously secondary nature of the location and the difficulty that such a location will bring in achieving their sale on the open market. Accordingly, I am of the view that a range of £160,000 to £175,000 depending on the unit best reflects the value of the units at that time.

G. THE APPROACH OF THE REASONABLE COMPETENT VALUER

[60] The reasonable competent valuer ("RCV") is another passenger on the Clapham omnibus. In Healthcare and Home Limited v Crown Services Agency [2014] UKSC 49 Lord Reed discussed the use of these passengers who included "the right thinking member of society, familiar with the law of defamation, the official bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom had season tickets for many years". He said in paragraph 3:

> "3. It follows from the nature of the reasonable man, as a means of describing a standard applied by the court, that it would be misconceived for a party to seek to lead evidence from actual passengers on the Clapham omnibus as to how they would have acted in a given situation or what they would have foreseen, in order to establish how the reasonable man would have acted or what he would have foreseen. Even if the party offered to prove that his witnesses were reasonable men, the evidence would be beside the point. The behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court. The court may require to be informed by evidence of circumstances which bear on its application of the

> standard of the reasonable man in any particular case; **but it is then for the court to determine the outcome, in those circumstances, of applying that impersonal standard**." (Emphasis added)

[61] While this court can say with confidence that the valuation of £10,000,000 was greater than the permissible range of values, it is not at present possible to give greater definition to this because there were errors and omissions in the approach of both Mr Callan and Mr Hopkins to the valuation of the site. This exercise namely the assessment by a RCV of the market value of the site in March 2007 remains to be carried out.

[62] In the present circumstances, and without being proscriptive, and accepting that reasonableness can encompass different approaches, an RCV in carrying out a market valuation of the site would:

(a) Make sure that the terms of his engagement were agreed and clearly set out these out before he commenced his valuation.

(b) Have set out any Assumptions and Special Assumptions in his report in a clear and unambiguous manner so that the client was able to understand exactly what task he was performing.

(c) Treat the agreed sale of the index site to Lacuna at £6.525m as a sheet anchor of any valuation process. The market had been tested fully and this represented the market value of the site at the time agreement was reached, unless there was good evidence that some error had been made on the basis of a common misapprehension.

(d) As a matter of judgment he would have determined whether the date of the transaction was in October or December 2006.

(e) Recognise this was a rising market. While there was no direct correlation between the rise of residential housing in general and apartments in particular on the one hand and development land on the other, there was of course an indirect connection. The RCV, as a matter of judgment, would have had to determine what was the appropriate percentage increase to apply to the sale price of the site to Lacuna given the date of this transaction. (See the discussion in the minutes of the experts as to the percentage increase).

(f) Check the sale price against other comparable transactions although limited weights should be given to off market ones. The RCV will check to see whether or not the "sales" of the Lavery Diamond site in December 2006 and the Ruskin site in July 2006, although of limited weight, would cause an adjustment to be made against the purchase price of the index site.

(g) Carry out as a check a residual valuation. The RCV will seek further information from a planning expert who is likely to have consulted with the Planning Service and perhaps also from a roads engineer. An RCV will want to know the irreducible minimum number of private residential units which could be built lawfully on the site. He will also want to know the prospects for additional residential units over and above those. In respect of those units he will give them a "hope value". He will make no adjustment for the fact that a greater density of units might be achieved from a mix of private and social housing. There will be no difference in the price of units being sold depending on whether or not they are for private or social housing. An RCV will make a suitable adjustment for the obvious secondary nature of the site

H. CONCLUSION

[63] At this stage the court has only heard the expert witnesses. It is unfair to them to form definite views on some issues and consequently many conclusions must be necessarily provisional. At present there are matters on which the court can pronounce with a degree of confidence as to why the report of valuation prepared by MDA was not within the permitted tolerances. These are:

(i) The valuation requested and which MDA purported to carry out was of the market value and not just for one particular scheme of 200 units. If MDA was only valuing a 200 unit scheme as is now claimed, then the Red Book demanded that this be included in the terms of engagement and that any Special Assumption or indeed any Assumption was spelt out clearly in the report.

(ii) Insofar as MDA now suggest there was a Special Assumption of planning permission for 200 units on the site, this is contradicted by what was agreed and the terms of the valuation. There was a failure on the part of MDA to comply with the Red Book requirements which would have materially misled Helm.

(iii) The failure to use the recent open market sale of the site as a sheet anchor in carrying out the valuation exercise was inexcusable.

(iv) The omission to seek expert opinion so as to find out whether a private residential and social housing mix would have achieved a greater density of units was a highly significant omission. MDA should have ascertained the number of private residential units which could be lawfully accommodated on the site.

(v) The purchase of the Ruskin site by Big Picture in the summer of 2006 and/or the Lavery Diamond site "sale" should have been considered although

limited weight should have been given to them because of the off market nature of these transactions. At least they would have provided a check.

(vi) The failure to seek planning advice from a planning expert and to find out Planning Service's view as to what they would permit on the site and what car parking requirements they would have insisted upon, was not good practice. The view of a roads' engineer may also have been required.

(vii) There was a failure to use values for residential accommodation which necessarily reflected the obvious marginal nature of this location.

(viii) There were a number of errors in the residual valuation which included the lead in time for obtaining planning permission.

[64] On the preliminary issue the court determines that the valuation is outside the permissible range which it considers to be + or – 10%. However, it is also considers it to be outside the range suggested on behalf of MDA, namely + or – 15%.