OUTER HOUSE, COURT OF SESSION

[2024] CSOH 99

CA106/22

OPINION OF LORD RICHARDSON

In the cause

DALE HOUSE DEVELOPMENTS LIMITED

Pursuer

against

BRIAN C RONNIE

First Defender

and

RYDEN LLP

Second Defender

Pursuer: Brown; DAC Beachcroft Scotland LLP
First and Second Defenders: A Jones KC (sol adv), C Watt (sol adv); Brodies LLP

6 November 2024

Introduction and background

[1] This case concerns a property known as Dale House on West George Street in Glasgow. The pursuer was formerly the proprietor of the property.

[2] The property is situated in a prominent location, a few metres from Queen Street Railway Station between Buchanan Street and George Square. The property consisted of a cash storage and counting facility which had been built for the Royal Bank of Scotland

in 1982. By 2016, which is the relevant date for the present proceedings, the property was vacant and had been unoccupied for a number of years. It was dilapidated. By this stage, the property, given its location, represented a development opportunity which would require demolition and re-development.

[3] The pursuer acquired the property for the sum of £2,640,000 with entry in October 2014. Also in October 2014, the pursuer concluded missives to sell the property to the Legal & General Assurance Society Limited ("L&G"). In terms of clause 16 of the missives, the pursuer was entitled to receive what was described as the "Profit Share" in certain circumstances. The amount of the profit share was to be determined as at the "Valuation Date" (as that term was defined in the missives) in accordance with a formula provided in the missives. The formula required the parties to seek to agree the "OMV" or open market value of the property on the valuation date. The pursuer and L&G subsequently agreed that the valuation date was to be 16 September 2016.

[4] However, in the event, the pursuer and L&G were unable to agree the open market value of the property. In those circumstances, clause 16.5 provided that:

> "Failing agreement in accordance with Clause 16.4 hereof the Seller [the pursuer] and the Purchaser [L&G] shall jointly appoint the Independent Valuer to determine the OMV of the Property as at the Valuation Date using the current edition of the RICS Valuation – Professional Standards having regard to information provided by both parties in support of their proposed valuation. Both the Seller and the Purchaser will each submit all marketing reports, surveys, offers and disclose the contact of all negotiations will third parties [sic]."

The appointment of the first defender

[5] The "Independent Valuer" was defined in the missives as being CBRE Limited. In the event, CBRE was unable to accept the appointment as independent valuer. The pursuer and L&G agreed to accept the nomination of a replacement valuer by the Chairman of the

Royal Institution of Chartered Surveyors (RICS). On 11 July 2017, Mr Kenneth Thurtell of Gerald Eve LLP, acting on behalf of the pursuer, submitted an application to RICS seeking the nomination of an independent valuer. In respect of the preferred professional background, Mr Thurtell stated:

> "The Independent Valuer should have specific sector knowledge and experience of undertaking development led valuations in Glasgow with a particular focus on the hotel, office and retail sectors to be able to compile a formal valuation in accordance with the RICS 'Red Book'."

[6] The first defender was subsequently nominated and accepted appointment as the independent valuer. The first defender was a member of the second defender and was acting in the course of its business. Following a preliminary hearing which took place on 26 September 2017, the first defender issued terms to the pursuer and L&G by letter dated 27 September 2017. Those terms were accepted by both.

[7] In his letter, the first defender set out a procedure whereby the pursuer and L&G were to provide him with written submissions. In the event, the first defender received both submissions and counter-submissions from the pursuer and L&G. For the pursuer, they were prepared by Ken Thurtell of Gerald Eve LLP. For L&G, they were prepared by Niall Bryers of Jones Lang LaSalle. The submission made by Mr Thurtell proposed a market valuation of the site based solely on a mixed office/retail use in the sum of £9,100,000.

[8] The submission from Mr Bryers included a valuation of the property based on re-developing it as a hotel as well as office/retail use. The L&G hotel valuation was based on a planning application which had been jointly submitted by L&G and Meininger Hotels. The Meininger scheme was based upon the proposed hotel containing 160 bedrooms. In terms of his submission, Mr Bryers was of the view that £2,000,000 was a reasonable valuation of the site.

The first defender's valuation

[9] Thereafter, the first defender produced his valuation of the property on 8 December 2017. He assessed the open market value of the property on 16 September 2016 as being £3,900,000. The first defender commented:

> "In my opinion the premises have reached the end of their economic life. I, therefore, considered other alternative uses for the subjects and was of the opinion that the highest use values would be that of either an office with retail/leisure on the ground floor or a hotel with retail/leisure on the ground floor.
>
> After having carried out a residual valuation, it was my opinion that the highest and most sustainable use would be based on an office and leisure scheme."

In his valuation, the first defender considered the development of the property based upon the Meininger scheme and concluded that the property's residual value on that basis was £2,576,000 (paragraph 2.11.53). The first defender concluded that valuing the property on the basis of office/retail use was likely to produce a higher value. On the basis of this valuation, the pursuer was not entitled to any profit share in terms of the missives.

Sale to Bloc

[10] In July 2019, L&G concluded a sale of the property to Bloc Glasgow Limited at a price of £8,750,000. Bloc purchased the property in order to develop it for use as a hotel with associated retail space. Bloc originally proposed 260 hotel rooms and a further 10 apartments. This scheme was subsequently amended to propose 190 rooms and 70 apartments.

The pursuer's case

[11] In the present proceedings, the pursuer sues the defenders for breach of contract. This case is advanced on two bases. First, the pursuer contends that the first defender failed to carry out the valuation in terms of the missives. The pursuer submits that, contrary to clause 16.5 of the missives, the first defender failed to carry out the valuation in accordance with the RICS Valuation – Professional Standards colloquially known as the "Red Book" and, in particular, RICS Valuation Information Paper 12: Valuation of development land ("VIP 12"). Second, the pursuer submits that, in preparing the valuation, the first defender failed to exercise the reasonable skill and care to be expected of a chartered surveyor of ordinary competence suitably qualified in the relevant area of practice. The pursuer contends that, had the valuation been properly carried out, it would have been entitled to a profit share in terms of the missives.

[12] I heard the parties at proof before answer.

Evidence

[13] Helpfully, the parties entered into a joint minute which agreed much of the background which I have set out above. The parties also agreed that the documentary productions which had been lodged in process were what they bore to be. In terms of the joint minute, the parties dispensed with the need for two witnesses to attend in person: Craig Westmacott of L&G and Robert Seeley, a surveyor who had acted for Meininger. The parties agreed that the witness statements of each of these witnesses were to be taken as their evidence.

The pursuer's evidence

Philip Kavanagh

[14] Mr Kavanagh is, along with George Aldridge, one of the two principals of the pursuer. He gave evidence as to his background in property development and to his involvement with Dale House. He had first become aware of the property in 2010 when it was being offered for sale. At that stage, Mr Kavanagh described the sale as being "distressed" in that the seller was in some kind of financial difficulty. He and Mr Aldridge were attracted by the location of the site and put in an offer of £3,255,000 to purchase it. This was unsuccessful.

[15] Thereafter, the property was brought back to the market in 2013 and, in June 2014, he and Mr Aldridge made a further offer for the property. The second offer was in the sum of £2,640,000 and was successful. The pursuer's offer was conditional on obtaining planning and licensing consent. The transaction did not settle until October 2014 when the pursuer entered into a back-to-back transaction with L&G. Mr Kavanagh described the role of L&G as being a "forward funder" or banker for the property development. He considered the relationship with L&G essentially to be a form of joint venture whereby the pursuer provided the property development expertise and L&G provided the funding.

[16] The two transactions settled simultaneously with the pursuer using the proceeds received from L&G to pay the original seller. Mr Kavanagh explained that he and Mr Aldridge made a couple of hundred thousand pounds immediately on settlement. In terms of the missives, the pursuer was also entitled to a share of any profits realised through the development.

[17] Mr Kavanagh explained that the pursuer had focussed on developing the property through refurbishment with retail on the ground floor and basement together with an office

development on the upper floors. The pursuer had pre-let two units to Done Brothers (operator of the Betfred chain) and Prezzo (a chain of Italian restaurants). However, following the completion in 2014, L&G had been responsible for taking the development forwards. Mr Kavanagh had had no contact with Meininger.

George Aldridge

[18] Mr Aldridge gave evidence consistent with Mr Kavanagh's in relation to the background to the pursuer's involvement with the property.

[19] In relation to the initial attempt to purchase the property in 2010, Mr Aldridge was aware that the successful purchaser at that stage was Shepherd Developments. Shepherd subsequently obtained planning permission, on appeal, to develop the site as a 120 room aparthotel. However the transaction involving Shepherd had subsequently fallen through.

[20] Mr Aldridge also clarified that the price to be paid by L&G in terms of the missives with the pursuer, £2,840,000, did not, in his view, represent a valuation of the property. The payment of this price did result in a small profit to the pursuer but Mr Aldridge emphasised that L&G had also agreed to cover the professional fees for the project which amounted to several hundreds of thousands of pounds as well as agreeing to the profit share.

Mr Aldridge also spoke about the way in which the pursuer and L&G had dealt with the profit share mechanism within the missives. This involved the discussion and agreement of the various elements used in the missives to calculate the "Distributable Profit" and, therefore, the profit share.

Robert Chess

[21] Mr Chess is a fellow of the RICS with over 25 years of experience in the hotel market sector. He had been instructed by the pursuer and had prepared a principal report together with two supplementary reports in respect of the case. Mr Chess is a partner in the hotels team at Gerald Eve. He is also the principal in his own consultancy.

[22] Mr Chess was asked to explain the importance when carrying out a residual valuation of cross-checking with comparable market transactions. This comparison – or benchmarking – was important because of the large number of variables involved in a residual valuation each of which involved an exercise of judgment by the valuer. Accordingly, finding a comparator formed, as Mr Chess put it, a landing pad to determine whether the residual value was in the right area. In relation to hotels, this comparison could be carried out on a per room basis.

[23] Mr Chess explained that in carrying out a residual valuation of a hotel development, the first input was effectively a valuation of what would be there were a hotel to be built. This could be achieved by following one of the standard valuation methods for hotels. It could be based on a discounted cash flow valuation based on the prospective trading performance of a hotel in the relevant location. Alternatively, one could consider a valuation based on the value arising from a hotel being developed and then let to a third party operator.

[24] Having obtained this gross valuation figure, it was then necessary to deduct the costs of all the elements which would be required to achieve completion of the hotel development. These would include costs for demolition, building, contingencies and indeed the developer's profit. Each one of these elements involved the surveyor making an

assessment based on the surveyor's knowledge and experience together with any other relevant evidence they could identify.

[25] In relation to the Meininger scheme, as this proceeded on the basis of a hotel being rented to the operator, it would be necessary for the valuer to make assumptions about the rental and the yield in order to determine the capital value. Determining the yield would involve considering the quality of the investment and making judgments about: the location of the hotel, the physical nature of the property, the potential for growth in the rental income and the quality of the tenant's financial covenant. The better the quality of the investment, the lower the assumed yield in percentage terms and, therefore, the greater the multiplier to determine the capital value.

[26] Each one of the factors that were included in a residual valuation involved an element of surveying judgment. As a result, the cumulative impact of these judgments could have a significant effect on the land value.

[27] In this context, Mr Chess was asked about the March 2008 version of VIP 12. He considered that it was an important document for surveyors to have regard to. Insofar as this document recommended a methodology, Mr Chess considered that it would represent normal and usual practice in the profession. Paragraph 5.2 of VIP 12 highlighted the risk associated with residual valuation. VIP 12 also stressed the need "if at all possible" to attempt to compare the result of a residual valuation with such comparative market evidence as might exist. Mr Chess explained that, in his opinion, it was very important to carry out the exercise of comparison with market transactions otherwise the residual exercise risked being essentially theoretical. In essence, Mr Chess' opinion was that it was necessary for a valuer to "stand back and look" at the conclusion of his or her calculation and ask whether it was in line with the market transactions.

[28] In preparing his report, Mr Chess had considered potential comparators for the Dale House site. In his oral evidence, he explained that, generally speaking, hotels were valued on price per room or key basis. Mr Chess highlighted three comparators in particular: the Ibis Styles hotel at Waterloo Street in April 2017 with a reported price of £4,000,000 and a price per key of £31,008; Native aparthotel at St Vincent Place in January 2016 with a reported price of £2,280,000 and a price per key of £35,625; and the Dakota hotel at West Regent Street in April 2014 with a reported price of £2,050,000 and a price per key of £24,405. Each of these comparators had been developed by owner operators (whether directly or through a management company).

[29] Mr Chess considered that all three of these comparators were in close proximity to Dale House albeit both Waterloo Street and West Regent Street were further to the west and were less well located. The Ibis Styles hotel was also of a similar quality and budget as Mr Chess would have anticipated for the Dale House site. Mr Chess recognised that the Native aparthotel was a different style of operation: aparthotels tended to have larger room sizes than conventional hotels. As a result of having fewer and larger rooms, this would tend to produce a higher price per key. Mr Chess also recognised that the Dakota hotel was a little smaller and a little more upmarket than he would have envisaged for the Dale House site

[30] Mr Chess highlighted he had considered comparators which had been developed by owner operators. Mr Chess explained that owner operators tended to pay more than property investors because they had a different business model. Unlike the investor, the owner operator enjoys profits from the business and anticipates capital growth in the asset.

[31] Mr Chess criticised the approach adopted by the first defender because the first defender had failed properly to cross-check the residual hotel valuation he had prepared. Mr Chess emphasised a number of aspects of this.

[32] First, had the first defender adopted the "stand back and look" approach spoken to by Mr Chess, he would have recognised that the Meininger scheme was not typical. In particular, the Meininger scheme envisaged greater slab-to-slab heights than the norm. This arose, in the Meininger scheme, from the use of bunk beds in the rooms. However, it had the result of reducing the number of floors and rooms in the potential hotel. The Meininger scheme envisaged six floors and 158 rooms. Mr Chess had developed a scheme whereby a hotel could be constructed on the Dale House site using conventional slab-to-slab heights and would have seven floors and 192 rooms. (In this regard, Mr Chess noted that the office development envisaged by the first defender also contained seven floors.)

[33] Second, had the first defender compared the result of his residual hotel valuation he would have had to ask himself why his valuation produced a value of approximately £2.5 million which equated to a price per key of £15,600. This was significantly lower than the comparables. Mr Chess considered that such a comparative exercise would have immediately indicated that the residual value produced was not in line with the market. In this regard, Mr Chess noted that the first defender did not appear to have considered the development of the site as a hotel by an owner operator and, as a result, had not considered those comparables.

[34] Mr Chess also highlighted that the figure of £2.5 million produced by the first defender for the hotel valuation apparently encompassed the retail and leisure development on the ground floor. Given the likely value of the retail and leisure space at street level,

Mr Chess considered that this again strongly indicated that the residual hotel valuation carried out by the first defender was not correct.

[35] Mr Chess had carried out his own valuation of the Dale House site as at the agreed date of valuation. He used the residual valuation approach. Mr Chess had considered comparable developments both inside and outside Glasgow. He accepted that good local evidence was likely to trump geographically remote evidence but also considered that there was strong comparability in relation to hotel transactions across equivalent cities. Mr Chess had also considered comparable transactions which had occurred after the date of valuation but prior to the date on which the first defender had prepared his report. Mr Chess considered that the first defender would be likely to have been aware of such transactions and they formed part of the overall picture.

[36] Mr Chess' residual valuation was based on a seven floor hotel development with retail and leisure on the ground and mezzanine floors. He envisaged 192 rooms. Unlike the Meininger scheme he had used conventional slab to slab heights. Mr Chess had worked out the project development costs having regard to the RICS Building Cost Information Service. Mr Chess explained that the use of this index was common practice in carrying out a valuation exercise of this sort. Mr Chess noted that the figures took account of the proposed location for the development – Glasgow city centre. He considered it reasonable to rely on these figures. In relation to demolition costs, he had derived his figure for demolition costs of £525,000 from the information which had been submitted to the first defender on behalf of L&G.

[37] In valuing the site, Mr Chess had considered the potential development of the site as a hotel by an owner operator as well as by a developer as an investment to be let to a third party operator. In relation to the former, Mr Chess assessed the site as having a value of

£7 million. In relation to the latter, Mr Chess assessed the value at £3 million. Mr Chess rejected the second figure as out of line with the comparable evidence of transactions which had been principally carried out by owner operators. Accordingly, having considered the comparables and also having made an allowance for risk, Mr Chess considered that the site had a market value of £6.3 million.

[38] Mr Chess was asked about what weight, if any, could be placed on the fact that Bloc had subsequently purchased the site for £8.75 million. Mr Chess did not consider that much could be taken from this. He had carried out an alternative valuation of the site based on the Bloc development. The Bloc scheme required a greater room density than Mr Chess had assumed in the scheme he had valued. This produced a market valuation of £8,070,000. However, Mr Chess did not consider that a prudent valuer would have had the confidence to produce a valuation on this basis at the valuation date.

[39] During cross-examination, Mr Chess was asked repeatedly and extensively both about the terms of the missives and the documents relating to the appointment of the first defender. In respect of the missives, Mr Chess explained that he had seen them only shortly before giving evidence following a meeting with Mr Murphy, the other expert surveyor instructed in the case. In relation to the appointment documents, he had not seen these. In re-examination, Mr Chess was asked whether, having seen both the missives and the other documents which were put to him, his views had in any way changed. He confirmed they had not.

[40] It was put to Mr Chess that on the basis of the missives and his appointment the first defender, as an independent valuer, had been instructed to consider the competing schemes which had been put to him by the pursuer and L&G respectively. Mr Chess did not accept this. He considered that the first defender was not acting as arbitrator and was not

prevented from carrying out his own independent investigations. An independent valuer was required to have proper regard both to his instructions and what was put to him, but he could carry out his own investigations and was required to draw his own conclusions.

[41] It was also suggested to Mr Chess that he had assessed the first defender on the basis of the standard to be expected of an ordinary competent hotel valuer rather than an independent valuer. Mr Chess did not consider that these were mutually exclusive. In Mr Chess' opinion, insofar as the first defender's instructions required him, in valuing the site as an independent valuer, to consider a hotel valuation, the first defender required to do this. Mr Chess considered that it would have been open to the first defender, if he felt unable to fulfil this part of his role, to obtain assistance either from elsewhere in his firm, the second defender, or externally.

[42] Mr Chess was also asked about the planning history for the site. This had been set out in a report prepared by Turley which had been appended to Mr Thurtell's submission to the first defender. He was aware of the planning application submitted by Shepherd Developments for a nine storey mixed development including a 124 bed hotel. This application had been granted in May 2012 but the development had fallen through. Mr Chess was also aware of the planning application which had been made in support of the Meininger scheme – that was for a mixed use development with mixed retail and leisure on the ground floor and a 160 bed hotel. The application had been made on 12 October 2017.

[43] Mr Chess accepted that the only valuation based on a hotel development which had been provided to the first defender was based on the Meininger scheme. This had formed part of the submission made on behalf of L&G by Mr Bryers. He accepted that there was no evidence of interest in the site by an owner operator in 2010 or 2013 and that the first

defender had no such evidence. Mr Chess noted that the sale to the pursuer in 2013/14 had been from an administrator. He did not think that such a sale necessarily represented a reliable guide to value. Mr Chess said he was not aware of the site being exposed for development as a hotel until 2018. On this basis, it was put to Mr Chess that his valuation, which was based on development by an owner operator was based on a hypothetical or imaginary market. Mr Chess strongly rejected this. In his view, it was apparent from the amount of interest shown in relation to other comparable sites in Glasgow city centre that there was demand for such a development.

[44] In relation to Mr Chess' own valuation, it was put to him that Mr Murphy had queried the assumptions which Mr Chess had made about void periods and yield in relation to the ground floor and retail elements of the proposed development. Altering these two factors reduced the valuation by £700,000. Mr Chess accepted that Mr Murphy had expertise in relation to retail letting. However, Mr Chess emphasised that there was an important difference between generating a residual value and valuing the land. In order to understand whether the former was reasonable, one required to look at what was going on in the market. That was the importance of looking at the comparables.

[45] Mr Chess also addressed Mr Murphy's criticism of his inclusion of the additional revenue income in determining the residual valuation for the hotel. Mr Chess explained that every valuation based on an owner operator model required to be approached on a discounted cash flow approach. He had fully set out in his report the way in which he made this calculation including consideration of the amount of trade in Glasgow and profitability.

[46] It was put to Mr Chess that, taking account of Mr Murphy's criticisms of his valuation, Mr Murphy's alternative valuation of £4.4 million for the hotel development was

a reasonable figure. Mr Chess considered that it was a low figure but he accepted that there was a range around the potential value.

The defenders' evidence

Kenneth Thurtell

[47] Mr Thurtell is a chartered surveyor. He had previously worked full time for Gerald Eve but since his retirement he had been working part time.

[48] Mr Thurtell gave evidence as to his instruction by the pursuer to act essentially as an advocate for the pursuer in the negotiations with L&G. Mr Thurtell considered that his role was to work with the pursuer to assess and evaluate various schemes of development for the property with a view to maximising its value in terms of the formula contained in the missives. Mr Thurtell confirmed that he had not received any instructions from the pursuer to assess or evaluate a scheme for the property which involved a hotel use. Mr Thurtell considered that the highest development value scheme was a combination of retail and leisure with an office development. He noted that this view appeared to be shared by Mr Bryers (who was instructed by L&G) and the first defender. His valuation of the property, which he had submitted to the first defender, brought out a figure of £9.1 million.

Niall Bryers

[49] Mr Bryers is also a chartered surveyor. He had previously worked for Jones Lang LaSalle but was currently working for his own property consultancy.

[50] Mr Bryers gave evidence about his professional background. He explained that his particular specialism was in office, retail and industrial valuations. He was not an expert in

the hotel market although he had experience in dealing with hotels particularly if the hotel was under lease.

[51] Mr Bryers also gave evidence as to the background to his instruction by L&G to prepare submissions. He accepted that his role was to represent L&G and to assist the first defender in coming to a valuation which was in his client's interests. He was not acting as an independent expert or carrying out a formal valuation exercise.

[52] Mr Bryers' view was that the best way to reduce risk in the hotel development sector was to obtain a pre-let for the completed development. That would involve finding out what the hotel operator wanted, designing it to their needs and agreeing a lease on this basis. Mr Bryers did not consider that owner operator hotels were built on a speculative basis in Glasgow as they were too risky. At the time he was involved, Meininger were the only party interested in the site. He did not know why the Meininger development did not proceed. He considered that the marketing of the property up to and beyond the valuation date strongly suggested that it would only have appealed to budget/limited service hotel operators.

[53] In relation to his submissions to the first defender, Mr Bryers concluded that the property had a higher value as an office development than as a hotel. His valuation was at the lower end of the possible range which he attributed to market uncertainty and the lack of pre-lets by the date of valuation. Mr Bryers did not consider that the value of the property could be the same as or greater than the price initially paid for it.

Craig Westmacott

[54] The parties agreed that Mr Westmacott's evidence could be given in the form of a signed written statement.

[55] Mr Westmacott is a qualified chartered surveyor. He is employed by L&G. In 2017, at the material time, he was the senior fund manager for L&G's commercial property fund. He gave evidence concerning L&G's involvement in the purchase of Dale House from the pursuer.

[56] Mr Westmacott was also able to explain, from his perspective, the Meininger scheme. Meininger was a German hotel brand which provided hostel-style rooms. They had decided that 160 rooms were enough for them at the property. Mr Westmacott had no insight as to the underlying reasoning for this. Meininger became involved with the property in 2016. Prior to their involvement, Mr Westmacott recalled that other hotel operators did look at the property including Premier Inn but, ultimately, only Meininger were interested. Premier Inn chose another site near to Queen Street station. So far as Mr Westmacott was aware, the deal fell through because the development costs increased significantly from the point at which the negotiations had begun.

[57] So far as L&G were concerned, its preference was to develop the property and then lease to a hotel operator. Although L&G would not have developed the site speculatively, it would have been open to selling to a hotel owner operator for the right price.

Robert Seeley

[58] As with Mr Westmacott, the parties agreed that Mr Seeley's evidence could be given in the form of a signed witness statement.

[59] Mr Seeley is also a chartered surveyor. He works for his own consultancy. In 2015, Mr Seeley was appointed as UK head of development by Meininger Hotels. Mr Seeley explained that Meininger operates a limited service hotel model. That means it provides sleeping accommodation, breakfast facilities and a basic bar operation. The main difference

between Meininger and other budget hotels is that Meininger offers multi-occupancy rooms in a hostel/hotel hybrid model. The scheme for the Dale House site was for 160 rooms with some being larger dormitory-style rooms and some a more traditional double room size. The need for the rooms to accommodate bunk beds did present constraints in respect of the floor to ceiling heights.

[60] So far as Mr Seeley was aware, the reason that the deal with L&G did not go ahead was because the L&G board declined to approve it. As Mr Seeley understood it, the L&G board were concerned with Meininger's financial covenant strength and with the security of the income which could be generated.

Gary Murphy

[61] Mr Murphy is a chartered surveyor who had been instructed as an expert on behalf of the defenders. He is a senior director at BNP Paribas Real Estate. Mr Murphy had prepared three reports on behalf of the defenders. He had undertaken a wide range of valuation work and had over 25 years' experience in the Scottish commercial property market. Mr Murphy was clear that he was not an expert hotel valuer and would not accept instructions from a hotel developer or lender to carry out a hotel-specific valuation.

[62] In his principal report, Mr Murphy set out his answers to a series of questions which had been posed by those instructing him. In his opinion, the first defender was obliged to take the guidance provided by the RICS Red Book into account in undertaking his role as an independent expert. Mr Murphy considered that the first defender had acted in a way expected of an ordinarily competent valuer acting as an independent expert. Mr Murphy noted that the first defender was presented with two separate reports with each report appearing to have a consensus as to use and density. Both reports identified the highest

value form and extent of development to be accommodated on the site, considering the likelihood of obtaining planning consent, as a mixed-use scheme with retail and leisure on the ground floor and office use of the upper floors. Presented with this information, the first defender adopted a similar approach to the use of the site in order to arrive at his opinion of the open market value.

[63] Mr Murphy considered that, in accordance with the guidance provided by RICS, it was good practice to cross-check the reasonableness of residual valuations, by way of analysis of comparable sales transactions. This was because residual valuations were extremely sensitive to small changes over the array of inputs necessary to arrive at an opinion of open market value.

[64] However, Mr Murphy emphasised that the guidance provided by RICS in VIP 12 was merely guidance. Direct analysis of other transactions could be misleading for a number of reasons and it was imperative to consider each comparison in isolation. Mr Murphy considered that accuracy of inputs adopted within the residual valuation was every bit if not more important. Having tendered build costs, an established planning position and associated costs, along with an identified exit strategy significantly reduced the inherent risk associated with any residual approach.

[65] Mr Murphy considered that the relevant standard which was applicable when considering the first defender's actions was that of an ordinarily competent surveyor with specific sector knowledge and experience of undertaking development valuations in Glasgow with a particular focus on hotel, office and retail sectors. That was what the parties had sought from RICS.

[66] Mr Murphy was asked to consider the first defender's actions bearing in mind the three-part test set down in *Hunter* v *Hanley* 1955 SC 200. Mr Murphy's opinion was that the

first defender had exceeded the duties incumbent on him. Mr Murphy based this conclusion on the fact that only the submission prepared by Mr Bryers, on behalf of L&G, considered the use of the site as a mixed-use hotel opportunity. The first defender followed normal practice by way of a secondary check to arrive at a possible open market value from this use. Mr Murphy noted that the first defender had also considered the further possible use of the site as purpose-built student accommodation.

[67] In his first supplementary report, Mr Murphy, although acknowledging that he was not an expert in hotel valuation, offered a "critique" of Mr Chess' valuation. Pursuant to what Mr Murphy described as "this shadow exercise", he varied various factors involved in Mr Chess' analysis. On this basis, Mr Murphy varied the yield figure used by Mr Chess for the retail element of the proposed development from 5.25% to 4.75%. He varied the void periods from 12 to 15 months. Mr Murphy reduced the figure used by Mr Chess for additional revenue income by 50%. Mr Murphy also queried the figure for demolition costs used by Mr Chess. More generally, Mr Murphy considered that the approach adopted by Mr Chess was perhaps indicative of his expertise as a specialised hotel valuer as opposed to the approach which would have been adopted by the ordinarily competent surveyor. On the basis of the adjustments made by Mr Murphy, he concluded that the market value of the property was £4.4 million.

[68] In his first supplementary report, Mr Murphy also criticised the comparables used by Mr Chess. In particular, Mr Murphy considered that Mr Chess had, wrongly, disregarded the two most obvious comparators, Motel One on Oswald Street and Custom House Quay on Clyde Street, as outliers. In this regard, he highlighted the fact that between 11 April 2007 and 31 March 2017, assets which had been vacant for more than 12 months could apply for the Business Premises Renovation Allowance. This was a 100% tax allowance for certain

spending when converting or renovating unused qualifying business premises in a disadvantaged area. In his report, Mr Murphy considered that this was a significant factor to be borne in mind when considering comparable developments to the Dale House site. Albeit, when asked about this in cross-examination, he accepted that the impact of this allowance would depend on a number of factors including, for example, the tax position of the investor.

[69] Finally, Mr Murphy also offered the opinion that an ordinarily competent valuer acting on the instructions received by the first defender would not have valued the property on the basis of a sale to an owner operator. Mr Murphy considered that the first defender rightly took into consideration the level and source of interest shown from the market at the date of valuation. However, Mr Murphy considered that at the time the first defender was carrying out his valuation it was not obvious that there was much of a depth of market for owner operators. This was by contrast with the position for investors as was evidenced by the Meininger offer. Mr Murphy was of the view that considering an owner operator purchase option would require the expertise of a hotel expert.

[70] In cross-examination, Mr Murphy accepted that the task carried out by the first defender in respect of the hotel was a residual valuation. He also accepted that VIP 12 represented normal and usual practice for a surveyor undertaking this type of valuation by carrying out a cross-check where at all possible. On this basis, Mr Murphy was asked how he had concluded that the first defender had followed normal practice in respect of the hotel valuation (see [66] above). Mr Murphy's initial response was that the first defender had carried out a cross-check to a satisfactory level given that the focus was on an office development. This was because, in Mr Murphy's opinion, the first defender had concluded that an office development produced the highest value and so the comparison with a

potential hotel valuation was itself the secondary check. However, Mr Murphy also maintained that, given his focus had been the office development, the first defender had followed normal and usual practice in respect of the residual valuation of the site as a hotel.

[71] Mr Murphy was asked whether it was legitimate for the first defender, in carrying out the residual valuation of the site as a potential hotel only to consider investment transactions. In addressing this point, Mr Murphy accepted that an expert did require to look beyond the submissions which had been put before him if other information was relevant. Mr Murphy also accepted that if the first defender was aware of comparable sites which had been developed by owner operator then he required to analyse them. He accepted that the Ibis Styles hotel at Waterloo Street was a direct comparator for the site. In comparison with Dale House, he accepted that the Ibis Styles had fewer rooms (129) and was in a worse location without potential for restaurant or retail development at street level. Mr Murphy speculated that the first defender may have disregarded the Ibis Styles hotel on the basis that it was refurbishment rather than a new build. Mr Murphy could not explain why the first defender had done this as there was no explanation in the report. He agreed that he would expect any material detail such as this to have been included in the report. Mr Murphy accepted that the same point could be made in respect of a number of other comparable sites which had been developed by owner operators including the Dakota at West Regent Street.

[72] Ultimately, in the course of his cross-examination, Mr Murphy appeared to accept that it was incumbent on a surveyor in the position of the first defender, in carrying out a cross-check, to consider the market and all those transactions which might properly be considered to be comparable. That general obligation meant that it would be normal and usual practice for a surveyor in the position of the first defender to look beyond solely lease

transactions and consider development by owner operators. It was then put to Mr Murphy that, insofar as the first defender had not done this, he had departed from normal and usual practice. Mr Murphy appeared to struggle to respond to this. After the point was put to him in a number of different ways, I understood his position to be that the first defender had formed a judgment that the non-leasehold comparables could be disregarded. Albeit, Mr Murphy accepted that there was no reference to the making of this judgment or on what basis it had been made in the first defender's report. Mr Murphy accepted further that as a material part of the reasoning the report ought to have made this clear. In the absence of any such reference in the report, Mr Murphy acknowledged that this was an assumption on his part. Mr Murphy also declined the opportunity of concurring with what he understood was the first defender's judgment but considered that it was appropriate for the first defender to have made the judgment. Mr Murphy's understanding was that this judgment was based on the absence of any evidence of interest in the Dale House site by owner operators. It was noticeable during this passage of his evidence that, unprompted, Mr Murphy began to refer to the first defender by his first name.

[73] Mr Murphy was then asked about what evidence there was in relation to the Dale House site. He accepted that it had been exposed for sale in 2010 and 2013. In 2010, the successful bidder had been Shepherd Developments who had sought to purchase the site with a view to constructing an aparthotel. That transaction had not been completed for reasons which were not known. Mr Murphy accepted that in 2010 there was a very different market environment in which it was difficult to obtain commercial finance. Thereafter, the property had returned to the market in spring 2013 and the pursuer had been successful. The pursuer had concluded a back-to-back transaction with L&G in which L&G had agreed to purchase the site for an uplift, had undertaken to pay the significant professional fees

incurred by the pursuer and had agreed to a profit share with the pursuer. Thereafter, L&G had had discussions with Premier Inn and had taken steps to market the property for development as an investment. However, Mr Murphy accepted that L&G had not exposed the property for sale on the open market. He also accepted that, subsequently, when the property had been marketed it had been purchased by Bloc, an owner operator, for £8.75 million. On this basis, Mr Murphy further accepted that, in sum, all this amounted to was an absence of evidence of unsolicited interest by an owner operator for the site. Nonetheless, Mr Murphy maintained that this absence of interest would provide the basis for a surveyor entirely to discount development by an owner operator.

[74] Mr Murphy was asked about the potential for retail or leisure development on the ground floor. He accepted that there was abundant evidence for this. Mr Murphy had valued this element as being worth £1.8 million. Mr Murphy also accepted that when the first defender's valuation for the hotel development of approximately £2.5 million, which included retail/leisure on the ground floor, was considered it should have been clear to any competent surveyor that the figure could not be right. He agreed that it was ludicrous that on the logic of these figures, a 160 room hotel ended up being valued at £750,000. In this respect, he agreed that the first defender could be considered to have departed from the usual standard to be expected of an ordinarily competent surveyor.

[75] Mr Murphy was cross-examined in relation to his critique of Mr Chess' valuation. He was asked about the basis on which he had reduced the yield figure used by Mr Chess and about how he had reached this conclusion given no working was shown in his report. His position was that he was carrying out a critique and not a valuation. There was no working underpinning his conclusion. This was also true of the view he had reached in relation to the rent-free period. In respect of the demolition costs, when he was taken to the

source of Mr Chess' figure – the Gardiner & Theobald assessment which had formed part of the Meininger scheme – he did not take issue with it. In relation to the construction costs, it appeared that in his analysis Mr Murphy had overlooked the existence of a lane at the back of the site. Ultimately, his position was that the Dale House site would not be any easier to develop than any other in Glasgow city centre.

[76] Mr Murphy was challenged as to his proposed reduction of the figure used by Mr Chess for additional revenue income by 50%. It was put to him that he was criticising the methodology of Mr Chess, a surveyor with expertise in the field of hotel valuation, whereas he, Mr Murphy, had no such expertise. When challenged, Mr Murphy accepted that, notwithstanding what he had put in his supplementary report, he could not properly criticise Mr Chess' methodology. Rather to my surprise, at the end of this passage of questioning when it was put to Mr Murphy that what he had done was to "whack out £1.2 million to keep the score down", his response was "Fair point".

The first defender

[77] The first defender set out his professional background and experience. He was a chartered surveyor for over 30 years. He is now retired. He had been a partner of the second defender from October 1998 to April 2023 when he retired. He specialised in valuations, rent reviews and rating. His main fields of expertise were industrial, office and retail development together with land and universities. He was an expert in valuing buildings and development-led opportunities within Glasgow city centre. He was not an expert in the hotel market or in valuing trading hotels but he did have experience and expertise in the valuation of hotel schemes. He was a RICS Accredited Registered Valuer and a RICS Accredited Expert Witness.

[78] The first defender stated that he had never been involved in another negligence claim where there were allegations against him as an individual or against the second defender.

[79] The first defender set out the background to his instruction by the pursuer and L&G. The first defender was aware from the RICS appointment paperwork that the parties sought a valuer who had

> "specific sector knowledge and experience of undertaking development led valuations in Glasgow with a particular focus on the hotel, office and retail sectors to be able to compile a formal valuation in accordance with the RICS 'Red Book'".

The first defender understood "development led" to be a reference to a valuation derived by the residual approach. The first defender considered that he had the appropriate knowledge and experience. His evidence was that he could not think of any other individual who would have been a more appropriate candidate than himself for the Glasgow market. The first defender presumed that the matter had been referred to him on the basis that the parties did not anticipate a hotel proposal to be the means of generating the highest value. He noted that neither of the parties' representatives, Mr Thurtell and Mr Bryers, both of whom knew him professionally, had objected to his appointment.

[80] The first defender considered that the overall feel of his instruction was that of a "quasi-arbitration". However, he was clear that he was acting as an expert because an expert opinion had been specified in the parties' missives. He had been appointed as an "Independent Valuer". The first defender considered that the terms independent valuer, expert or arbitrator were all one and the same. He considered his role was to gather evidence and produce an independent valuation of the market value of the property at the valuation date.

[81] The first defender also set out his understanding of the procedural background which led up to the production of his valuation. He had convened a preliminary hearing on 26 September 2017 because he considered this to be an unusual case and he wanted to gather as much information as possible. The meeting had been attended by both sides and their representatives. It had been business-like and, so far as the first defender remembered, the great majority of the meeting had been taken up by discussion of office development schemes. A hotel development had only been mentioned by Mr Bryers. The first defender's impression, throughout the process, was that hotel use did not appear to be on the parties' radar. The first defender had also invited the parties each to provide submissions and counter-submissions. He did this in order to obtain as much information as possible to ensure he understood the property.

[82] In terms of his own valuation, the first defender explained that he considered the development schemes proposed by each of the parties. He did not consider creating a hotel-based development scheme of his own. This was particularly so given that the Meininger scheme, with which he had been provided, had a pending application for planning. He was not an architect and so he considered that it would not have been appropriate for him to create an alternative scheme. The first defender did not consider any other hotel valuations or comparative hotel sales in the city because none had been provided to him. He considered that a higher value was associated with office use. The first defender's position was that the hotel valuation carried out by him was, in itself, the "cross-check" referred to in VIP 12. He had carried this out alongside sensitivity analysis and his own market research.

[83] The first defender explained that the practice of the second defender was to carry out peer reviews of valuations with personnel from various sectors including office, retail,

building consultancy, hotel and leisure. The first defender had consulted with seven of his colleagues from these sectors as a cross-check prior to finalising his valuation report.

[84] The first defender was very critical of Mr Chess' reports. The first defender considered that Mr Chess had a conflict of interest and was, effectively, advocating for the pursuer. The first defender had formed this view on the basis that Mr Chess currently worked part time for Gerald Eve. This was the same firm as Mr Thurtell had acted for. The first defender considered that Mr Chess had a conflict of interest in that it would be in his interest to direct blame away from Gerard Eve who should have put forward a hotel scheme in their original submissions to him.

[85] In cross-examination, the first defender accepted that the broad consensus was that the street-level use of Dale House was likely to be either retail or leisure. He had valued the building on this basis. On this basis, the first defender was asked whether he had taken the further step of identifying the value of the ground floor as a standalone valuation as part of the sense-checking of the valuation of the building. The first defender did not take this step and did not understand why one would go down that route. It would be very unlikely to be developed on its own and the costs would be different if only the ground floor were to be developed.

[86] The first defender accepted that in carrying out a "Red Book" valuation it was necessary, at an early stage, to identify the class of buyers who might be interested in the site. In his valuation report, he had considered four possibilities and had dismissed two – residential and student accommodation. The first defender had settled on two possibilities – either office or hotel with mixed retail or leisure on the ground floor. He had then worked up a valuation for each possibility and concluded that the office development produced the higher figure. The first defender was asked about the transactional evidence which he had

considered in respect of the hotel valuation. He confirmed that he had looked only at lease valuations. The first defender confirmed that the reason he did not consider acquisition of the site by a hotel owner operator was that he was not aware of any demand or interest in the Dale House site by this type of buyer. His position was that, although in theory he could have considered any number of different possibilities including industrial use, that was not what the parties had presented to him. He had assessed the schemes presented.

[87] In relation to the Meininger scheme, the first defender agreed that it was not a mainstream offering but, not being an architect, he did not consider that he could look behind a scheme which had been developed and which was being advanced through planning. He did not consider that there was anything untoward about the Meininger scheme.

The pursuer's submissions

The first defender's appointment

[88] The starting point was what the parties to the missives had agreed that the first defender was to do. That was set out in clause 16.5 of the missives (see [4] above). The Independent Valuer was to determine the Open Market Value of the property at the Valuation Date "using the current edition of the RICS Valuation – Professional Standards having regard to information provided by both parties in support of their proposed valuations."

[89] It was common ground that clause 16.5 was referring to the RICS Red Book. The first defender had specifically quoted from this in his valuation (at Appendix 2.0). The Red Book provided that the valuer was to assume a willing buyer and a willing seller in an arm's

length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.

[90] The pursuer submitted that it was clear that the parties to the missives had intended that the exercise to be carried out was one of expert determination and not arbitration. This was apparent from the wording of clause 16.5 itself particularly when compared with clauses 15.2 and 16.7 which referred expressly to the appointment of an "arbiter". Counsel for the pursuer submitted that the process the parties had gone through of appointing the first defender did not alter the nature of the task which the "Independent Valuer" was to carry out. In particular, counsel rejected the suggestion that the first defender's task was altered by the information set out on the RICS application to the effect that the Independent Valuer was to have "sector specific knowledge and experience of undertaking development led valuations in Glasgow with a particular focus on the hotel, office and retail sectors to be able to compile a formal valuation in accordance with the RICS 'Red Book'".

[91] In any event, the first defender had confirmed his own understanding of the task in his letters dated 27 September 2017 and 24 November 2017 where he had described his role as being that of an "Independent Expert". The first defender's report also confirmed that he had carried out his own investigations in arriving at his opinion of market value (see paragraph 1.1.8). Such investigations would not have been consistent with the first defender acting as an arbitrator or in some kind of quasi-judicial manner.

Liability of an independent expert

[92] Having been appointed as an independent expert, the first defender owed the parties a duty to carry out the valuation with reasonable skill and care (*Zubaida* v *Hargreaves* [1995] 1 EGLR 127).

Residual valuations

[93] Counsel for the pursuer submitted that when considering the normal and usual practice in the field of the valuation of development land, it was necessary to consider the aforementioned RICS Valuation Information Paper 12: Valuation of development land (VIP 12). In 2008, this paper had been stated to be reflective of established practice among surveyors (*Dunfermline Building Society* v *CBRE Limited* [2018] PNLR 13 at paragraph 40). VIP 12 explained that there were two approaches to the valuation of development land: first, comparison with the sale price of land for comparable development; and, second, the assessment of the value of the scheme as completed and deduction of the costs of development (including developer's profit) to arrive at the underlying land value: the residual method (at paragraphs 1.5 to 1.7). Counsel highlighted the fact that VIP 12 made clear that the residual method is very sensitive to variations in the variables which make up the calculation of residual value (at paragraph 7.3). This sensitivity was notorious (see *Dunfermline Building Society* at paragraphs 45 to 47). It was for this reason that VIP 12 stated the following:

> "The residual value is not necessarily the same as the value of the land as it has to be considered in the context of the valuation as a whole. The following matters may have an impact on the residual value and need to be addressed before the final conclusion is reached …
>
> 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 in the market …"
> (paragraph 7.3)

[94] Counsel for the pursuer submitted that the need to carry out a cross-check was not controversial. The first defender had accepted this and there was ultimately no dispute between Mr Chess and Mr Murphy that this represented normal and usual practice.

Allegations of negligence

[95] The pursuer's case was advanced on three overlapping strands of negligence.

[96] First, the pursuer submitted that the first defender had acted negligently in uncritically adopting the Meininger Scheme and failing to ask himself why the proposed hotel development had one fewer floor than an office development which was subject to the same height constraint. The first defender had simply made no investigation in this regard. The guidance was clear in directing the valuer to consider what the site would support in the hands of a competent developer. There was clear evidence that the Meininger Scheme did not represent a "mainstream" development involving, as it did, bunkbeds and higher ceilings. Furthermore, Mr Chess' evidence in respect of the slab-to-slab heights and the possibility of inserting an additional floor without any compromise on room size was unchallenged. Mr Chess' indicative scheme resulted in 192 rooms rather than the 160 rooms which featured in the Meininger scheme. It appeared that the first defender, having received the Meininger Scheme, had simply not looked beyond it. Counsel recognised that the causal potency of this first strand was relatively limited. Essentially, its principal result was to mask the true extent to which the value per room in the first defender's residual valuation was indefensibly low.

[97] The second strand relied upon by the pursuer was the failure by the first defender properly to cross-check the result of the residual calculation he had performed for the proposed hotel development with transactional evidence. As noted above, VIP 12 made it clear that if at all possible an attempt to compare with market evidence ought to be made. As Mr Murphy had ultimately come to accept, the exercise of cross-checking with transactional evidence necessitated a prior exercise in ascertaining what the relevant

transactional evidence was. It was apparent from his report that the first defender had been aware of transactions involving owner operators in the hotel development market in Glasgow at the relevant time. He mentioned these transactions but did not analyse them. The first defender restricted his analysis to the transactions that were structured as leases.

[98] Counsel submitted that it was apparent from the evidence how this error had arisen. The first defender had proceeded on the assumption that he was valuing a lease transaction because that was what had been put before him by Mr Bryers on behalf of L&G. By proceeding in this way, the first defender also remained in his comfort zone. Considering lease transactions, the methodology was basically the same whether one was considering retail, office or hotel.

[99] When one considered the comparators more closely, it became apparent that the value of Dale House had to be significantly higher than the first defender had assessed. The pursuer submitted that there was consistent evidence that owner operator transactions generated higher values. A valuer having sufficient understanding of hotel valuation would understand the reason for that as had been persuasively explained by Mr Chess. The pursuer's position was straightforward: the first defender had undertaken a hotel valuation but had failed to do it properly. What the first defender had done represented a departure from normal and usual valuation practice and there was no explanation for it.

[100] Counsel for the pursuer submitted that neither of the possible justifications which had been advanced by Mr Murphy were plausible. First, it could not be relevant that neither of the parties had suggested that the first defender look at the owner operator comparators. That argument depended on the first defender acting as some sort of quasi-arbitrator. It was clear that was not what he was doing. The first defender had recognised the need to carry

out his own investigations and had done so. The first defender had himself identified a series of hotel projects which were being constructed or which were "in the pipeline".

[101] The second suggestion was that the first defender's approach might be justified if he had made a prior valuation judgment that the history of the Dale House site indicated that there was no interest from owner operators. Counsel submitted that there were a number of significant problems with this suggestion. First, there was nothing in the first defender's report to indicate that this was, in fact, what he had done. Second, there was, in any event, no evidential basis for such a conclusion. The site had not been exposed to the open market from the date of the pursuer's acquisition up until late 2017 when the first defender was completing his valuation. Finally, even if it could be suggested that there was a body of professional opinion justifying the exclusion by the first defender of the owner operator comparators from his cross-check of the residual valuation of hotel development, that opinion did not stand up to rational analysis (*cf Bothwell* v *DM Hall* 2009 CSOH 24 at paragraphs 36 and 37).

[102] The final strand of negligence founded upon by the pursuer was the first defender's failure to recognise that the value of the ground floor retail/leisure development was such that the remaining value attributable to the hotel element was obviously far too low. This had been accepted by Mr Murphy.

Scope of duty – relevant standard

[103] The pursuer submitted that determination of this issue turned on the proper construction of the documents which formed the trilateral contract between the pursuer, the first defender and L&G. On this basis, it was straightforward that the first defender had undertaken to carry out a "Red Book" valuation of the site at the valuation date. The first

defender had asserted competence in undertaking development-led valuations in Glasgow with a particular focus on the hotel, office and retail sectors. If, in fact, he was unable competently to carry out valuations of owner-operated hotels, he ought not to have accepted the appointment or, at least, he ought to have made this clear. If necessary, it would have been possible for the first defender to obtain specialist input in this area as he had done in others (see paragraph 1.3 of his valuation report). In these circumstances, the first defender could not now contend that the relevant standard to be applied was anything other than the ordinarily competent hotel valuer (*cf Baxter* v *FW Gapp & Co Ltd* [1938] 4 All ER 457, per Goddard LJ at p459).

Valuation

[104] Once negligence was established, it was the task of the court to find the true value of the property. It was not to find the lowest non-negligent value (*South Australia Asset Management Corp* v *York Montague Ltd* [1997] AC 191 at 221 per Lord Hoffman). To adopt the latter course would confuse the standard of care with the question of the damage which falls within the scope of the duty.

[105] On this basis, the only admissible evidence came from Mr Chess. The pursuer submitted that his evidence ought to be accepted for a number of reasons. First, as was apparent, his expertise in the field was obvious. He was vastly experienced. Second, he had been able to explain his opinion persuasively and clearly. Third, he had set out the basis for the various inputs that he had used in this calculation. Fourth, he had been prepared to make appropriate concessions. For example, he readily accepted that his approach to the valuation of the retail or leisure elements might not be more reliable than others. Finally, counsel emphasised that Mr Chess had been fundamentally cautious. It was clear from his

evidence that there was scope for a significantly higher residual value. This could be seen from the alternative 224 room scheme which Mr Chess has worked up based on the Bloc scheme. However, Mr Chess did not consider that this alternative scheme would have been alighted upon by a reasonable surveyor and, as a result, he had disregarded it. Counsel also noted that Mr Chess has made a series of relatively pessimistic assumptions in his calculation: he had increased the contingency cost and made a 10% allowance for what might thought to be a fairly negligible planning risk.

[106] Counsel for the pursuer contrasted the position of Mr Chess with that of Mr Murphy. Mr Murphy had been clear that he was not in a position to give admissible evidence on the proper hotel valuation of the site. Albeit, Mr Murphy had, apparently, felt able to offer a critique of Mr Chess' valuation. This seemed to amount to giving evidence about a number of the individual inputs which Mr Chess had included in his calculation.

[107] On demolition costs, Mr Chess had explained that the source of the £525,000 figure he used was the detailed cost estimate prepared by Gardiner & Theobald for L&G. Mr Chess had explained why he considered it was likely to be the most reliable. The first defender had used a figure of £600,000. He had indicated that this figure had been arrived at following a discussion he had had with colleagues. Mr Chess had accepted that this was a perfectly legitimate approach albeit he considered £525,000 was the better figure.

[108] On build costs, the pursuer submitted that Mr Murphy had not been able to justify his contention that the site was unusually difficult. On the contrary, it appeared to have a number of features which made it easier to develop than other city centre sites: including the gates on the front elevation and the right of access via the lane at the side of the property. Notably, the first defender had not uplifted the build cost figures he had used on this basis.

[109] The pursuer took issue more generally with the evidence of Mr Murphy on the basis that, at times, he had ceased to be an independent expert and had strayed into the role of partisan advocate on behalf of the first defender. Counsel highlighted that in his report Mr Murphy failed properly to address the principal thrust of the pursuer's case – namely, the failure by the first defender properly to cross-check the residual value of hotel development. Counsel also drew attention to the fact that in respect of a number of issues, Mr Murphy had adopted a trenchant position in his report which had been quickly abandoned in cross-examination. An example of this was Mr Murphy's positon as regards the relevance of transactions that had occurred after the valuation date but before the first defender carried out his valuation. In his report, Mr Murphy had stated these properties ought not to be considered and yet he had subsequently accepted their relevance when crossed on this issue.

Calculation of damages

[110] The pursuer sought damages in the sum of £928,650.96 together with interest at the judicial rate from the date of citation. The calculation of the principal sum was the result of the application of the formula for determining the Profit Share set out in clause 1 of the missives. The Profit Share was defined as being 50% of the "Distributable Profit". The Distributable Profit was to be determined in accordance with the following formula:

> "`Distributable Profit'" means such sum as is calculated in accordance with the following formula:
>
> A = B - (C + D + E)
>
> where A is the Distributable Profit
>
> B = the OMV as determined in accordance with Clause 16.

C = the Project Costs less the Receipts

D = the Finance Charge

E = the Purchaser's Priority Return"

[111] The parties had agreed by joint minute the value of each of the elements, C, D and E. Accordingly, the total of those three factors - (C + D + E) - was equal to £4,442,698.08. In terms of the formula, the pursuer was entitled to 50% of the difference, if any, once this total was subtracted from the Open Market Value. The pursuer submitted that the correct figure for the Open Market Value was the figure of £6,300,000 which had been proposed by Mr Chess.

The defenders' submissions

[112] Senior counsel for the defenders moved me to assoilzie the defenders.

Duty of care

[113] The defenders submitted that there was much which was uncontentious under this heading. The defenders accepted that they owed a duty of care to the pursuer. They also accepted that the relevant standard of care was, as was averred by the pursuer, that to be expected of a chartered surveyor of ordinary competence (Article 14 of condescendence).

[114] It was also uncontentious that, in order to establish negligence, the pursuer required to prove: first, that there was a normal and usual practice; second, that the first defender did not adopt that practice; and, third, that the course adopted by the first defender was one which no surveyor of ordinary skill and care would have taken if acting with ordinary skill.

[115] In this regard, senior counsel drew attention to the fact that the expert relied upon by the pursuer, Mr Chess, was a surveyor with particular expertise in the field of hotel valuation (see below at [120] and [121]).

Scope of duty

[116] Senior counsel submitted that an issue arose in respect of the scope of duty owed by the defenders. The starting point was that the scope of the defenders' duty was to be governed by the purpose of the duty (*Manchester Building Society* v *Grant Thornton UK LLP* [2022] AC 783 at paragraph 4). In the present case, that meant determining the purpose of the valuation to be carried out by the first defender by reference to the terms on which he was appointed.

[117] The pursuer's allegations of negligence all essentially turned on what was said to be a failure to look beyond the Meininger scheme. However, senior counsel submitted that when the evidence of the first defender's terms of appointment were considered, the court would be entitled to conclude that the purpose of the first defender's instruction did not in fact extend to going behind or beyond the Meininger scheme.

[118] In this regard, senior counsel emphasised the following. First, he highlighted that, in terms of clause 16.5 of the missives, both the pursuer and L&G were obliged to provide the valuer with "all marketing reports, surveys, offers and disclose the contact of all negotiations will third parties [sic]." Second, senior counsel drew attention to the RICS form that had been completed by Mr Thurtell, on behalf of the pursuer, seeking the appointment of an independent valuer. The form stipulated that the independent valuer "should have specific sector knowledge and experience of undertaking development led valuations in Glasgow with a particular focus on the hotel, office and retail sectors to be able to compile a

formal valuation in accordance with the RICS 'Red Book'". Third, senior counsel referred, generally, to communication between the pursuer, L&G and the first defender following his appointment including what had been discussed at the meeting on 26 September 2017. Finally, senior counsel drew attention to the submissions and counter-submissions which had been provided to the first defender by the pursuer and L&G respectively. Importantly, in the submissions which the first defender had received, each party had put forward valuations based on a mixed office and retail/leisure development but the only hotel scheme put forward was the Meininger scheme (proposed by L&G). Furthermore, neither party put any evidence before the first defender of any interest being expressed in the site by a hotel owner operator.

[119] In these circumstances, the defenders submitted that the purpose of the exercise which the first defender was asked to accomplish was to carry out a valuation based on what had been submitted to him together with any other information he felt was relevant. It did not extend to the consideration of an alternative hotel scheme.

The expert witnesses

[120] Senior counsel submitted that the dispute between the parties as to whether there had been a breach of duty turned on the differences between the expert surveyors who had given evidence. In this regard, senior counsel submitted that Mr Murphy was a surveyor with a similar background and experience to the first defender. By contrast, Mr Chess was a surveyor who had specialised in hotel valuation for over 25 years. The defenders argued that this difference in expertise was significant.

[121] First, the defenders objected to the admissibility of Mr Chess' evidence on the basis that he lacked the relevant knowledge and expertise to give evidence in relation to the

appointment of the first defender. The short point for the defenders was that the first defender had been instructed as a surveyor with specific sector knowledge and experience of undertaking development-led valuations in Glasgow with a particular focus on the hotel, office and retail sectors. The defenders contrasted this with Mr Chess who could only speak to the usual and normal practice of an expert hotel valuer.

[122] Second, even if his evidence were admissible, Mr Chess, with his experience in hotel valuation, considered that it was necessary for a surveyor, acting consistently with paragraph 7.3 of VIP 12, to consider the wider transactional evidence of hotel owner operator purchases. On the other hand, senior counsel submitted that Mr Murphy's evidence had been to the effect that ordinary practice would not include looking at the comparative owner operator sales where there was no "source of demand" demonstrated for the site. According to senior counsel, Mr Murphy considered that whether to look at other sectors of the hotel market was a matter of judgment for the surveyor concerned having considered the information, or lack thereof, in respect of the site together with any other information, such as any transactions in the wider market.

[123] In respect of Mr Murphy's evidence, senior counsel accepted that it had been unwise of Mr Murphy to have gone down the route of engaging with Mr Chess' hotel valuation given that Mr Murphy expressly disavowed any expertise in this field. However, senior counsel emphasised that it was to Mr Murphy's credit that he recognised that he had crossed the line in this respect. Mr Murphy had also made appropriate concessions when challenged during cross-examination in other areas. Importantly, the defenders submitted that Mr Murphy had not moved on the position that the first defender's decision not to look at the owner operator hotel comparators was a question of judgment which depended on the absence of any evidence of demand for the site by owner operators.

[124] For these reasons, the defenders submitted that the pursuer had failed to prove that the first defender had acted negligently.

Causation

[125] In the defenders' written submissions, a number of challenges were advanced under this heading. First, it was argued that the pursuer's case based on the hotel valuation carried out by the first defender was at odds with the absence of any criticism of the first defender's valuation of the site based on a mixed office and retail/leisure development. Second, various criticisms were made of Mr Chess' approach to the comparable transactions.

[126] In the event, as the points were not advanced in oral submission, it was not clear to me to what extent, if at all, they are insisted in.

Valuation

[127] Under this heading, the defenders accepted that, beyond the criticisms which had been made by Mr Murphy, the only relevant evidence which the court had before it was that from Mr Chess. However, senior counsel highlighted that, while Mr Chess considered that Mr Murphy's figure of £4.4 million was low, he had accepted that there was a range of figures for the potential value of the site. Mr Chess had also accepted that the assumptions which Mr Murphy had made in respect of the retail elements of the development and the extension to the rent-free period were both reasonable.

[128] The defenders also contended, both in their written submissions and orally, that any loss to the pursuer should be calculated on the basis of a loss of chance. This proposition was advanced on the basis that the present case was analogous with a situation in which, as

a result of a negligent undervaluation, a property is sold at a price less than that which should have been achieved if proper advice had been given.

Decision

Objections to evidence

[129] In accordance with normal practice in the Commercial Court, I had ordered the parties to prepare and exchange written notes of objection based on the expert reports and witness statements lodged by each party. Thereafter, the parties were agreed that the evidence be heard under reservation with objections being dealt with at the stage of submissions. In the event, when it came to submissions, two grounds of objection were insisted on – one for the pursuer and one for the defender.

[130] The pursuer objected to the evidence of Mr Murphy and the first defender which, so the pursuer contended, was directed to the construction of the first defender's appointment (see, for example, [65] and [79] above). This objection was made on the well-recognised basis that matters of construction of the terms of the first defender's appointment are properly questions of law for the court and neither the subjective evidence of one of the parties, nor the evidence of a non-legally qualified expert are admissible. As a general statement of law, the pursuer's position is clearly correct. However, I do not consider that the impugned evidence falls to be excluded as a result. That is because I do not consider that this evidence has been led in order to address the proper construction of the first defender's appointment. In this regard, I note that the defenders do not rely on this evidence in support of their arguments as to the proper construction of the first defender's appointment. As I understand it, the evidence, for what it is worth, was intended, in each

case, to explain the witness' understanding of the first defender's obligations in order to give context to each of their evidence.

[131] The defenders, for their part, objected to the evidence of Mr Chess for the reasons I have set out above at [118]. As this objection is closely linked to the defenders' arguments in respect of scope and breach of duty, I have dealt with the objection below at [145].

[132] Finally, I would note for completeness, that, at an earlier stage in proceedings, the defenders took objection to Mr Chess apparently on the grounds that he was currently a partner at Gerald Eve and, therefore, in some way lacking independence. Mr Chess was cross-examined by the defenders' senior counsel on this basis. However, having heard Mr Chess' evidence, the defenders indicated, entirely correctly in my view, that they were not insisting on this ground of objection. In this regard, as I have noted above (at [84]), the first defender took it upon himself to criticise Mr Chess in his witness statement on a similar basis. Why it was thought appropriate to include his irrelevant and inadmissible opinions on these matters in his witness statement is entirely unclear to me. Plainly the first defender cannot be regarded as independent and impartial in the present proceedings. Furthermore, the allegations he made were unsubstantiated at the time and, as it turned out after the evidence had been heard, without foundation.

Duty of care

[133] At the outset, there are two foundational issues which are not contentious.

[134] First, there is no dispute between the parties that, as a result of his acceptance of the instruction by the pursuer and L&G, the first defender owed them a duty of care to carry out the valuation with reasonable skill and care (*Zubaida* v *Hargreaves* [1995] 1 EGLR 127 per Hoffman LJ (at 127 K-L and 128 A-C)). It was further agreed that in accepting the

instruction, the first defender was acting both in his capacity of a member of the second defender and in the course of the ordinary business of the second defender. Accordingly, insofar as the first defender has acted in breach of duty and or contract, the second defender is also liable.

Standard of care

[135] Second, there is no dispute that the relevant standard against which the actions of the first defender are to be assessed is that to be expected of a suitably qualified chartered surveyor of ordinary competence acting with reasonable skill and care. This is uncontroversial and is a term which falls to be implied into the tripartite contract formed between the pursuer, L&G and the first defender following the first defender's acceptance of his appointment.

Scope of duty

[136] However, there is an issue between the parties in respect of the scope of the first defender's duty.

[137] The pursuer's position is straightforward. The parties had agreed the purpose of the first defender's appointment in clause 16.5 of the missives. The "Independent Valuer" was to determine the open market value of the property at the valuation date using the current edition of the RICS Valuation Professional Standards having regard to the information provided by both parties in support of their proposed valuation. It was plain that the parties intended that the exercise conducted by the independent valuer was to be one of expert determination and not arbitration or quasi-arbitration. The process of appointing the first defender had not changed this. It was apparent from the first defender's own

contemporaneous correspondence and his report that he regarded himself as being an independent expert conducting his own investigations as part of his own valuation exercise.

[138] On the other hand, it is contended on behalf of the defenders that the scope of the first defender's duty was restricted in some way with the effect that it did not extend to looking beyond the parties' submissions and, in particular, the Meininger scheme. As I understood it, the defenders advanced this argument on the basis that this restriction flowed from the purpose of the first defender's duty being the purpose for which the first defender was instructed. In general terms, the defenders relied upon the terms of the missives, the process of the first defender's appointment, and the procedure followed by the first defender (see [116] to [119] above).

[139] I found this aspect of the defenders' argument difficult to follow as I was unable to see any basis for it. First, I consider that the terms of clause 16.5 of the missives are clear. The "Independent Valuer" is to be appointed in order to determine the open market value of the property in accordance with the current RICS standards. In that regard, it is notable that, although the parties have made provision at various points in the missives for the appointment of an independent arbiter (e.g. clauses 15.2 and 16.7), the parties have elected not to use that wording in clause 16.5. Although the independent valuer is to have regard to the information put forward by each of the parties – including all marketing reports, surveys, offers and details of negotiations – there is no suggestion that he or she is to be restricted to that information.

[140] Thereafter, I am unable to find any basis in the appointment documentation for the restricted scope of duty contended for by the defenders. Certainly, the RICS Application form dated 11 July 2017 completed by Mr Thurtell provides no assistance. Under the heading "Nature of Dispute", the form essentially seeks to repeat the terms of clause 16.5:

> "Dale House Developments and Legal and General wish to jointly appoint an Independent Valuer to undertake a market valuation of Dale House, 21 West George Street, Glasgow as at 12 September 2016. The process is as per a condition within the 'missives' between the Parties taking the form of letters between the Parties Solicitors [sic]. The Independent Valuer will be required to produce an RICS 'Red Book' valuation which will be used to calculate the Distributable Profit in accordance with the Parties legal agreement [sic]."

Thereafter, under the preferred professional background of the dispute resolver, the form provides:

> "The Independent Valuer should have specific sector knowledge and experience of undertaking development led valuations in Glasgow with a particular focus on the hotel, office and retail sectors to be able to compile a formal valuation in accordance with the RICS 'Red Book'."

[141] This wording was specifically founded on by senior counsel for the defenders and yet no explanation was provided as to why this stipulation should be regarded as in any way restricting the first defender's scope of duty. If anything, by requiring that the independent valuer has particular knowledge and expertise to be able to prepare a valuation, it would seem to reinforce the notion that the independent valuer is to carry out his or her own exercise rather than being restricted in some way to the parties' submissions.

[142] For completeness, I note, for what it is worth, that, as pointed out by the pursuer, this conclusion is consistent both with the first defender's contemporaneous correspondence and with the report he produced. Both make it clear that the first defender was acting as an independent expert able to conduct his own investigations and unconstrained by the parties' submissions. After the preliminary hearing on 26 September 2017, the first defender wrote to the parties on the following day setting out the procedure he wished to adopt. This included the provision to him of written submissions from each of the parties and an agreed statement of facts relating to three particular matters. The first defender then said:

> "I would reiterate that my role is as an Independent Expert and this is merely to provide me with all the factual elements available in order than [sic] I can progress with my valuation. …"

In his valuation report dated 8 December 2017, the first defender acknowledged receipt of the submissions and counter-submissions from both parties (paragraph 1.1.6) and also confirmed that he had carried out his own investigations in arriving at his opinion of market value (paragraph 1.1.8).

[143] Accordingly, I do not consider that the first defender's scope of duty falls to be constrained as contended for by the defenders. The purpose of the first defender's instruction was no more and no less than that provided for by clause 16.5 of the missives, namely to determine the open market value of the property at the valuation date using the current edition of the RICS standards.

[144] For the avoidance of doubt, in reaching this conclusion, I place no weight upon the evidence of the first defender to the effect that he considered that the feel of his instruction was that of a "quasi-arbitration" (above at [80]). Quite properly, this evidence of the first defender's subjective opinion as to the meaning of his appointment was not founded on by the defenders. In any event, as the first defender candidly acknowledged, given that the terms independent valuer, expert and arbitrator were all one and the same to him, it is not clear to me what the first defender intended to convey by his remark other than, perhaps, a sense of the formality involved.

Objection to the evidence of Mr Chess

[145] The principal evidence led by the pursuer on the issue of breach of duty came from Mr Chess. As I have noted above (at [121]), the defenders objected to Mr Chess' evidence. Accordingly, it is appropriate to deal with the defenders' objection at this point.

[146] The defenders' objection was, in short, that Mr Chess lacked the relevant knowledge and experience to give opinion evidence in respect of the actions of the first defender. This was because Mr Chess was a surveyor with extensive experience and expertise in the valuing of hotels whereas the standard against which the actions of the first defender were to be measured was that of a suitably qualified chartered surveyor of ordinary competence acting with reasonable skill and care. The defenders accepted that in the present case, based on his appointment, the appropriate qualifications were:

> "specific sector knowledge and experience of undertaking development led valuations in Glasgow with a particular focus on the hotel, office and retail sectors".

On this basis, so the defenders submitted, the evidence of Mr Chess as to the usual and normal practice of an expert hotel valuer were neither relevant nor admissible in respect of the assessment of the actions of the first defender.

[147] The pursuer's response to the defenders' objection was that the defenders failed to recognise that the valuation of the property necessarily involved considering its potential use as a hotel. That had been expressly recognised in the formulation of the preferred professional background stipulated for in the first defender's appointment which referred to experience of undertaking development-led valuations in Glasgow with, among other things, a particular focus on hotels. In these circumstances, it was not open to the first defender to accept the instructions, as he had done, and then to assert that he did not have the appropriate expertise to carry them out. The defender's position was akin to a submission of tailoring the duty to the actor rather than to the act. This argument had been consistently rejected in the professional negligence field (*Wilsher* v *Essex Area Health Authority* [1987] QB 730 at 749 to 751; Jackson & Powell, *Professional Liability* (9th Edition) at paragraphs 10-059 to 10-061).

[148] I agree with the pursuer's argument and repel the defenders' objection to Mr Chess' evidence. As a starting point, it is clear that where negligence is alleged on the part of a professional, it will usually be necessary to lead evidence from an expert of the same discipline in order to establish whether the actions of that professional fell below the reasonable standard of his or her profession. I also recognise that where one is dealing with an action against a surveyor that that profession encompasses a very wide set of sub-specialisms (see Jackson & Powell at paragraphs 10-003 and 10-064). As a result, it is more useful to define the surveyor's job by reference to the particular task which he or she was carrying out rather than focussing on his or her particular position.

[149] From this starting point, the learned authors of Jackson & Powell suggest that the next question which requires to be asked is – was the task one which the professional undertook within his or her own proper and usual professional sphere? If not, a question may arise as to whether the professional should be judged not according to his or her usual professional practice but rather according to the practice of the specialism in which the professional purported to act (Jackson & Powell at 10-064).

[150] In the present case, the parties are agreed that the task which the first defender was to carry out was the valuation of the property at the valuation date on the basis of a development-led valuation and with a particular focus on the hotel, office and retail sectors. That is what can be taken from clause 16.5 of the missives together with the appointment documentation. As to the question posed by the learned authors of Jackson & Powell, there was no suggestion that in carrying out his instructions the first defender was acting otherwise than within his own proper and usual sphere. That was very emphatically the first defender's own evidence (see [79]). There was also no suggestion from Mr Murphy that

he considered the first defender was acting outside his usual sphere. Accordingly, there is no basis for the subsidiary question to arise.

[151] Having undertaken the task of valuing the property and having held himself out as an expert valuer having experience of undertaking development-led valuations in Glasgow with a particular focus on, among other things, hotels, the first defender's actions fall to be judged by that standard. As Lord Justice Mustill (as he then was) put it in *Wilsher* "If ... [a professional] assumes to perform a task, he [or she] must bring to it the appropriate care and skill" (at 747 B-C). On this basis, the evidence of Mr Chess, an acknowledged expert in hotel valuation, is plainly both relevant and admissible.

Breach of duty

[152] The pursuer's case on breach of duty was broken down into three linked elements or as counsel described them "strands". In summary, these were: first, the failure by the first defender to notice that the proposed hotel scheme he was valuing, the Meininger scheme, had one fewer floor than the office scheme he was valuing; second, the failure by the first defender properly to cross-check the result of the residual valuation of the proposed hotel development with transactional evidence; and, third, the failure of the first defender in cross-checking the residual value of the proposed hotel development to take account of the likely value of the retail/leisure development on the ground floor.

[153] Although presented as three separate stands, the essence of the pursuer's case is the alleged failure by the first defender to cross-check the result of his residual valuation of the proposed hotel development. In submissions, counsel for the pursuer recognised that the first strand had limited causal potency. The other two strands, upon which the pursuer's case is principally founded, are both directed towards what the first defender did, or

perhaps more accurately, did not do with the results of his residual valuation for the proposed hotel development.

[154] There being no real dispute as to what, as a matter of fact, the first defender had done in carrying out his valuation, the principal evidence in respect of this issue came from the two expert witnesses: Mr Chess and Mr Murphy. Notwithstanding the sharply divergent views expressed in the reports both he and Mr Chess had prepared, it became apparent during the course of Mr Murphy's cross-examination that there was, in fact, a considerable degree of common ground between them.

[155] On the basis of their evidence, I consider that Mr Chess and Mr Murphy were agreed on the following:

- First, the task being undertaken by the first defender involved carrying out a residual valuation based on a hotel development with mixed retail and leisure on the ground floor.
- Second, that, as was set out in VIP 12, it was normal and usual practice for a surveyor undertaking this type of valuation to carry out a cross-check with available market evidence where at all possible. The need for this cross-check arose from the large number of variables involved in a residual valuation, each of which involved an exercise of judgment by the valuer, and which could have significant impact on the resulting valuation.
- Third, that an ordinarily competent expert, in the position of the first defender, could not restrict him or herself simply to considering the submissions which had been made to them.

- Fourth, that in carrying out a cross-check, such an expert required, first, to consider the market and all those transactions which might properly be considered comparable.
- Fifth, that such an expert, in the position of the first defender, would, in cross-checking the residual value of the hotel development, have considered the likely value of the proposed retail or leisure development on the ground floor.
- Sixth, that the first defender, in failing to do this, had not acted in accordance with the normal and usual practice of an ordinarily competent surveyor.

[156] As will be immediately apparent from the fifth and sixth points noted above, the two expert witnesses were agreed that the first defender had not acted in accordance with the normal and usual practice of an ordinarily competent surveyor in failing to consider the likely value of the proposed development on the ground floor when cross-checking his residual valuation of the proposed hotel development. Given that this is one of the two main elements of breach of duty founded upon by the pursuer, this consensus is, of course, highly significant.

[157] In light of the significance of this point, I am compelled to observe that I find it difficult to square Mr Murphy's evidence in relation to it when under cross-examination with the evidence given in his various reports. As I have noted above (at [66]), Mr Murphy was specifically asked in his first report, which was dated 11 August 2023, to consider the first defender's actions bearing in mind the three part test set down in *Hunter* v *Hanley*. At that stage, Mr Murphy's opinion was that the first defender had not merely acted in accordance with usual and normal practice but had exceeded the duties incumbent upon him (at paragraph 6.4.10). Notably, at that time, it is clear from his report that Mr Murphy had Mr Chess' first supplementary report dated 26 May 2023 in which the issue of the value

of the ground floor development was specifically raised (at paragraph 6(iii)). Mr Murphy adopted these reports during examination-in-chief. When subsequently asked, in cross-examination, why he had not said anything about this issue, Mr Murphy remarked candidly that he had simply not considered it. It was also striking that no attempt was made either in re-examination of Mr Murphy on behalf of the defenders nor in submissions to address or justify this aspect of the first defender's actions.

[158] I consider that Mr Murphy's preparedness to concede this point frankly when under cross-examination reflects well on him. However, it is highly disappointing, to put it mildly, that a point of this significance was not addressed in any of the three reports prepared by him and only arose in cross-examination. At the very least, this omission highlights a worrying lack of rigour in the preparation of Mr Murphy's reports. Furthermore, as will be seen below (at [164] and [179]), this is not the only aspect of Mr Murphy's evidence which caused me concern. Overall, taking these aspects together, they did reduce the weight I was prepared to attach to his opinion.

[159] Turning to the other main strand of the pursuer's case, in light of the agreement between the experts, it would seem that the outstanding issue is a narrow one.

[160] First, the experts were in agreement that, in accordance with VIP 12, it was normal and usual practice for a surveyor undertaking a residual valuation, if at all possible, to cross-check the result with available market evidence. The experts were also agreed that the first defender had carried out a residual valuation of the proposed hotel development. On this basis, it is clear that the first defender's initial position that the residual valuation of the proposed hotel development was itself the cross-check is untenable. I note that this position was not advanced on the defenders' behalf in submissions. I note further that comparing the first defender's residual valuation for office development to a residual valuation for

hotel development does not seem to accord with the guidance provided in VIP 12 which is to compare the result of a residual valuation with "such market evidence as may exist" (paragraph 7.3).

[161] Second, the experts were agreed that, at least in general, an expert valuer in the position of the first defender could not restrict him or herself to the submissions which had been provided by the parties but required to consider the market in order to determine which transactions might be comparable. There was also no doubt that the first defender was aware of the owner operator comparables. He had made reference to them in his report (at paragraphs 2.10.89). On this basis, the remaining issue in dispute was whether, in the circumstances of this particular case, the first defender was justified in having restricted himself to considering only those transactions which had been on a leasehold basis and not considering those transactions which had involved a hotel owner operator.

[162] As I understood it, the position of the defenders, based on the evidence of Mr Murphy, was that in the whole circumstances of the present case the first defender was entitled to make a judgment that there was no evidence of owner operator demand for the site and, therefore, entitled not to consider the owner operator comparables on that basis. The whole circumstances included the submissions and associated information presented to the first defender by the parties. In this regard, the defenders highlighted the fact that, in terms of clause 16.5 of the missives, the parties were obliged to provide the first defender with all marketing reports, surveys, offers and to disclose any contact or negotiations with third parties. Senior counsel emphasised that there was no evidence before the first defender of any interest in the property by a hotel owner operator.

[163] I reject the defenders' arguments for two principal reasons. First, the defenders' position is predicated upon the first defender having exercised his judgment to exclude

those comparable transactions which involved owner operators. However, there is simply no contemporaneous evidence that the first defender in fact exercised any such judgment. There is no reference to the exercise of any such judgment in the first defender's valuation report. Having been referenced, the comparable transactions involving owner operators are not mentioned again. This omission of any reference to a judgment by the first defender is significant in that Mr Murphy considered that this ought to have been set out in his report.

[164] Notably, there is also no reference to any such decision making in the first defender's witness statement (which formed the entirety of his evidence in chief). I recognise that, in cross-examination, the first defender's position was that the reason he had not considered owner operator comparators was that he was not aware of any demand or interest in the property (at [86]). However, I do not consider this evidence to be of significance or that it points to a different conclusion. The first defender's evidence was plainly given with the benefit of hindsight and does not alter the fact that there was no contemporaneous evidence of an exercise of judgment by the first defender. Furthermore, I do not consider that the first defender's evidence actually supports the conclusion that, having considered the particular circumstances of the property, he concluded that owner operators could be disregarded. Rather it is more consistent with the first defender's position that he was justified in taking the approach he did because neither of the parties had presented an owner occupier scheme to him.

[165] Second, the defenders' position is dependent upon Mr Murphy's evidence that, notwithstanding the normal and usual practice, the first defender's actions did not represent a departure from that practice (see [72] above). I found this part of Mr Murphy's evidence to be unpersuasive. As I have noted, during this passage of his evidence, I found him to be hesitant and difficult to follow. He offered no explanation as to why Dale House would not

be of interest to a hotel owner operator. He was only able to point at the absence of unsolicited interest by an owner operator in the site. As such, his position seemed to be perilled upon the fallacy that an absence of evidence constituted evidence of absence. On this point, I preferred the evidence of Mr Chess that no ordinarily competent valuer would have failed to consider the possibility that the purchaser of the property might be an owner operator.

[166] Accordingly, I conclude that the first defender acted in breach of the duties incumbent upon him in both of the two principal ways founded upon by the pursuer, namely: the first defender failed properly to cross-check the result of the residual valuation of the proposed hotel development with transactional evidence; and he failed, in cross-checking the residual value of the proposed hotel development, to take account of the likely value of the retail/leisure development on the ground floor. In so acting, the first defender was in breach of contract both in having failed to value in accordance with the RICS Valuation Professional Standards and in having failed to carry out the valuation of the property to the standard to be expected of a suitably qualified chartered surveyor of ordinary competence acting with reasonable skill and care.

[167] For completeness, in respect of the first strand founded upon by the pursuer – the alleged failure relating to the difference in the number of floors in the Meininger scheme and the first defender's proposed office development – I am not persuaded that this aspect of the valuation exercise can meaningfully be considered in isolation. In the circumstances in which the scheme was provided to him, I do not consider that it was unreasonable for the first defender to take the Meininger scheme as his starting point. However, for the reasons I have set out above relating to the other strands of the pursuer's case, I consider that the

difficulties for the first defender arise once he had produced a residual valuation based on the Meininger scheme.

Causation of loss

[168] The pursuer's position in respect of causation is that, as a result of the defenders' breach of contract, the value for the property was understated and, in terms of the missives, the pursuer was not entitled to any profit share. The logic of the pursuer's position is that but for the defenders' breach of contract, the first defender would have carried out the valuation of the property to the standard to be expected of a suitably qualified chartered surveyor of ordinary competence acting with reasonable skill and care. The pursuer contended that if the first defender lacked the necessary expertise to do this properly, he could have obtained the necessary assistance either from the second defender or externally. On the basis of Mr Chess' evidence, the pursuer asserts that such a surveyor would have concluded that the property had a value of £6.3 million. The pursuer then seeks payment of the profit share to which it would have been entitled in terms of clause 16.2 of the missives had the property been valued at that figure.

[169] As noted above (at [125]), although during oral submissions the defenders advanced no arguments in respect of causation, two arguments were included in their written submissions. The first argument was that the pursuer's case on causation was at odds with the absence of any criticism by the pursuer of the first defender's valuation based on an office development. The second argument focussed on what the defenders contended were issues with Mr Chess' approach to the comparable owner operator transactions.

[170] I am not surprised that senior counsel elected not to advance either of these arguments during oral submissions. In respect of the first, the fact that the pursuer made no

criticism of the first defender's office valuation is entirely irrelevant. The pursuer's case proceeds on the basis that, had the first defender acted in accordance with his contractual obligations, the resulting market value of the property would have been greater than the first defender had produced for the proposed office development.

[171] As to the second argument, once breach by the defenders has been established, the court requires to determine what loss has been caused to the pursuer. In the present case, that requires the court to determine what the correct valuation of the property being developed as a hotel would have been. The pursuer advances the evidence of Mr Chess in order to address this. Although included under the heading of causation, the second argument for the defenders is essentially a criticism of Mr Chess' evidence as to the correct valuation of the property as a hotel. I deal with those arguments below.

[172] Accordingly, as a matter of causation, I have no difficulty in concluding that as a direct and natural result of the defenders' breach of contract the pursuer has been caused loss.

Valuation

[173] As a starting point, I accept the pursuer's submission that in terms of the quantification of the pursuer's loss, the court requires to establish the correct value of the property rather than seek to determine what the lowest non-negligent valuation of the property might be. In this regard, I consider that Lord Hoffman's analysis on this point in *South Australia Asset Management Corp* is entirely apt (at 221E to 222A).

[174] The pursuer relies on the evidence of Mr Chess. Mr Chess is extremely experienced in hotel valuation. He had set out, both in his reports and in oral evidence, the basis upon

which he had determined that the value of the property, were it be developed as a hotel by an owner operator, was £6.3 million.

[175] By contrast, the defenders advanced no evidence from a surveyor with expertise in hotel valuation. Mr Murphy described himself as not being an expert in hotel valuation. However, notwithstanding that lack of expertise, as I have noted, Mr Murphy did advance what he described as a critique of Mr Chess' valuation. It was on the points identified in Mr Murphy's evidence that the defenders relied.

[176] I accept the evidence of Mr Chess for a number of reasons.

[177] First, he was an impressive witness and I found his evidence to be persuasive. He had obvious expertise in the field. He was able to set out clearly both his methodology and the various inputs into the calculation of the residual valuation of the property. He also explained how he had then cross-checked the results of that calculation before reaching his final view of the market value. I am also satisfied that Mr Chess took a fundamentally cautious approach. That is evidenced both by his rejection of an alternative scheme based on the Bloc purchase together with his treatment of contingency and risk.

[178] Second, Mr Chess' approach was, to a very great extent, unchallenged. That was largely as a result of the fact that the defenders elected not to lead evidence from a witness with expertise in the valuation of hotels.

[179] Third, I found certain aspects of Mr Murphy's evidence in respect of Mr Chess' valuation to be unsatisfactory. It was not clear to me how, despite professing not to be an expert in the field of hotel valuation, Mr Murphy felt able to criticise aspects of Mr Chess' methodology which appeared to fall peculiarly with the province of hotel valuation. It was also notable that the effect of all of Mr Murphy's criticisms was to reduce the overall valuation. A particularly striking example of this was Mr Murphy's view, set out in his

supplementary report, that Mr Chess' assumption for revenue income should be reduced by 50% (at [76]). I agree with senior counsel for the defenders that it was unwise of Mr Murphy to have engaged in this process.

[180] Finally, I do not consider that any of the criticisms advanced by Mr Murphy are of sufficient force as to undermine Mr Chess' overall valuation. In this regard, I accept Mr Chess' evidence that it is important to distinguish between, on the one hand, the process of generating a residual valuation and, on the other, the actual value of the land itself. I note that this distinction is also set out in VIP 12 (at paragraph 7.3).

[181] Accordingly, on the basis of the evidence of Mr Chess, I am satisfied that the property had a market value of £6,300,000.

Quantum

[182] The pursuer seeks £928,650.96 in damages together with interest at the judicial rate from the date of citation. The principal sum is calculated in accordance with the formula provided in clause 1 of missives under the definitions for "Profit Share" and "Distributable Profit" (see [110] above).

[183] The only figure for calculating the Distributable Profit which is not a matter of agreement is that for the open market value as calculated in accordance with clause 16. For the reasons set out above, I hold that this figure should be £6,300,000. The Distributable Profit is therefore £1,857,301.92 and the Profit Share is £928,650.96.

[184] As I have noted above (at [128]), the defenders argued that the pursuer's damages fell to be calculated on the basis that the pursuer had suffered a loss of a chance. The Inner House has recently reaffirmed that assessment of damages on a loss of chance basis is applicable where the supposed beneficial outcome to the pursuer is dependent upon what

others, unrelated to the parties, would have done (*Centenary 6 Limited* v *TLT LLP* [2024] CSIH 13 at paragraph 68).

[185] In the present case, the beneficial outcome to which the pursuer would have been entitled but for the defenders' breach of contract was the payment of the profit share by L&G under the missives. On this basis, properly analysed, I consider that the defenders are correct that the valuation of the pursuer's loss falls to be approached as a loss of chance.

[186] Lord Hodge helpfully analysed the correct approach to be taken to this exercise of the valuation of a lost right or entitlement in his opinion in *McCrindle Group* v *Maclay Murray & Spens* [2013] CSOH 72 at paragraph 139:

> "Once it is shown that loss has occurred, the court has to quantify that loss. In *Parabola Investments Ltd* v *Browallia Cal Ltd* [2010] EWCA Civ 486, Toulson LJ stated (at para 25):
>
> > 'Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account. (See *Davies* v *Taylor* [1974] AC 207, 212 (Lord Reid) and *Gregg* v *Scott* [2005] 2 AC 176, para 17 (Lord Nicholls) and paras 67-69 (Lord Hoffmann)).'"

[187] Applying this to the present case, the question becomes one of assessing the pursuer's chance of recovering the profit share from L&G. On the basis of the evidence I have heard, I consider this to be straightforward. There was no suggestion at all that L&G would do other than honour its obligations under the missives. That was clearly the understanding of the pursuer's principals Mr Kavanagh and Mr Aldridge. The latter was involved in reasonably extensive discussions with Mr Westmacott of L&G in relation to agreeing the other elements of the Distributable Profit formula contained in the missives. Perhaps unsurprisingly, there was also no suggestion of this in Mr Westmacott's statement. Accordingly, I see no basis for making any discount to my assessment of the pursuer's loss.

Disposal

[188] On this basis, I will sustain the pursuer's first, second and third pleas-in-law and grant decree against the defenders in the sum of £928,650.96 together with interest thereon at 8% from the date of citation until payment. I will reserve all questions of expenses meantime.