Neutral Citation Number: [2013] EWHC 1039 (Comm)

Case No: 2009 FOLIO 931 & 2009 FOLIO 1692

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2013

Before:

MR JUSTICE BLAIR

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Between:

GRUPO HOTELERO URVASCO S.A.	**Claimant**
- and -	
(1) CAREY VALUE ADDED S.L.	**Defendants**
(Formerly Losan Hotels World Value Added I S.L.)	
(2) LONDON VALUE ADDED I LIMITED	
CAREY VALUE ADDED S.L.	**Claimant**
(Formerly Losan Hotels World Value Added I S.L.)	
- and -	
GRUPO URVASCO S.A.	**Defendant**

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- -

Mr Duncan McCall QC and Mr Tom Smith (instructed by **Hogan Lovells LLP**) for the Claimant in Folio 931 and the Defendant in Folio 1692.
Lord Grabiner QC, Mr Manus McMullan QC, Mr Andrew De Mestre and Mr Douglas Paine (instructed by **Mayer Brown LLP**) for the Defendants in Folio 931 and the Claimant in Folio 1692.

Hearing dates: 29-31 October 2012; 2, 5-9, 12-16, 19-23, 26, and 30 November 2012; 3-6, 10-13, and 17-18 December 2012; February 6-8 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BLAIR

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Mr Justice Blair:

1. This is a claim by Grupo Hotelero Urvasco S.A. ("GHU"), which is a Spanish hotel company, against Carey Value Added, S.L. ("Carey"), which is a Spanish fund which invests in hotels. Carey has a counterclaim, and it has also brought its own claim against Grupo Urvasco S.A. ("GU") as guarantor.

What the case is about

2. The dispute arises between GHU as borrower and Carey as lender. It relates to the development of a hotel and apartments on the site of the old Marconi Building, which is a prime site on the corner of Aldwych and the Strand in central London. The site was bought in 2004 by Urvasco Ltd, an English subsidiary of GHU which was set up as the vehicle for the development. Carey came on the scene in 2007, when GHU had difficulties increasing its bank finance. Various agreements were entered into on 21 December 2007, including a Loan Agreement. Had the agreements run their course, at completion, Carey would have acquired the property under a Share Purchase Agreement, subject to a leaseback to GHU, which would have had an option to repurchase after seven years.

3. In short, GHU claims damages against Carey for failing to advance funding under the Loan Agreement. (The other defendant is Carey's nominee company London Value Added I Ltd which plays no independent role in the proceedings.) Lending stopped in June 2008. GHU says that the failure to lend any more money was in breach of contract, and that it starved the development of funding at a time of tight credit and thereby caused its failure. Work on the development stopped in September 2008.

4. GHU's claim is based on the premise that, but for Carey's breaches of the Loan Agreement, completion would have taken place under the contractual arrangements between the parties on time. GHU says it lost the profits it would otherwise have earned on the hotel's operation, and incurred extra loss over and above the loss that it accepts would have been incurred on the development anyway. Its damages claim was valued in closing (on the basis of an exchange rate of £1 = €1.16) at about £71.38m.

5. On its side, Carey says that it was not in breach, because it was not obliged to continue to lend. This is because GHU was in default within the terms of the Loan Agreement. Carey's case at trial had two parts. The first part concerned alleged "financial defaults" arising from the financial difficulties in which it says the Urvasco group found itself in 2008. These were associated with the collapse in the property market in Spain. This part of the case raises significant issues as to the application of the "material adverse change" clause that routinely appears in corporate loan agreements internationally. The second part concerns alleged "development defaults" relating to the London development, which is effectively a construction case added during the course of the litigation.

6. Carey counterclaims against GHU for repayment of €55.4m advanced under the Loan Agreement (a figure that includes interest up to 23 December 2009). It also claims against GU under a guarantee. It is not in dispute that GU's liability is coterminous with that of GHU, and no separate issues arise in this respect.

7. There were, therefore, three cases within this trial, each of which was substantial in its own right. However, there was no doubt as to the central battleground. In opening, both sides were agreed that the main issue was whether or not GHU was in default within the terms of the Loan Agreement as at 6 June 2008 when Carey was due to advance a tranche of the loan, but did not do so.

8. If GHU was *not* in default, it says that Carey was in breach of contract and is liable to pay damages. Further, GHU was relieved of the obligation to repay what had been advanced under an exculpatory clause in the Share Purchase Agreement (clause 6.17). (Carey says that the clause in question is void as a penalty.) It has an alternative case to the effect that it can set off its damages claim to extinguish any liability to repay the sum advanced.

9. If GHU *was* in default, Carey says that it was entitled to withhold further advances, and is entitled to repayment of what it had advanced by 6 June 2008.

10. Within these apparently straightforward parameters a large number of issues and sub-issues have been raised arising under both English and Spanish law, involving complicated factual and expert evidence, some relating to the financial state of the Urvasco group, some relating to the building project. Each side submits that the other is precluded under Spanish law from relying on points that might otherwise be open to them. The case is notable for the number of issues, both factual and legal, advanced by the parties at trial (particularly Carey).

The proceedings

11. There are two actions, and they have been ordered to be heard together. On 9 July 2009, GHU commenced the first action against Carey (2009 Folio 931) though it was not served until later in the year. The claim is for declaratory relief in respect of GHU's right to rescind the Share Purchase Agreement pursuant to the exculpatory clause 6.17. If successful, the effect is to cancel the indebtedness under the Loan Agreement. GHU also claims damages in respect of Carey's breaches of the Loan Agreement which exceed the sums advanced in respect of which it claims a set off. Carey filed a counterclaim claiming repayment of the sums which it advanced under the Loan Agreement.

12. On 29 December 2009, Carey commenced the second action against GU (2009 Folio 1692) claiming payment under a guarantee also dated 21 December 2007. GU's defence to this claim is that, as guarantor, it is entitled to avail itself of the defences which are available to GHU, as principal debtor. On 23 July 2010, I dismissed Carey's application for summary judgment which had been made on the basis that the guarantee was a first demand guarantee and therefore payable without regard to the underlying contract (see [2011] 1 B.C.L.C. 352). As already indicated, it is not now in dispute that GU's liability under the guarantee is coterminous with that of GHU.

13. The summary judgment proceedings were the first of a considerable number of interlocutory disputes between the parties. The start date of the trial was postponed on two occasions. GHU says that to a large extent these difficulties have been caused by the changing, and expanding, case which GHU has had to face, involving an increased reliance on construction-based as opposed to financial issues. It is correct, it appears to me, that Carey's construction-based case has arisen and been developed

substantially during the course of the proceedings. Carey responds that so far as this is so, it is because of late disclosure of matters about which it should have been told at the time. I do not intend to debate this further in the present judgment, in case it is relevant to the question of costs.

The trial

14. Although well over two hundred bundles were prepared for the trial, in the event the documentary evidence consisted of those documents referred to during the hearing. In accordance with my direction at a preliminary hearing on 25 October 2012, these were extracted from the trial bundles as the evidence progressed and put into (eleven) core bundles. In their closing submissions, both GHU and Carey made reference to further documents (in GHU's case, running to two files).

15. There are a few points to make on the documents. When reading the text of emails and so forth referred to in this judgment it should be borne in mind that many of them are translations from the Spanish.

16. There was only one translation issue of substance at trial, which relates to the meaning of the word *forzado* used about certain certifications for the building works. In opening, Carey translated the word as "forced" or "distorted". GHU said that the word "rather referred to estimations which were at the upper end of the reasonable range", capturing "the idea that the [project manager] had pushed the valuation/certification as far as he felt he properly could, and that anything more could not be justified". I do not think that this was pursued in closing. I am satisfied from the evidence of the translators at trial that in context the word means "forced". In the end, the parties sensibly just used the Spanish word.

17. The parties agreed, and observed, a timetable for all the hearings. The oral openings and closings were both relatively brief, since the parties' cases were set out in extensive written submissions. There were however a considerable number of witnesses at trial, both factual and expert. The witness evidence was as follows.

18. The following employees of GHU and/or GU gave evidence for the companies: Mr Pablo Couto Sagredo ("Mr Couto"), the general manager of GU, Mr Emilio Iraculis Soteres ("Mr Iraculis"), the associate director of GU, Mr Julio Esparza Lopez ("Mr Esparza"), the head of accounting and of the finance department at GU, and Ms Isabel Santamaria Lucianez ("Ms Santamaria"), GU's financial controller. I also heard evidence from Mr Rodolfo Di-Pietro Elizaran, who was at one time General Manager of an associated company, Urvasco Energia.

19. The remainder of GHU's factual witnesses are (or were during the development) mainly employees of a Spanish company called IDOM, which provided project management services. The project director was Mr José Angel Fernandez ("Mr Fernandez"). The others were Mr Miguel Angel Valverde ("Mr Valverde"), the structures package manager; Ms Maria Aspiroz ("Ms Aspiroz"), who was responsible for the mechanical and engineering package and the lifts package; Mr Sergio Llamosas Fernandez ("Mr Llamosas"), the façades and roof manager; Mr Miguel Utrilla Castrillo ("Mr Utrilla"), the programme manager; Mr José Manuel Gonzalez Mato ("Mr Gonzalez"), the concrete package manager; Mr Inigo Aguirre ("Mr Aguirre"), the mechanical and engineering package manager; and Mr Javier Davila

("Mr Davila") who was responsible for the plasterworks and the fit-out. GHU also called Mr Giles Robinson ("Mr Robinson"), a partner at Foster & Partners, which was the architect on the development.

20. As regards GHU's witnesses, I need only mention Mr Pablo Couto further at this point. His evidence was subject to a strong attack in Carey's closing submissions, some of his evidence being it was said patently untrue. I reject this attack. In my view, Mr Couto was an honest witness, who answered questions over some three days of cross-examination as best he could. He is an experienced businessman who was strongly committed to the London project, and attended court nearly every day of the trial. He is also strongly committed to Grupo Urvasco, which in some respects at least is a family company. At times, that commitment led to him giving evidence which I cannot accept. Where that is so, I have rejected it in favour of other evidence, particularly from the contemporaneous documents.

21. Carey had only three factual witnesses. The first was Mr Rafael Garcia-Tapia ("Mr Garcia-Tapia"), a lawyer who was at the time an employee of Losan Hotels World S.L., the company then responsible for the management of Carey. Mr Garcia-Tapia had a difficult role, and acquitted himself creditably in taking action in relation to serious defalcations alleged within the company. Though I generally accepted his evidence without hesitation, I did not do so as regards the events of and around June 2008 in instances where I felt it was inconsistent with the other evidence.

22. The other two Carey witnesses were Mr Carlos Ramos Fernandez ("Mr Ramos"), who is a director of Ahorro Corporación Financiera S.A., which is part of Ahorro Corporación, a group owned by Spanish savings banks, and Mr Tony Farmiloe ("Mr Farmiloe"), who is a partner at Gardiner & Theobald which acted as the Monitoring Surveyors for Carey in respect of the development.

23. It is important to note that the person who had by far the most dealings with this matter on behalf of Losan (Carey's predecessor) was Mr César Losada. He has considerable experience in the hotel business. As I shall relate, Mr Losada and Carey parted company after he was accused of theft in November 2008. Mr Losada signed a witness statement on behalf of GHU for use in the proceedings. However, he subsequently withdrew that statement and did not give evidence at trial. Carey did not want the statement put before the court, and it was not. The fact that there is no evidence from the main actor on Carey's side is plainly a considerable gap.

24. There was a considerable body of expert evidence covering various fields. The expert witnesses were (1) Spanish lawyers (Professor Fernando Gomez for Carey and Professor Mariano Yzquierdo Tolsada for GHU) in relation to the areas of Spanish law at issue, (2) a Spanish accountant (Mr Fernando Beltrán) for Carey and an English accountant (Mr Gervase MacGregor) for GHU in relation to the "material adverse change" issue, (3) quantity surveyors (Mr Peter Brooker for GHU and Mr John Boultwood for Carey) about the expected cost to complete the development from mid-2008, (4) construction planners and programmers (Mr Richard Chamberlain for Carey and Mr Michael Saulsbury for GHU) about the likely completion date of the development, (5) hotel valuers (Mr David Bailey for GHU and Mr Timothy Smith for Carey) as to the revenue and expenditure which might have been expected if the development had reached completion, and (6) English accountants on the calculation

of GHU's damages claim (again Mr MacGregor for GHU and Mr Chris Clements for Carey).

25. The expert evidence covered thirty or so files, but parts of it had been superseded following the meetings of the experts, or were otherwise peripheral. At my request the parties prepared and agreed reading lists of those parts of the reports that were relevant for the trial, an exercise which made the pre-reading considerably more manageable, and for which I express my appreciation.

26. So far as I need to comment further on the individual factual and expert witnesses, I shall do so in the body of the judgment.

27. A general issue relates to the changing value of the pound sterling against the euro. Since the development was in London, the applicable currency was the pound. However, a substantial number of contractors were Spanish, and invoiced in euros. Much of the funding anticipated for the project was also in euros. Specifically, the loan made by Carey (the subject of this action) was in the euro equivalent of £70m. There was, however, a fixed contractual exchange rate of €1.386 to £1. Finally, GHU had hedging arrangements with a bank, BBVA.

28. The pound declined significantly against the euro during the course of 2008. Mr Beltrán sets out the figures in paragraph 5.10.3 of his report. It went from a rate of €1.47 on 1 September 2007, €1.39 on 21 December 2007, €1.26 on 6 June 2008 to €1.03 on 31 December 2008. Because of the difficulty of selecting dates for conversion, GHU's damages claim is presented in its pound and euro constituents. The conversion issue arises in a number of other instances.

29. The factual enquiry attendant on the parties' cases was one of considerable breadth traversing the recent financial history of the Urvasco group as well as the various stages of the London development over a number of years. It was set out in the parties' substantial written submissions in opening and closing. There is a contents list at the beginning of this judgment. I have first set out the factual narrative. I then deal with the various defences raised by Carey ("financial breaches" followed by "development breaches"). I then deal with GHU's damages claim. On the evidence, the facts as I find them are as follows.

<u>The Urvasco group of companies</u>

30. The Urvasco group is a Spanish enterprise with interests in construction and hotels. Mr Couto explained in his evidence that Grupo Urvasco S.A., that is, GU, is a private company which was established in 1998 as part of a restructuring of the interests of the main shareholders, Mr Anton Iraculis and Ms Maria Carmen Hernandez. GU is the holding company for construction companies based in various Spanish cities and provides management services to them. Since 1973, the group has built over 15,000 apartments in Spain. By the end of 2006, the value of the construction business was over €1.6 billion (land and sites plus work in progress). According to Mr Carlos Ramos of Ahorro Corporación Financiera, at the time of the agreements with GHU at the end of 2007, GU was one of the main real estate developers in Spain. The group is based in the Basque Country, and is particularly strong in the North of Spain.

31. The Urvasco group became involved in hotels in 1987 when Vizcaina de Edificaciones S.A., one of the group's main construction companies, started work on a new hotel in Bilbao. In 1995, Mr Anton Iraculis (who is the founder of the business and I infer is still its driving force) set up a company called Hoteles Silken S.A. to manage the group's hotels.

32. In 1999, the business was split between its construction and hotels division, with the hotels having their own service company, Grupo Hotelero Urvasco S.A., that is, GHU. GHU is also the immediate holding company for the individual hotel companies, and has a small number of employees, the people who work at the hotels being employed by the individual hotel companies. GU owns 93.25% of GHU, the remaining shares being held by individuals involved in the business. The total hotel revenue for 2006 was more than €125m. Hoteles Silken is owned 55.55% by GHU (5.55% indirectly). The company currently manages 34 hotels, most of which are owned by the Urvasco group. They operate under the Silken brand.

33. In addition to these operations, the Urvasco group established a renewable energy business called Urvasco Energia S.A. in 1999. This also prospered, and by 2007, Urvasco Energia owned and managed six wind farms and a hydro-electrical mini-power station in Spain. GU's shareholding in Urvasco Energia was 70%, the remaining 30% being held by individuals involved in the company. By 2006, the turnover of Urvasco Energia was €22.9m. As explained below, a decision was taken at the beginning of 2008 to sell the company to raise funds.

34. It is plain, therefore, that the Urvasco group was a substantial operation. Mr Couto is justly proud of the fact that despite the problems that have beset the Spanish economy, the group (unlike some of its peers) has survived.

The Urvasco group's relationship with the banks

35. The business was highly geared. The evidence of Mr Couto, which I accept, is that much of the funding was obtained through syndicated loans with savings banks. It is necessary to say something about these banks. A significant part in the Spanish banking system is played by savings banks, called the *cajas de ahorros*, or *cajas* for short. The *cajas* are regionally based. The evidence is that their number has been considerably reduced by restructuring and consolidation since the 2008 financial crisis.

36. The biggest single lender to the group was not a *caja*, but the major Spanish multi-national BBVA (Banco Bilbao Vizcaya Argentaria SA). This bank, like the Urvasco group, is headquartered in the Basque Country, and has a substantial operation in London.

37. Mr Couto says, and I accept, that the Urvasco group's business model was based on a high volume of activity, and that funding was needed for both buying land and constructing apartments on the land. By the end of 2006, Grupo Urvasco had funding arrangements in place with forty six (mainly Spanish) banks. Part of the reason for setting up GU was so that finance could be obtained for the individual construction companies on a group basis, supported by GU guarantees.

38. Mr Couto says that the Urvasco group's ability to service these funding arrangements came from the increasing value of its assets and the profits from its apartment sales. In the ten years up to 2007, the business grew rapidly encouraged by the banks which were, as he puts it, very willing to provide the group with the funds it needed. Some of its projects were very substantial, for example, that at the site of the old Heineken brewery in Seville purchased in 2006 for €400m with 100% bank finance. The banks also provided mortgages to prospective buyers of the apartments. Due to the nature of its business model, he says, and I accept, that liquidity was constantly an issue for the group.

39. In round terms, the Group debt at the end of 2007 was about €2.3 billion. Even given the size of the business, it is plain that this was an enormous sum. According to Mr Couto's second witness statement, as at September 2008 it had reduced to €1.77 billion "for the real estate division". By then, there was a massive restructuring going on, which involved lenders accepting assets in satisfaction of debts. By the end of 2008, the figure had fallen to €1.348m. Some indication of the extent of the contraction can be seen by the fact that as at June 2011, the figure stood at €354 million.

Carey Value Added S.L.

40. Carey Value Added S.L. is a Spanish fund which invests in hotels. The evidence is that it was set up by Mr César Losada. It appears that Mr Losada persuaded various *cajas* to join him as investors in the new fund. These included Ahorro Corporación (which is itself owned by savings banks). In substance, therefore, Carey is an investment vehicle mainly owned by a number of savings banks, along with some other investors.

41. With shareholders' funds leveraged by way of bank finance, interests in hotels were acquired by the fund. It was then called Losan Hotels World Value Added I, S.L.. It was managed by Mr Losada through a company called Losan Hotels World S.L. (in which Ahorro Corporación held a 30% shareholding). It is clear that he personally controlled the operation for most of the period relevant to this litigation. Mr Losada and Carey parted company at or about the end of 2008 following (to quote Carey's closing submissions) the discovery that he had been involved in the diversion of funds for his personal benefit. On 25 June 2009, the company was renamed Carey Value Added, S.L., which is its present name.

THE PROJECT STARTS

42. GHU's involvement with the London project began in 2004 when Mr Couto, returning from a visit to Tokyo, saw the site. The office building then in place was called Citibank House (which itself comprised two buildings, one being the former site of the Gaiety Theatre and the other Marconi House). It was a central location, and Mr Couto was enthusiastic about its possibilities for development as a hotel and apartments. He was able to engage for the project Sir Norman Foster's firm of architects, whom he knew from working on a hotel in Madrid. Though very experienced in the domestic market, GHU had not built a hotel outside Spain at that time.

43. The site can be envisaged as (very) roughly triangular, with Montreal Place as the base, the Strand and Aldwych comprising the other two sides, and a west-facing apex. GHU's plan involved the demolition of the existing building (preserving the facade of the former Marconi House which looked onto Montreal Place) and replacing it with a 173 room luxury hotel, 92 residential apartments, and underground car parking spaces. The new building was to consist of four basement levels, a ground floor and ten further floors. The hotel would occupy most of the Strand and Aldwych sides, with the West Tower providing the main entrance. The apartments were primarily on the Montreal Place side. The centrepiece of the building was to be an atrium.

44. On 22 May 2004, Urvasco Ltd was incorporated in England as GHU's vehicle for the project. The same day, the company agreed to buy the site for £48.5m, completion taking place on 22 December 2004.

45. GHU's main source of bank lending for the project was BBVA. On 22 December 2004, Urvasco Ltd and BBVA entered into a Credit Agreement (the "BBVA Credit Agreement") for the euro equivalent of £83,670,000, namely €120,000,000. There were three facilities, one for the purchase of the site, one for the construction of the hotel, and one for the construction of the apartments. They were secured by a first charge over the property.

46. Of the price of £48.5m, £28m came from the BBVA facility, the rest coming from the group's own resources. This left the euro equivalent of £55,670,000 for development costs, which as I shall explain proved to be too little. Later, when Carey entered the picture, the facility was amended and restated. The total amount was increased to the euro equivalent £87,670,000, but the substantive terms were not changed.

47. The work on the project was in three phases being (i) planning permission, (ii) demolition, and (iii) construction of the new building. The first phase was speedily accomplished. On 15 April 2005, Westminster Council granted planning permission for the development. On Foster & Partners' recommendation, Buro Happold was appointed as the structural engineers, Davis Langdon as the quantity surveyors, and Cantillon as the main demolition contractor.

48. In July 2005, the demolition works began. They were complicated by the fact that part of the façade of the old Marconi building had to be retained as a condition of planning permission, and Cantillon took longer to do the work than had been anticipated.

The role of IDOM

49. The way the project worked followed the "construction management" methodology which the Urvasco group successfully operated in Spain. In short, instead of employing a contractor for the development (which would in turn employ sub-contractors), as is more usual in Britain, Urvasco Ltd entered into contracts directly with the companies working on the development. Some of these were Spanish companies with which the Urvasco group already had a working relationship.

50. Another Spanish company also played a major role. IDOM is a major enterprise providing engineering, architectural and consulting services in Spain and worldwide. It has an office in Vitoria where GU has its headquarters, and had done some work in

London on the Spanish embassy. Following a successful bid in March 2005, it was appointed in about July 2005 to provide project management services for the London project, and in the event supplied most of the personnel for the site team. Each package of works had a package manager provided by IDOM.

51. The evidence was that this was the first time that the Urvasco group had appointed another company to act as project manager, since usually it managed projects themselves. At the time of appointment, there was a bid document which set out what IDOM proposed to do, but no formal agreement between the parties. IDOM and GHU were prepared to work together on trust, and indeed did so.

52. In July 2005, Mr José Angel Fernandez of IDOM's Vitoria office became Project Director, and co-leader of the Urvasco Site Team (which was called the UST). Mr Fernandez says, and I accept, that a contract backdated to April 2008 was eventually signed in November 2008 when Urvasco was trying to sell the site.

53. Mr Fernandez gave important testimony in the trial. Like Mr Couto, he was subject to a strong attack by Carey in its closing submissions. Indeed, Carey was very critical of the IDOM witnesses generally. Again, I reject this attack. Mr Fernandez was competent as well as honest, although I am satisfied that he struggled with this site, in part because he had never worked in London before. His main problem, however, was the fact that there was insufficient funding to pay contractors, which was entirely outside his control. As explained in detail later, this led to him "forcing" the amounts of the certifications for which he was responsible.

54. I regard Carey's attacks on the rest of the IDOM personnel as generally unjustified also. They were a young team at the time of this development, but were in my view quite capable of handling it, albeit some of their work methods may have been informal by UK standards. I do not consider that the problems which the development encountered were to any large degree their fault.

55. Carey has maintained that the "construction management" methodology was an inefficient and dysfunctional method of working. There were, it points out, over 120 contractors working on over 100 work packages. In my view, there is some truth in this. But whilst it certainly led to complexity, both the IDOM and the Urvasco personnel had experience in this kind of working albeit mainly in Spain. In practice, Mr Couto and Mr Fernandez played a pivotal role, and it is clear that they had a good relationship.

Budgets

56. The question of budgets was a controversial one in the trial. Carey contends that even had it continued lending, there would have been insufficient funding to complete the project. This is an issue which I consider in detail under GHU's damages claim.

57. In factual terms, the starting point is that in July 2005 the cost of the development works was priced by Davis Langdon at £93.6m (excluding consultants' fees). (They prepared a cost plan the previous November of which there is no longer a copy, and Mr Couto was criticised by Carey for not having referred to it in his witness statement. However, in my view nothing turns on this.)

58. Carey points out that the Davis Langdon estimate was considerably more than the balance then available under the BBVA facility. However, his evidence suggested that at this stage Mr Couto was not unduly concerned about the financing. He believed (probably at the time reasonably) that if the amount of the BBVA facility proved to be inadequate, the bank could be persuaded to increase it, as had been his experience with banks to date.

59. In any case, Mr Couto did not accept the accuracy of the Davis Langdon budget, and it is plain that he was very concerned to keep the cost of the development down. As he said at one point, everything in London costs more than you expect. At his request, in November 2005 a revised budget of £77.5m for the construction works (excluding consultants' fees) was produced by IDOM. This was a much lower figure than had been estimated by Davis Langdon.

60. However, Mr Couto felt that the budget could be reduced still further. He set IDOM a target of £55m for the construction works. As he put it, when he proposed this, "The team of IDOM looked at me, unbelieving, like cows look at a train". Nevertheless, in April 2006 a revised budget was prepared by the UST of £57.6m as at February 2006 for the construction works. However, IDOM made it clear to Mr Couto that this was unachievable, as it clearly was, even on the most optimistic basis.

61. As the developer, it was natural for Mr Couto to try to cut costs. Nevertheless, there is some significance in the fact that he was thinking in such unrealistic terms. The impression I have got is that because he regarded it as a flagship project, and genuinely wanted to build a landmark hotel, he assembled a prestigious team for the task, but fairly rapidly found that the project was more expensive that he had anticipated.

62. On 31 October 2006, Davis Langdon prepared a Construction Cost Update which gave an estimated total of £90.1m, £3.5m less than their earlier estimate, but still much higher (Carey emphasises) than the IDOM budgets. To give a balanced picture, it should be noted that at the end of 2007, both Knight Frank, and Gardiner & Theobald, the surveyors appointed by Carey to do due diligence prior to entering into the transaction, generally supported the IDOM figures.

Estimated completion date

63. Another important issue in the trial is when the development would have been completed, had the work gone the full distance. One of the UST's tasks was producing programmes of works, detailing which works were scheduled to take place by which date, up to the target date for completion. The UST's Programme Manager was Mr Utrilla. As is standard practice on such developments, there were two types of project programme, Long Term Programmes ("LTPs"), which covered the entire duration of the project, and Short Term Programmes ("STPs") which covered a shorter time period but in greater detail. (There were also contractor programmes for the individual contractors.) Mr Utrilla used a standard software package to produce the programmes.

64. In June 2006, the UST produced the first detailed Long Term Programme, LTP Revision 14, which had a target completion date of November 2008. However, when it became clear that the demolition contactors would not be able to hand over the site

by October 2006, LTP Revision 15 was produced. This was in September 2006, and the target completion date was moved to 18 December 2008, where it remained for some time. (Mr Saulsbury, GHU's programming expert at trial, considered that LTP Revision 15 is the correct baseline programme.)

The apartments

65. Though the case has tended to centre on the hotel, the apartments were an important part of the development. Arrangements were made for their sale at an early stage. In 2005, Mr Couto was introduced to an Irish property developer. On 15 June 2006 Urvasco Ltd entered into an agreement with his nominee company, LPS Direct (Strand) Ltd ("LPS"), for a 999 year lease of the apartments. The consideration for the lease was agreed at £70m. This was increased by a variation of the lease agreement on 30 October 2007 to £71m when LPS asked for the plans to have fewer apartments. Pending completion of the construction work, a deposit was paid by LPS of £7m, which was held in escrow in an account with BBVA.

66. At the time the Lease Agreement was entered into in 2006, the "initial target date" under the lease was 30 September 2008. Under clause 22.1 of the Lease Agreement, LPS was entitled to terminate the Lease Agreement if practical completion of the development did not occur by 30 September 2009. This was extended to 31 October 2009 at the time of the variation of the lease agreement, with an option given to Urvasco Ltd to extend for another two months.

67. A target date of December 2008, and a Long Stop Date of 30 April 2009, was in due course agreed between GHU and Carey. By way of comparison, under the BBVA Facility, the Required Completion Date was 30 June 2009.

The construction work begins

68. In the event, the site was not handed over by Cantillon until 20 December 2006. (There were thereafter a series of adjudications between Cantillon and Urvasco relating to payment for the demolition works.)

69. Once handover happened, the construction work could get underway. The two main contractors at this stage were companies called Knight Build Ltd, which was responsible for the concrete work, and Rowen Structures Ltd, which was responsible for the steel work. The contractor responsible for the tower cranes on the development was Select Plant Hire. Work began on 5 January 2007.

70. On 7 February 2007 an acceleration programme was agreed by Urvasco Ltd with Knight Build to make up the time which had been lost as a result of the delay to the demolition. In return, Urvasco Ltd agreed to pay Knight Build a bonus of £250,000. A second acceleration programme was subsequently agreed in June 2007. This second acceleration programme was proposed by Knight Build to bring the concrete works ahead of schedule by a month.

71. On 7 May 2007, the UST prepared an updated version of revision 15 of the LTP which maintained the 18 December 2008 target completion date. This was on the basis that the acceleration programme would recover the time lost on the demolition works. Further versions of revision 15 of the LTP were produced in September 2007

and November 2007. (Mr Chamberlain's choice of baseline was LTP Revision 15 of 22 August 2007. He was Carey's programming expert at trial.)

THE WORSENING ECONOMIC CLIMATE

72. Unfortunately, just as the construction work was getting underway, the economic climate began to deteriorate sharply. As is well known, from about mid-2007, the so-called credit crunch marked a freeze in lending between financial institutions internationally. Although the development was in London, the position in Spain was also very important, because the Urvasco group was funded by Spanish credit institutions, as indeed was Carey itself. Its construction arm in particular was vulnerable to the downturn.

73. The evidence shows that in the years prior to 2007 Spain experienced a property bubble which burst in 2007-2008 with disastrous effect. As Mr Fernando Beltrán (one of Carey's expert witnesses) put it in his report: "To give a simple and easily illustrated example, in 2007 - when the Spanish real estate sector was already in decline - the number of new home starts was 634,098, almost the same figure as in the UK, Germany and France put together. However, in 2008, the reduction in Spain was much greater than that experienced in the main European economies".

74. Mr Couto says that he started to feel that something was happening from the beginning of 2007. It had serious implications for the Urvasco group which depended on finance for acquisitions and construction, which had been readily available whilst demand was high and prices were rising. As will be seen, things got so bad that by the end of 2008, the combination of a high level of debt and collapsing asset prices meant that the group had to consider bankruptcy. In the end, it managed to avert it.

75. At the same time, 2008 saw a significant strengthening of the euro against pound sterling. I have set out the figures above. This should have been beneficial to the London development so far as it was funded in euros and costs were incurred in sterling (though a significant part of the costs was incurred in euros).

76. In fact, the position was more complex. As regards the BBVA Credit Agreement, GHU drew down the funds in euros, and it appears from Ms Santamaria's evidence that to the extent that it was necessary to convert the money into sterling, it did so under hedging arrangements with BBVA. As regards the Loan Agreement, the funds were to be advanced by Carey in euros but at a fixed exchange rate of €1.386 to £1.

77. Further, the group, and in particular GHU, was to find that the effect of sterling's decline was that it faced heavy losses on derivative contracts entered into with banks, entered into, Mr Couto said (and I accept), at the behest of the banks. I will come back to this issue.

The funding needs of the London development

78. By May 2007, it was clear that Urvasco Ltd would require further funding to complete the development above that available under the BBVA Credit Agreement. So far as the hotel was concerned, the existing terms of the agreement only committed the bank to lend 72% of the cost. Discussions were held with BBVA, and though the

bank indicated that it would be prepared to lend more, this was subject to terms which included the Urvasco group putting more equity into the project.

79. From about May 2007, BBVA began telling Mr Julio Esparza (whose role was to oversee the financial operations of the group) that the group was going to have to fund a substantial proportion of the cost of the development from its own funds.

80. As another sign of changing times, Mr Esparza was told that for future drawdowns, the bank would require certification by IDOM instead of a list of invoices as in the past. The bank told him that it wanted a new valuation, which it was later agreed would be done by Knight Frank. No further sums would be advanced by BBVA until new terms were agreed. Consequently, after drawdowns permitted in June, none were allowed until November 2007. Urvasco Ltd missed the interest payment due on 30 June 2007 (it was paid in November out of that drawdown).

81. GHU says that it did not wish to contribute further equity to the project, as BBVA was asking. Mr Couto explained that GHU had already invested approximately €30m by the end of August 2007, and that he needed funds to deal with the worsening economic climate in Spain. He also wanted to keep the costs associated with the project ring-fenced within Urvasco Ltd. There was no alternative therefore to finding an alternative lender, and the search began.

82. On 17 September 2007, IDOM reported to BBVA on the project status, stating that 24.3% of the construction works had been completed. As regards the cost, in September 2007 the budget for construction works was set by IDOM at £80.3 million (excluding consultants' fees) based on an exchange rate of €1.47 to £1. This budget (subject to a March procurement commentary) was still in place when work on site was suspended in September 2008.

Growing problems in making payments due to contractors

83. The position in the second half of 2007 was therefore that BBVA was not prepared to advance more money unless GHU committed more of its own resources, which it was not prepared to do. It is clear that this lack of funding was leading to growing problems in making payments which were due to the contractors. I accept the evidence of Mr Fernandez that such problems were manageable up to about August 2007. However by then, they were becoming acute, and he was worried about the situation.

84. A postscript to an email sent by Mr Fernandez to Mr Couto on 13 October 2007 makes his concerns clear:

> "P.S.: Please, the same Monday talk to BBVA to find out how we can expedite the matter of certifications. We owe 2.4 million pounds of due invoices (1.7 million of two certifications to Rowen, metallic structure). We have a high risk of the work being stopped, attachment proceedings being started and Urvasco Limited closing."

85. An email of 18 October 2007 from Mr Javier Davila (Project Manager and Construction Manager, IDOM) to Baker & McKenzie in respect of unpaid fees explains that "Urvasco has been delaying what we have considered less critical

payments to help fund more critical payments for site progress. Hence, your company has been affected for this delay."

86. On 24 October 2007, Mr Davila emailed Mr Esparza attaching a note from Mr Fernandez on "payment issues". This stated that Knight Build would pull off site a few days later, and that Rowen would follow. All other contractors, it was said, would start to do the same. It noted that Knight Build had threatened to issue a winding up order in respect of Urvasco Ltd. Any future delays in payment, it was said, would result in an immediate suspension of works "with all the resulting problems". That included losing "about 1 to 2 months from the programme for every payment problem".

87. I do not accept, as GHU suggests, that this was a "worst case scenario" designed to act as a warning to Urvasco as to what could happen if contractors remained unpaid. In my view, it shows the seriousness of the situation that had by then developed. In its closing submissions, GHU pointed to numerous other "outstanding sums due to contractors resulting from the inability to draw down any funds under the BBVA Credit Agreement from June to November 2007" that had not featured in the evidence at trial.

88. Mr Esparza was at this time trying to address the situation by getting BBVA to agree to a release of money from the deposit that LPS had paid in respect of the apartments against a bank guarantee. On 25 October 2007 he forwarded Mr Davila's email to BBVA expressing his "bitterness" at the bank's delay in allowing that to go through.

89. As it happened, neither Knight Build nor Rowen suspended work on site at this stage (though this was to happen the following year). Mr Fernandez said that contractors were told that Urvasco was trying to find new financing from BBVA or from other sources, as indeed was the case, and that promise doubtless helped keep them on board.

The Knight Frank valuation and report

90. In October 2007, in accordance with BBVA's June 2007 requirements, Knight Frank undertook a valuation of the development for BBVA which valued the hotel at £173m and the apartments at £71m.

91. On 5 November 2007, Knight Frank produced a building surveyor's appraisal report on the development which concluded that the projected completion date of December 2008 was achievable. Using comparable construction costs provided by the Royal Institute of Chartered Surveyors, Knight Frank undertook a review of the costs budgeted by IDOM (£80.339 million) and concluded, "We are satisfied that the development cost plan is adequately detailed, and that the costs are appropriate for a scheme of this nature."

92. At trial, Carey criticised the Knight Frank report. It was not asked, Carey says, to do a cost estimate from the ground up and did not do one. I accept that the report was limited to that extent, and Knight Frank may not have been aware of the full extent of the problems with non-payment of contractors. Nevertheless, I am satisfied that the report has evidential value as an independent contemporary assessment of IDOM's costing and the viability of its target date at that time.

Credit issues with the banks in the second half of 2007

93. In closing submissions, GHU identified communications between GU and its lenders which took place in the second half of 2007. These had not been referred to in the evidence, and there was no real analysis of them. Notwithstanding, GHU says that they show that GU was in a poor financial condition in 2007, so that the communications in the first half of 2008 which are relied on by Carey are not any evidence of a change in financial condition. It accepts that the company faced financial difficulties, but says that these were extant at the time of the Loan Agreement entered into with Carey on 21 December 2007. This in turn supports a submission that there was no material adverse *change* in the company's financial condition at the time Carey withheld lending. In my view however, the communications identified from the second half of 2007 are not as serious as those which followed in the first half of 2008. In fact, it is common ground that the position was deteriorating during that period. I deal with this issue later in this judgment.

CAREY COMES ON THE SCENE

94. Mr Couto explains that by the summer of 2007, he and Mr Anton Iraculis had contemplated selling the hotel to a third party in order to get the necessary funds to cover the construction costs. By this point, he says, Urvasco's total investment in the project was £82.3m. This was made up of the purchase price and construction costs. Approximately €38m remained to be drawn down on the BBVA Facility. They estimated that they needed €112m (including the €38m remaining of the BBVA Facility) to complete the project.

95. In the autumn of 2007, a broker arranged a meeting between Mr Couto and Mr César Losada who was the President of Losan Hotels World, S.L.. I have described the role of this company earlier. It was in the market for acquisitions, though it had not previously been involved in financing developers or investing in a hotel that had not already been built. Mr Losada was plainly enthusiastic, and saw the hotel as a potentially iconic addition to the portfolio.

96. Mr Couto first met Mr Losada in Madrid in early October 2007. He says, and I accept, that Mr Losada was fully aware that he needed to introduce further finance to complete the work. From the beginning Mr Couto made it clear that though it was to be by way of a sale, he wanted a deal which would enable him to hold on to the hotel by way of an option to repurchase.

97. On 14 November 2007, a meeting took place at the Harrington Hall Hotel in London (one of the hotels in Carey's portfolio) between Mr Couto, Mr Iraculis, Mr Emilio Guevara (GHU's lawyer), Mr Losada and Mr Garcia-Tapia to finalise the outline terms of the deal. A collaboration agreement was entered into between GHU and Carey setting out commercial terms, which were eventually contained in the transaction documents.

98. In summary, the proposed transaction involved the sale of the hotel on completion by way of the sale of the shares in Urvasco Ltd to a Carey subsidiary, with GHU then leasing back the hotel from Urvasco Ltd under a 10 year lease. At the end of seven years, GHU would have the right to re-acquire the hotel (or the shares in Urvasco Ltd)

at an option price calculated as the price paid by Carey for the hotel increased by 4.6% per annum.

99. In approximate numbers, the price payable by Carey of up to £105m was to be funded by an initial advance of £30m under a loan agreement, a further £40m by way of advances against certifications of works as the project progressed, and a final payment of £30 to £35m on completion.

100. The proposed deal was therefore something of a hybrid. Carey was to provide the lending necessary to bring the project to completion. On the other hand, it was not merely a lender. On completion, it would acquire the hotel, or more accurately the shares in Urvasco Ltd, albeit the hotel would be leased back to GHU. The rental was in effect part of the financing package. After seven years, GHU was to be given the option to re-purchase at the pre-agreed price.

101. The Collaboration Agreement envisaged a completion date for the development of 31 March 2009. As regards that date, GHU stated in its pleading that Mr Fernandez "indicated that, subject to sufficient funding being provided, the Development could potentially be completed by the end of March 2009" (Amended Response to a Request for Further Information dated 22 February 2011). Mr García-Tapia says, and I accept, that he understood that the end of March was a date by which GHU thought the development would be completed, which allowed for some slippage from the date at which GHU was aiming, which at that time was December 2008.

BBVA allows further drawdowns

102. Knight Frank's reports appeared to be sufficient for the purposes of BBVA (which was advised by Allen & Overy) to free up some of the funding. On 20 November 2007, the BBVA Credit Agreement was amended and restated to increase the facility for the apartments from £39.4m to £43.4m (in order to provide for a letter of credit which was to be issued to LPS as security for the repayment of its deposit).

103. On 22 November 2007, £3.5m of the LPS deposit was released by BBVA, £1.5m of which was transferred to GU. With the wheels thus lubricated, on 26 November 2007 Urvasco Ltd made a drawdown under the BBVA Credit Agreement of €5,400,000, of which approximately €2,248,313 was used to pay interest due to BBVA from 1 January 2007 to 31 June 2007. €1,663,000 was transferred to GU and €1,485,000 was transferred to Urvasco Ltd.

104. On 5 December 2007, further drawdowns of €1,601,051.75 and €1,798,958.25 were made, making a total of about €3.4m. (As I shall explain later, the date of these drawdowns is important to Carey's case as to when representations were deemed to be made under the material adverse change clauses.) Of the €3.4m, €2,700,018 was transferred to GU. This was for the purposes of repaying a loan owed by one of its subsidiaries, Viviendas Ciudad de Sevilla which had nothing to do with the London development. In fact, only €690,000 was transferred to Urvasco Ltd.

105. The above numbers come from GHU's submissions and are not in dispute. Carey characterises them as "examples of the Urvasco Group raiding the London Development in order to pay its most pressing needs". GHU says that the use of the

drawdowns to pay interest to BBVA and for other purposes within the group was with BBVA's knowledge and consent.

106. So far as interest was concerned, I expect that BBVA insisted to be paid out of the advance. Nevertheless, it is right to say that a substantial part of the money released by BBVA under the facility at this time was used to satisfy needs elsewhere in the group when the development itself was in need of funds. This was a trend that continued.

Carey's due diligence

107. The Carey board approved the transaction with GHU in principle on 27 November 2007. Mr Garcia-Tapia accepted that it was an attractive deal from Carey's perspective. This no doubt reflected the fact that GHU was in a weak bargaining position, since it is to be inferred that no other source of funds was available.

108. At about the same time, Gardiner & Theobald LLP ("G&T") was appointed on Carey's behalf to prepare a due diligence report and subsequently to carry out monthly monitoring of the development.

109. G&T's due diligence report was dated 18 December 2007. The firm had access to the extensive information in the disclosure bundle, and had meetings with the UST. Among other things, it noted that, "Whilst the superstructure works have been delayed, IDOM have set in motion an acceleration programme with Rowen Structures to pull back some of the delay". It stated that G&T had "reviewed the package budget allowance prepared by IDOM, dated 30 October 2007" and "… the level of construction contingency of 5.5% would seem to be sufficient for a project of this size". It stated that G&T had "carried out a benchmarking exercise in respect of the construction costs and consider this development to fall within an acceptable range".

110. Carey says that the scope of the report was based on limited documentation and a limited review. G&T had not, Carey says, been provided with important information such as the Davis Langdon cost estimate, and its comments on the development must be understood in the context of the information which they had. I did not find this convincing. Carey had a full opportunity to perform due diligence, and I see no reason to suppose that G&T did not do its job adequately.

THE AGREEMENTS ARE ENTERED INTO BETWEEN GHU AND CAREY

The meeting in Bilbao

111. From 19 to 21 December 2007, a meeting took place between GHU and Carey at the *Gran Hotel Domine* in Bilbao (one of GHU's hotels) to finalise the transaction. Both Mr Couto and Mr Losada were there, as well as Mr Fernandez, and both sides had their lawyers. On 21 December 2007, they entered into the package of agreements that is at issue in these proceedings. This consisted of the Loan Agreement, the Share Purchase Agreement (SPA), the GU Guarantee, and other security agreements including the right to a second charge and a performance bond. An Intercreditor Agreement was entered into between Carey, BBVA, Urvasco Ltd, GHU and GU governing relations between Carey and BBVA. The BBVA Credit Agreement was again amended and restated.

112. One subject of negotiation was the Long Stop Date. According to GHU's pleadings, Mr Fernandez indicated that "a realistic date for completion of the Development, allowing some scope for contingencies and on the basis that Urvasco had adequate funding, would be May or June 2009". However he said that he accepted that an earlier completion date might be achievable. In the event, a date of 30 April 2009 was agreed as being half-way between the 31 March 2009 date in the collaboration agreement and Mr Fernandez's proposed May/June 2009 date.

113. I will set out the relevant terms of the agreements when I deal with the issues to which they relate. Presently, it is sufficient to note the structure of the transaction. The Loan Agreement was governed by Spanish law, whereas the SPA was governed by English law, reflecting the underlying economics of the transaction in each case.

114. Under the Loan Agreement, Carey agreed to make available to GHU a loan in the maximum amount of the euro equivalent of £70m. The loan was to be made available in two initial tranches of the euro equivalent of £30m (the First and Second Tranches) available for draw down on 28 December 2007 and 15 January 2008 respectively, and then in Subsequent Tranches of up to £40m on a monthly basis as the development proceeded.

115. Under the terms of the SPA, GHU agreed to sell, and Carey agreed to procure that its nominee (LVA) would purchase the entire legal and beneficial ownership of all the issued shares in Urvasco Ltd (which owned the property) at the date of completion. Clause 3 of the SPA provided that the purchase price was to be between £95,000,000 and £105,000,000, with Carey entitled to set off any sums due to it under the Loan Agreement against the purchase price. (It was not in issue at trial that the relevant figure is £105,000,000.)

116. Clause 5.2 of the SPA provided that at completion GHU and Carey were obliged to do those things listed in Parts 1 to 3 of Schedule 4 to the SPA. Under those completion arrangements:

(1) GHU (or its nominated company) and Urvasco Ltd (which at that point would have been owned by Carey or its nominee, LVA) were to enter into a lease of the property in favour of GHU for a period of 10 years with an option to renew for a further period of 10 years;

(2) GHU and Carey were to enter into a Call Option Agreement under which GHU would have the right after seven years to acquire either the shares in LVA or the property, in either case for the price paid under the SPA as increased by 4.6% per annum.

117. Accordingly, whilst following completion of the development Carey had the right (and obligation) to acquire the shares in Urvasco Ltd, it was then obliged immediately to lease the hotel back to GHU, and GHU had the option to acquire the property (either directly or indirectly through LVA and Urvasco Ltd) in seven years' time.

118. Under the terms of the Guarantee, GU guaranteed the performance by GHU of its obligations under, *inter alia*, the Loan Agreement.

119. Part of the security granted in favour of Carey was an assignment of the proceeds due under the Agreement for Lease with LPS. The provision of this security amounted to financial assistance for the purchase of its own shares by Urvasco Ltd within the meaning ss 151 and 152 Companies Act 1985, and it was accordingly necessary to undertake the so-called "whitewash" procedure provided for under that Act. Carey strongly criticised GHU for the cashflow statement prepared in connection with this procedure. It is not necessary to resolve the points raised for the issues which I have to decide.

The payment of the advance

120. The original intention was that the first £30m was to be advanced at the 2007 year end. Mr Couto says, and I accept, that during the course of the negotiations he was told by Mr Losada that one of his banks had approved the deal, but was not going to give him the money until the first week of January.

121. In fact, the method by which Carey paid the £30m was a circuitous one. On 28 December 2007, it advanced a First Tranche of €8m. As regards the Second Tranche, instead of cash, it provided GHU with pagarés (a form of promissory note) issued by Caja Burgos in the sum of €33.58m. Out of that, Caja Burgos (one of Carey's shareholders) itself retained €4m to discharge debts of the Urvasco group. GHU used the balance of the instruments to secure a short term loan of €29.58m from Banco Vasconia. That bank allowed €14m to be drawn down, and the loan was repaid on 15 January 2008 when GHU received the cash payment due under the pagarés.

122. On its part, Carey funded the payment made to GHU with a bridge loan which it obtained from Caja Burgos, Caixanova and three other lenders for €23,500,000. This was repayable on 15 October 2008.

123. It is a feature of the transaction that the initial advance of £30m was not required to be used for the purposes of the development at all. Indeed GHU submits that one of the commercial purposes of the transaction from the Urvasco group's perspective was to raise this finance in order to pay other debts of the group which were due to be settled by the end of 2007. In the event, of the sum advanced, GHU only transferred €4.28m to Urvasco Ltd. This directly led to a funding gap further down the line.

124. It also gives rise to another oddity in the transaction. Although (as I have explained) Carey was set up as a fund to acquire interests in hotels, by this transaction it was providing funding for the Urvasco group generally. When I raised this point, Carey responded that whatever money was advanced under the loan agreement was going to be an offset against the price to be paid in due course under the SPA. That is correct, but is a partial answer. It is unclear to me why Carey should have been providing such a substantial amount of funding to the Urvasco group generally, rather than directing the funds to the construction of the hotel which it was buying.

Carey's press release

125. In January 2008, Carey issued a press release which shows how it presented the deal at that time:

> "The investment company Losan Hotels World, founded and run by Rioja businessman Cesar Losada (Haro 1971) has just invested €155m, to acquire the Silken Hotel in London, which will open its doors in late 2008 in the heart of the City at 366 Strand (near Covent Garden and Waterloo Bridge).
>
> It is a luxury 5-star hotel, which is currently being built according to the design of the prestigious architect Norman Foster. According to Losada, it is a 'very emblematic project', which is being erected on the site of the former Marconi House (home to the first ever radio transmission and subsequently Citibank's London headquarters), respecting its original façade.
>
> Losada expects the Silken to 'become one of the five best hotels in London' …"

THE FIRST PART OF 2008

Introduction

126. At the beginning of 2008, IDOM had been involved in the project for two and a half years, and Mr Fernandez had been managing the construction for a year. Now a third party funder had appeared on the scene, with its own monitoring surveyors, G&T. It would not be surprising if there was a degree of tension, particularly bearing in mind the difficulties the site had been experiencing, and the informal way in which the development had been conducted between Mr Fernandez and Mr Couto to date. As Mr Fernandez put it in his evidence, Mr Couto preferred to deal on the phone rather than written communication.

127. Personal relations are important to Mr Couto in his business dealings, and I have no doubt that he felt he could strike up a good working relationship with Mr Losada. However, Mr Couto's evidence was that the situation in 2008 was such that most of his attention had to be elsewhere, not least as regards the sale of the wind farm business (Urvasco Energia), which Urvasco regarded as essential in stabilising the financial position of the group.

128. Whatever Mr Couto's hope may have been of the relationship with Mr Losada, the contractual documentation (particularly the SPA) placed extensive obligations on GHU, and therefore on IDOM. This reflected the fact that whilst Carey was providing the financing, it had also agreed to acquire the hotel, albeit on a leaseback basis. In other words, it was a purchaser as well as a financier. Mr Fernandez was at the Bilbao meetings, and would have been aware of these obligations. However, he may not have fully appreciated the potential extent of the consequences of a breach.

129. Carey had appointed an architect called Ms Victoria Cortes to help it deal with the London development (she did not give evidence at trial). This was because of its unfamiliarity with a deal that involved the acquisition of a hotel in the course of being built. Mr Fernandez says that on 11 January 2008 when she visited the site, he gave her copies of the reports which had been provided to BBVA, stating that they would from now on be issuing such reports to both Carey and BBVA. He did the same as regards G&T at the beginning of February. He says that Carey did not take issue with the proposed form of the reports, and that if any complaint had been made, steps would have been taken to ensure that the reports were compliant with Schedule 3 of the SPA. I accept this evidence.

130. But whilst this may have been a reasonable reaction on his part, I am satisfied that no estoppel or waiver as to the form of the reports arises (as GHU faintly submitted). In any case, Carey says that the extent of G&T's understanding of what was happening on site was what they were being told by IDOM. Carey's case is that G&T was asking for, but not getting, the information that it needed.

131. At the beginning of 2008, a practical problem arose almost immediately, which on the face of it is surprising. Under the contractual provisions, the amount available for drawdown was to be calculated on a month by month basis. Actual drawdown would however take place two months later. Mr Couto said that he understood that the first "Subsequent Tranche", that is the amounts available for drawdown after the initial £30m, was to be paid by Carey at the end of February to cover the works done in *both* January and February.

132. An email of 8 February 2008 however shows that (despite his evidence at trial) Mr Fernandez thought at that stage that the January work was to be covered by BBVA, not Carey. In fact, as Mr Fernandez found out shortly afterwards (as appears from an email of 18 February 2008), Carey took the view that it was contractually obliged to start paying only in respect of the February works onwards.

133. Mr Couto says that he complained to Mr Losada about the problems this caused, but felt he had no alternative but to accept Mr Losada's interpretation. I am sceptical about his evidence on this point, but need make no further findings, because no breach is alleged by GHU, and it is now immaterial what the parties understood at the time. The consequence however was that the first of the Subsequent Tranches of the Carey loan was not available until *April* 2008 (in respect of the month of February).

134. It is worth noting that Carey says that even if it had been liable to pay for the January works, an email of 2 January 2008 from Mr Fernandez to Mr Esparza shows payments then pending of about £1m due to UK contractors and €3m plus VAT due to European contractors. Since they had already been incurred, these would not have been covered by a January certification, assuming the certification process was done properly.

135. Finally on the question of funding, in January 2008 there was also a drawdown under the BBVA Credit Agreement, but Urvasco Ltd used it (again no doubt at the bank's insistence) to pay the interest due under the agreement as at 31 December 2007. As already stated, of the £30m advanced by Carey over the December–January period, €4.28m was transferred to Urvasco Ltd. This is not the whole picture, however, because Mr Esparza's witness statement (paragraph 70 of which was not in dispute) shows about €5.1m paid by GHU to Urvasco Ltd on 31 December 2007 and in January 2008. (According to Carey, this is minus a transfer the other way of €380,000 on 28 January 2008 evident from Urvasco Ltd's bank statements.)

136. Looking forward however, only €110,000 was advanced in February, which is plainly a very small sum. The next significant payments were not made until the end of March 2008. By this time, as will be seen, the contractors had walked off the site. Carey calculates the unfunded gap at the beginning of April as £5.79m (or €8.28m).

January 2008

137. In January 2008, the shareholders decided to put Urvasco Energia up for sale. This cannot have been a welcome decision for Mr Couto and his colleagues, and reflected the urgent need to raise cash. The company was described at trial as one of Urvasco's "crown jewels". An article published in the Financial Times on 11 June 2008 ("After the bust, a time for adjustment") refers to the fact that, "The Basque country has developed a successful cluster of high technology companies that supply the renewable energy industry".

138. Offers were invited for Urvasco Energia from a number of prospective buyers. On 22 February 2008, an offer was received from the German company RWE in the sum of €356m, and it was decided that this offer would be pursued. A binding offer of €363.5m was made on 25 April 2008. The sale completed on 6 June 2008.

139. Meanwhile, on the London development, certificates of non-completion were issued by Urvasco Ltd to Knight Build in January 2008, stating that the company had failed to complete key aspects of its works. Though Knight Build disputed this, the evidence as a whole makes it clear that the people on the developer's side had very considerable issues with the quality of the work that Knight Build did. This becomes relevant later in relation to the west core of the hotel in particular.

140. On 16 January 2008, a meeting took place on site between the UST, Foster & Partners and Mr Couto. Carey says, and I agree, that one might have expected G&T to have been invited to attend, but they were not. However, I reject Carey's suggestion that Mr Fernandez dealt untruthfully with the matter in his evidence. There is, in my view, no justification for the allegation that the "clear implication is that Mr Fernandez did not want G&T to know the true state of the Development".

141. There is, however, a more general issue between the parties as to IDOM'S willingness to share information with G&T. I am satisfied that the root of the problem was that G&T had arrived on the development late, and at a time when the other professionals were used to working together. Whilst I accept Mr Farmiloe's evidence that IDOM was not particularly forthcoming, I also consider that, perhaps because of the limit which Carey had put on its remuneration, G&T was not as proactive in seeking information as it might have been. In fact, it did press for information particularly after 6 June 2008, but by that stage it was plain that its client Carey wanted to exit the deal.

February 2008

142. There were significant problems with a number of contractors during February. However, it is clear from the contemporary material (including an email of 8 February 2008) that the main issue was non-payment. An email which Mr Fernandez sent to Mr Couto on 18 February 2008 headed "URGENCY of Payments" speaks for itself. In the email, Mr Fernandez raises the possibility of a temporary suspension of work on the development, rather than risk the closure of Urvasco Ltd.

143. This is the second time the documents show Mr Fernandez raising the possibility of a suspension of the works, the first being the previous year. He said (in translation from the Spanish):

> "Pablo,

> It's difficult to get hold of you these days so I'm writing an email to notify you of the situation regarding the work payments and I hope you read it when you get a moment. We'd like to be able to establish a real plan of action that would allow us to handle the work in a manner causing the least legal problems for Urvasco Limited. At this moment we're a bit in the dark about how we should be acting regarding the works to be done and what to promise the contractors. It's important to all of us not to lose any days' work on the project but we also have to consider that it can be less problematic to cope with a problem of temporary suspension of work than default on payments which could lead to a possible termination of contract, suspension and closure of Urvasco limited, etc….
>
> The situation has been dragging on over the past few months and gives little confidence to the contractor[s]. It's going to be impossible for us to be able to continue working beyond this week due to all these elements. The first to stop will be the cranes and the rest will either stop soon after or stop when the cranes do as they can no longer continue with the work.
>
> For the past few weeks we have been promising that the outstanding payments would be made promptly. We thought that the BBVA payment would arrive and we gave last Friday as the realistic date of payment. However, this was not the case and no other explanation we give will be credible either, at least for the English [contractors]. During October we had already promised that the situation was the consequence of the renewal of the BBVA credit agreement and purely a temporary problem. There is now going to be a similar temporary problem and I don't see the contractors having the same patience considering the recent late payments we have been making over the past few months. With the Spanish companies we have more power of persuasion and there is less urgency but for smaller companies which we have still not paid, the situation is much more serious."

144. Though Mr Couto was inclined to minimise this email, I accept it as reflecting the very difficult state of affairs that had arisen. Something of the difficulties that he was working under was revealed by Mr Fernandez in his oral evidence, when he accepted that he had not worked on a job that had been more difficult.

145. In this email of 18 February 2008, Mr Fernandez also referred to the position as regards certifications. I set this passage out below when dealing with Carey's *forzado* case. Presently, it is sufficient to note that it is potentially significant in this context. Carey submits that it contains an "early admission by Mr Fernandez of … the improper adjustment of certifications ultimately designed to extract more money than was due from Urvasco's lenders". Whilst I do not accept that loaded way of putting it, the email does in terms show that Mr Fernandez anticipated that the certification that IDOM would issue for the February works, which (as I have explained) was the first month in respect of which Carey was obliged to pay, would include certain works carried over from the month of January. This is the foundation for an important aspect of Carey's breach of contract case.

146. On 21 February 2008, Mr Gonzalez, the IDOM package manager for the concrete works, sent Knight Build a list showing most of the works that Knight Build had to attend to from the 7th floor down. This showed that a substantial amount of work

remained to be completed or defects remedied. In relation to the west core, the document referred to an issue with "verticality", and said that Knight Build was "to produce a survey and bring it up to standards".

March 2008: suspension of works

147. In March 2008, the suspensions which Mr Fernandez had been warning about finally happened. There was first a problem with the crane operator, Select, which on 4 March 2008 wrote to Urvasco Ltd giving notice of an action for recovery of an outstanding debt of £53,221.92, and threatening to withdraw the crane drivers.

148. On 7 March 2008, Richardson (the roofing contractor) suspended work because of non-payment. The same day Mr Fernandez sent a lengthy email to Mr Couto (copied to various other people) regarding the due payments and the notifications of suspension of works. He stated that €5m was now urgently needed in order to pay contractors, not including sums due to Baker & McKenzie, B&B Italia (the interior fit-out contractor), and "delayed payments to the Spanish contractors already certified before November and unpaid". This latter point shows the extent to which payment was being delayed.

149. On 10 March 2008 (the day on which G&T undertook a site visit), Select reduced its personnel on site to one person. The same day H&B (scaffolding contractors) suspended work because of non-payment. On 13 March 2008, Select suspended work, so that there were no cranes operating. These events had an inevitable knock on effect. The following day Knight Build reduced resources on site because of a lack of crane drivers. On 17 March 2008, Rowen demobilised its erection crew, complaining of overdue invoices amounting to £1,049,677.69.

150. This was clearly a serious situation, and Carey complains that it was not informed of it, and that this was a default. Effectively, the work on the structure of the building had ceased. As set out in Carey's closing submissions, Mr Fernandez was being bombarded with demands. He nevertheless said that he saw some grounds for hope that things might improve. His evidence in cross-examination was that the effect of these suspensions was that although the structural works could not be progressed, work could continue in other areas.

151. His email of 7 March 2008 concluded that, "I hope that within one month we'll be able to clear up a good part of the uncertainties impeding our progress and regain the scheduled work momentum." In re-examination, he said that, "I thought that we could recover very quickly the levels of work that were normal. And in fact in May, it was a record month of work on the site with the participation of about 150 people that practically doubled what has been achieved in March and April, doubled in terms of staff." Thus he maintains that it was possible to catch up. That however must be subject to the various outstanding issues that were holding things up, including non-payments, being resolved.

152. The position of the demolition contractor Cantillon may also be mentioned, though it no longer had the capacity to cause delay. An adjudication decision dated 28 November 2007 had found that Urvasco Ltd was liable to pay it £391,565.60 plus a portion of fees. Court proceedings were commenced by claim form issued by Cantillon on 10 January 2008. On 20 March 2008, Cantillon served a statutory

demand on Urvasco Ltd in respect of a court order dated 29 February 2008. The statutory demand was presumably the precursor of winding up proceedings. Again, Carey complains that it was not informed of this, and that this was a default. In fact however, the sums due to Cantillon were paid shortly afterwards on 31 March 2008 and 3 April 2008.

153. At this point, some money now materialised. On 28 March 2008, GU finalised two short term €10m loans from Banco Vasconia secured against the offer made by RWE for Urvasco Energia and against personal guarantees from among others Mr Couto. It is quite revealing that personal guarantees were required, and that Mr Couto was prepared to give one. At all events, €1.9m of these funds was transferred to Urvasco Ltd so that it could make outstanding payments due to its contractors and suppliers.

Carey requests financial information

154. At this time, Carey was itself negotiating with various banks to obtain long term debt financing for the project, to replace the bridging loan already in place. According to Mr Garcia-Tapia the process started in about February 2008. Carey's case is that it wanted financing because "leveraging was a means of increasing the return to its shareholders, and had nothing to do with the financial position of the fund". Mr Garcia-Tapia explained that Carey usually leveraged its transactions with between 60% to 75% debt. I accept that leverage was part of its business model, but I am satisfied that Carey needed to finance the advances which it was obliged to make to GHU under the Loan Agreement and the SPA. These obligations could only be met in part out of shareholder funds.

155. On 7 March 2008, Mr Garcia-Tapia sent an email to Mr Emilio Iraculis requesting financial information for GU and GHU to 31 December 2007. On 15 March 2008, Mr Garcia-Tapia emailed again chasing this information saying: "it is necessary to get this to contract our financing of the project and we are very short of time".

156. GU and GHU had no contractual obligation to provide this information, but were prepared to do so. This has given rise to a peripheral dispute on the facts. GHU says that the information was not yet available as the accounts were still in the process of being prepared and audited. The audited accounts were subsequently provided to Carey under cover of GHU's letter of 21 July 2008 as soon as they were ready.

157. Carey suggests that Urvaso was dragging its feet, and that the reason for not providing draft accounts earlier was that they would have confirmed the financial problems of the Urvasco group. This was the subject of evidence from Mr Emilio Iraculis, managing director of GU since May 2007. He is the nephew of Mr Anton Iraculis, the President of GU. Until 2007, he was a consultant cardiologist in Barcelona. Carey submits that he was "not a reliable witness" and had a "willingness to conceal important details if it suited GHU's purpose". I reject this submission. In my view, he was a patently honest witness, though it is correct that he lacked business experience, and he certainly came into the company at a difficult time. I accept the explanation which he gave.

Certification for the February works and payment of the first Subsequent Tranche

158. On 11 March 2008, the Employer's Agent Report for the February works was issued by IDOM certifying the sum of £3,263,058.17. The estimated completion date for the works in the report was 24 December 2008. The report was sent to G&T the same day. On 12 March 2008 LTP revision 16 was issued by the UST with a target date for completion of the development of December 2008. As this revision of the LTP did not involve a change to the target date for completion, Mr Fernandez was able to issue it immediately without waiting for Urvasco's approval. It was provided to G&T on 12 March 2008 together with the March "procurement commentary".

159. On 19 March 2008, G&T issued its Monitoring Report for the February works, mentioning in the covering email from Mr Giles Dickey-Collas of G&T to Mr Garcia-Tapia that "the information flow to us has been somewhat slow". According to the email, "the main conclusion of our report is that the project is on programme". The report did not refer to any of the suspensions of work which occurred in March 2008.

160. The same day G&T provided the Project Certificate for the February works to Mr Fernandez. The sum certified was £2,538,058.17 being the amount stated in IDOM's Employer's Agent Report less deductions for a general contingency provision of £300,000 and £425,000 in respect of the acceleration bonus which had been paid to Knight Build the previous year. On 21 March 2008, Mr Fernandez emailed Mr Garcia-Tapia submitting the Project Certificate and requesting drawdown of the funds.

161. On 2 April 2008, the first Subsequent Tranche of €4,106,798.62 (for the February works) was advanced by Carey to GHU. The amount paid added back the Knight Build acceleration bonus which had been deducted. There is an issue which I deal with below as to whether this payment was late.

162. Carey says that of the €4,106,798.62 received, GHU transferred a total of €2,311,625 to Urvasco Ltd between 3 and 8 April 2008. Thus, on Carey's case, GHU used some €1,795,173 for other purposes. It identifies from GHU's disclosure (a) €668,000 transferred to two other companies in the Group (Hotel Diagonal and GU); (b) €219,000 transferred to Urvasco Hotels Deutschland; and (c) €183,693.06 transferred back to Carey in payment of interest due under the Loan Agreement. However, this has to be seen against the fact that GHU had transferred €1.9m from the Vasconia loan just before. As I explain later in this judgment, the substance of the position was that the Carey money was advanced in full to Urvasco Ltd.

Work restarts

163. Given the money that had come available, payments could be made and work on the development resumed. In summary, on 1 April 2008 Select re-started works, and on 7 April 2008, Richardson re-started works. H&B returned to site, on 14 April 2008 Rowen re-started works, and on 21 April 2008 Knight Build re-started works.

164. However, I accept Carey's submission that significant problems remained. In summary, these were that the BDSP Partnership (mechanical and electrical service engineers) had not provided revised layouts taking account of the reduction in the number of apartments that had been agreed in October 2007. This would, I accept, have a knock on effect on internal fit out, electrical and mechanical work. The problem as regards Knight Build's work on the west core had not been acted upon,

and this would have an affect on cladding and glazing. DMP Design (the contractor responsible for the design of plasterboard drawings) were not progressing their design works. Despite having restarted, Richardson made a further threat to suspend work on 14 April 2008.

165. Payments clearly remained an issue. On 7 April 2008, Mr Fernandez sent Mr Anton Iraculis Ruiz (an accountant with GHU) a list of payments to be made that day divided into columns headed "very very urgent", "very urgent" and "urgent". He said in cross-examination that he "tried to prioritise the payments so that the things could keep moving forwards", though it was Urvasco Ltd which gave the payment instructions.

166. As regards completion, on 7 April 2008, EI-WHS Ltd (electrical contractor) issued a Progress Report which included a progress summary estimating a delay to their works of 16 weeks. According to Ms Maria Aspiroz (who was IDOM's designer responsible for mechanical and electrical services and lifts), she knew that Mr Miguel Utrilla (IDOM's programme manager on the Urvasco Site Team) was looking at how to accommodate the recent delays which had occurred following the suspension of works by Select and other contractors in March. The position as regards EI-WHS Ltd continues to feature in the evidence, but I accept what Ms Aspiroz says as to what the position was at this time.

Certification for the March works and payment of the second Subsequent Tranche

167. On 14 April 2008, Mr Tony Farmiloe, Mr Giles Dickey-Collas, and Mr Monti Molefe of G&T undertook their monthly site visit (the latter two people did not give evidence at trial). Mr Farmiloe said in his evidence that when engaged as monitoring surveyors G&T had sought payment from Carey on an hourly rate, but in the event Carey had contracted on the basis of a fixed monthly sum. The following day Mr César Losada and Mr Garcia-Tapia also visited the site.

168. The same day as their visit, the Employer's Agent Report for the March works was produced by IDOM to G&T, which as revised on 21 April 2008, certified a sum for the March works of £2,808,317.53. This Report (Carey accepts) included more information than had been included in the February one, including a list of the main contract variations which had occurred during March 2008 and details of the current status of Urvasco Ltd's contract tendering process.

169. The Works Progress document at Appendix 4 showed that the target completion date remained 24 December 2008. It noted however this was "to be reviewed", which Mr Fernandez says was as a result of the delays which occurred during the suspension of the works in March. Carey says that given the suspensions that had occurred, it was obviously unrealistic and wrong. However, in my view it was factually correct to state that the date was "to be reviewed", which happened soon afterwards as described below.

170. On 23 April 2008, G&T produced its Monitoring Report for the March works. This included a valuation by G&T for the works for March of £2,403,317.54. According to Mr Farmiloe, by this stage he was of the view that the 24 December 2008 target date was "in jeopardy". This was based on the lack of progress on the 9th and 10th floors, which had been evident at G&T's site walkabout and confirmed in IDOM's

short term programme attached to the Employer's Agent Report. G&T asked IDOM to provide a revised long term programme in time for its next report. This and other issues were raised in the report.

171. On 28 April 2008, Mr Fernandez asked Mr Molefe of G&T when IDOM would receive G&T's report so they could apply to Carey for payment. Mr Molefe said that the report could only be released to IDOM with Carey's permission, and told him he needed to contact Carey regarding payment, which Mr Fernandez did. On 29 April 2008, G&T issued the Certificate for the March works in the sum of £2,483,317.54. Mr Fernandez then sent an email to Mr Garcia-Tapia requesting payment.

172. The second Subsequent Tranche in the sum of €3,441,880.59 was advanced by Carey to GHU on 5 May 2008. GHU says that this payment was again made late, as it should have been made on 25 April 2008. (As explained below, I do not accept this.) Of the monies received, GHU transferred a total of €3,008,000 to Urvasco Ltd on 6 and 7 May 2008 (which was some €433,880 less than Carey had advanced).

The target date moves

173. In April, the UST updated the Long Term Programme for the development works. On 23 April 2008 LTP revision 17 was produced in draft with a target date for the completion of the works changed from 24 December 2008 to 27 January 2009. On 30 April 2008 LTP revision 18 was produced in draft showing a target date for completion of 20 March 2009. This change came too late for the March Employer's Agent Report described above.

174. It was not used in the Employer's Agent Report for the April works either on the basis, GHU says, that it needed to be checked with Urvasco and the contractors. For similar reasons, GHU says that LTPs revisions 17 and 18 remained in draft and were not issued pending Urvasco's agreement to the change in the target date. They were not provided to G&T, which Carey says was in breach of the contractual provisions.

175. As a matter of fact, however, by 22 May 2008 Mr Farmiloe knew that the works were not on target for completion by 24 December 2008 because IDOM had told him. He informed Mr Garcia-Tapia of the position when emailing him G&T's Monitoring Report for the April works.

176. It is convenient to note here that LTP revision 19 was subsequently issued on 30 June 2008, and was the first Long Term Programme issued to Carey showing a revised target completion date of 20 March 2009.

177. The evidence was that in around March or April 2008 Mr Fernandez also formed the view that the September 2007 budget for the construction works of £80.3m was unlikely to be sufficient and that an increase in the budget in the region of £10m would likely be required. This cannot have been welcome news to Mr Couto, who requested that work be done with Foster & Partners to try and reduce the budget. It was discussed internally and meetings were held with Foster & Partners, but no revised budget was finalised or approved by Urvasco.

Carey continues to seek to finance its obligations to GHU

178. An important part of GHU's case is its contention that in deciding to withhold the April Tranche, Carey was influenced by the fact that it had not been able to raise the finance it needed to cover its loan commitment to GHU. Subsequently, it says, Carey has sought to justify its conduct by reference to an ever increasing range of alleged defaults which it now says were subsisting as at 6 June 2008.

179. It is not in dispute that Carey was seeking long term finance to replace the existing short term arrangements. On 7 May 2008, Mr García-Tapia told Mr Esparza that Mr Couto had guaranteed that he would receive the GHU and GU annual accounts on 5 or 6 May, but these had still not been received, and they were "absolutely essential".

180. Among other banks, Carey was at that time in discussions with BBVA. Mr García-Tapia said that BBVA was "the natural financer" because as primary lender, it already had a first ranking charge on the site and knew the project. In April 2008 a presentation was prepared for this purpose.

181. On 8 May 2008, Mr García-Tapia emailed a Mr Alonso of BBVA, saying (in translation from the Spanish) that following on from their last conversation, he was "concerned about the financing transaction of the London project" (that is, between Carey and BBVA) "not going ahead not because of its criteria but because of the lack of clarity of the project's structure".

182. He went on to say (clearly in an effort to reassure Mr Alonso) that:

> "The project is moving forward very positively and the pending construction risk is decreasing. From Losan's experience in similar projects, once the structure is completed (which it now is) in the case of having to finish the Losan-BBVA work there will be no problem."

183. His evidence in cross-examination on this passage was not very clear. Asked whether what he had told BBVA was true, he said that, "Apparently it wasn't moving that positively from what we heard from Gardiner & Theobald". It was put to him that if he had thought at this stage (8 May 2008) that the development might not be completed by the Long Stop Date, he could not truthfully have commented to BBVA as he did. Carey submits that in his answers he honestly acknowledged that he had exaggerated to BBVA the progress being made.

184. He said in cross-examination that Carey had "mild concerns about the progress on site and the ability to meet the long stop date". However, at this date they did not have "sufficient information" to say that it was not going to be met. Carey's case is that this was because, in breach of contract, it had not been told by GHU or the UST about the very serious delays and other problems on the development.

185. Mr García-Tapia's explanation of the fact that a deal was not reached between BBVA and Carey was because the debt-equity ratio available from BBVA was too low. Carey wished to fund 80% of the investment with debt and the rest with equity, particularly given the valuation from Knight Frank which estimated the hotel element alone to be worth £173 million which was significantly more than the £100 million which Carey would be investing.

186. As to Carey's ability to raise the required finance, Mr García-Tapia said that he was "concerned", but not "genuinely concerned":

> "Well, we were looking for financing in the market with different banks, and I was concerned, like in every single deal that we did, there is a concern, the markets were getting a little bit complicated by then, so I was concerned, but I don't think I was genuinely concerned. We had conversations with many banks open, I don't know if at that time or a prior time we got offers for financing this. We were just starting here with the financing actively, okay."

187. I agree with GHU that a fair reading of this evidence is that Carey was starting to have concerns about its ability to raise finance at this point. (Mr Losada was apparently also pursuing projects in the United States, but Board minutes from a meeting on 16 June 2008 suggest that the priority was funding on the London project.)

188. On 9 May 2008, Mr Emilio Iraculis sent the draft 2007 individual (i.e. unconsolidated) accounts for GU and GHU to Mr Garcia-Tapia. Mr Garcia-Tapia responded by email on 13 May 2008 saying that "we need the GU and GHU draft consolidated accounts as soon as possible".

189. On 27 May 2008, Mr Garcia-Tapia sent an email to Mr Iraculis again pressing for the consolidated accounts, stating that these were "absolutely vital for our financing and even more so after what has been published in the press regarding Urvasco". This was a reference to the articles which were appearing at this time. He continued:

> "I have spoken with Pablo Couto about this matter and the relationship between Urvasco and Losan is very healthy meaning that when you need to tell us anything you speak to us in a direct way. Given this, I can guarantee that this type of news, although not released by Urvasco itself and not official, can raise all sorts of doubts amongst financial institutions and the best way to resolve this is to provide the information required.
>
> We hope to receive the documentation as soon as possible."

Mr Garcia-Tapia said in his oral evidence that he spoke frequently to Mr Couto at this time. In fact, further accounts were sent by Mr Iraculis on 2 June 2008.

190. Meanwhile, on 30 May 2008, Mr Borja del Riego who was employed by Carey as a financing manager (he did not give evidence at trial) emailed the German bank Hypo International which was one of the potential funders stating:

> "Losan Hotels World is building a five star hotel in the Marconi building located at Strand 336.
>
> Considering its location and innovative design (by Norman Foster & Partners) we think it will become one of the three or four best hotels in the City once we open it by the end of the first quarter or spring 2009 ...
>
> We're looking for a bridge loan during construction period (until Q2-09) and a 7 year senior loan with first rank mortgage."

An opening “by the end of the first quarter or spring 2009” as this email contemplates would be within the contractual Long Stop Date agreed with GHU of 30 April 2009.

191. In cross-examination, Mr Garcia-Tapia said that, contrary to what was stated in this and other documents provided by Carey to potential lenders, by late May 2008 Carey in fact had “very serious concerns” that completion by the Long Stop Date was not feasible, and that G&T had said that the Long Stop Date was in jeopardy. As to what the banks were being told, he said, “We were not going to put too much stones to ourselves in the way of obtaining a financing”. In other words, “we couldn’t jeopardise our financing by telling them” that is, potential lenders, “exactly what was the situation of the project”.

192. In its closing submissions, Carey says that it should be remembered that at this date it did not have the information about the state of the development which has now been provided by GHU in disclosure—its case is that there were serious breaches of GHU’s obligations under the SPA in not providing important information at the time.

193. However, it is to be noted that Mr Riego was telling Deutsche Bank as late as 23 July 2008 that, “all the info we have from Urvasco as well as from Gardiner & Theobald (project monitor) tells that the work advance is as forecasted”.

194. GHU submits, and I accept, that there are reasons to doubt Mr Garcia-Tapia’s evidence about Carey having “very serious concerns” in May/early June about the Long Stop Date, and about G&T having said this. There is no evidence of it in the contemporary documents. It is not suggested that G&T asked to speak to Mr Utrilla (the UST's programmer) which it surely would have done if it had really been concerned about the progress of the development works. In fact, Mr Farmiloe’s evidence was that G&T had no evidence to be able to say to Carey that it did not think that the Long Stop Date would be met, and that at mid-May G&T did not in fact think that the ability to complete by the Long Stop Date was impacted. That appears to me to be conclusive.

195. The Long Stop Date was an issue raised in Carey’s 9 June 2008 letter withholding the next tranche. But as Carey accepts, this was in the context of GHU’s financial condition and its ability to fund the construction to completion. The Long Stop Date is of course different from the target for completion, which was moving back at this time.

Certification for the April works

196. A number of points are identified by Carey in the context of delay as at May 2008 in its closing submissions. I deal further with these later. They include issues raised by Richardson which advised that its works remained suspended (Richardson was also in dispute with Urvasco Ltd about its terms and conditions), a small claim by New Haden Pumps Ltd (paid by Urvasco on 19 May 2008), and a letter from A & T Partners dated 8 May 2008.

197. A & T were the mechanical contractors, and was a joint venture between two Spanish companies, Agefred and Teice. They were responsible for mechanical installation works and co-ordinating the mechanical and electrical services. The letter of 8 May 2008 says that A&T estimated completion of its works in June 2009 (this is not

accepted by GHU). On 21 May 2008, EI –WHS Ltd (electrical contractors) advised Mr Utrilla of IDOM that they were currently forecasting a sixteen week delay.

198. On 18 May 2008 the Employer's Agent Report for the April works was produced by IDOM. The sum certified was £3,164,543.59. The estimated completion date for the works stated in the report was 24 December 2008 but again subject to the caveat that this was "to be reviewed". The works progress document maintained the budget at £80 million. On 19 May 2008 the Employer's Agent Report was sent to G&T.

199. On 19 May 2008, G&T undertook its monthly site visit. During this visit, Mr Fernandez says (and I accept) that Mr Karl Zadeh (who was Commercial Manager of the Urvasco Site Team) informed G&T that the estimated completion date of 24 December 2008 was no longer feasible. (Mr Zadeh did not give evidence at trial.) There were then some exchanges between Mr Molefe of G&T and Mr Fernandez some of which related to increases in budgeted figures for certain items.

200. On 22 May 2008, Mr Farmiloe of G&T emailed G&T's third Monitoring Report to Mr Garcia-Tapia. In his email Mr Farmiloe said that the main conclusion of the report was that:

> "… the project is behind programme and IDOM have verbally accepted that they are not on target for completion by 24th December 2008. In-line with this the valuation has dropped below their forecast cash flow."

201. On 23 May 2008, Mr Molefe forwarded three different project certificates for the April works to his colleagues in G&T with instructions to them to release the certificate which Carey indicated it was prepared to pay.

202. On 26 May 2008 Mr Garcia-Tapia provided G&T with some comments on the valuation relating to the deduction of amounts relating to contingencies, retentions and materials held off-site. GHU points out that there was no comment or question from him regarding the ability to complete the development by the Long Stop Date. On 27 May 2008 Mr Fernandez sent chasing emails.

203. On 3 June 2008, Mr Molefe sent G&T's Monitoring Report for the April works to Mr Fernandez and Mr Garcia-Tapia including the Project Certificate. In it, G&T valued the works for April at £2,258,784.70. This was a reduction of £905,758.89 from the sum in the Employer's Agent Report. The deductions related to contingencies (£325,000), Dolce Stone materials (£158,027.82) and a 5% retention on all Subsequent Tranches (£422,731.05).

204. GHU says that there was no basis for deducting the 5% retention since the fact that Urvasco was entitled to withhold a retention from a contractor did not mean that the works in respect of which the retention was being applied had not been carried out. This had not previously been raised as an issue in relation to the earlier tranches. I need not resolve this issue, because GHU accepted Carey's position for the purposes of the April Tranche in order to progress matters.

205. In his covering email of 3 June 2008, Mr Molefe asked to see a number of documents for incorporation in G&T's next report, including "Proof of payment to contractors and consultants". As I shall describe later, this raises an issue between the parties. As

would soon transpire, the 3 June 2008 certificate issued by G&T was not going to be paid by Carey at all.

The closing of the Urvasco Energia sale and the Numerus Clausus transaction

206. It is convenient at this point to deal with two aspects of the chronological account which occupied some time at trial. The salient facts were substantially not in dispute. As explained above, having put Urvasco Energia on the market in January, a binding offer was received from RWE in April, and the sale completed at a price of €363.5m on 6 June 2008. The date is significant, because it is the date when the Subsequent Tranche in respect of the April works was due from Carey, and just before Carey's letter of 9 June 2008 withholding it. The sale of Urvasco Energia is relevant to Carey's claim that a material adverse change in the financial condition of relevant companies in the Urvaso group is established as at this point in time.

207. One matter can be dealt with at this point relatively briefly. For reasons explained elsewhere, I am satisfied that the pending sale had been used over the preceding months by the group (particularly Mr Esparza who had responsibility for dealing with the group's banks) to provide reassurance that the banks would be paid.

208. A considerable complicating factor arose from the fact that since February 2007, Ms Maria Carmen Hernandez (known as Maricar), who was one of the GU's two main shareholders (the other being Mr Anton Iraculis), had been negotiating to sell her stake in the business. Given the financial pressure that was building on the group, this was (to say the least) badly timed.

209. The difficulties in the negotiations are illustrated by the fact that in May 2008, obviously in an attempt to put pressure on Mr Iraculis, Ms Hernandez sought to block the sale of Urvaco Energia by refusing her consent. She also threatened to place GU into court administration, a process known as a *concurso de acreedores*, which is similar to voluntary liquidation in English procedure.

210. In late May 2008, agreement was reached with Ms Hernandez whereby her shares would be acquired for a price of €79.6m. To implement the purchase, a new company called Numerus Clausus SL was set up by Mr Iraculis, which was in effect a new holding company for GU. The shares were held 45% by Anton Iraculis, 45% by his wife, the remaining 10% being divided between Mr Couto, Mr Esparza, Mr Jesus Esparza (Mr Esparza's uncle) and a company called RCM S.L. It appears that the payment to Ms Hernandez mainly came from Mr Iraculis and his wife, and from Mr Couto and Mr Esparza. As to the rest, GHU says that part came from a dividend of €17.5m declared by GU to Numerus Clausus which was paid from the proceeds of the sale of Urvasco Energia. The balance was provided by a bank loan of €22.5m from a syndicate of Spanish banks which were lenders to the group.

211. The Numerus Clausus transaction is part of the background, and no more than that in my view. I do not accept GHU's submission that the substantial investment by GU's shareholders and management is inconsistent with a belief that the financial position of GU at this time was poor, or that the syndicated loan was inconsistent with the banks concerned thinking that the group was in a poor state. Nor do I think that there is much force in Carey's submission that since the purchase price for the 50% interest was €79,615,527.57, this implies a value for 100% of GU as approximately €159m,

and when taken with the cash gain from its share of Urvasco Energia, the construction and hotel divisions had little or no residual value. The answer to these submissions, in my view, is that the deal was conducted in abnormal circumstances, and driven by necessity, probably on both sides. It is to be noted that only €55m was paid at the time, the rest of the money being paid in 2009 and 2011.

212. As regards the use of the sale proceeds of Urvasco Energia, Mr Esparza explained that after paying off mortgages relating to the wind farms, repaying a debt of €14.3m, and placing €17.5m into escrow against contingencies, net proceeds of €135.9m were received by GU for its 70% stake. From these funds, the Banco Vasconia short term loans of €20m mentioned above were repaid. That left a net sum of €115,619,000. Bank statements confirmed that on 9 June 2008 that sum was transferred from GU's Banco Vasconia account to GHU's Banco Vasconia account. As Mr Esparza explained, it then went to service various debts.

213. Mr Esparza said that all the €135.9m was used to settle payments due on the debt obligations of the Urvasco group. Among other things, €3,942,208 was paid to BBVA in respect of amortisation and interest due under lending to Vizcaina de Edificaciones (one of the group's construction companies). However, Carey points out correctly that he did not mention the fact that part of the proceeds from the sale of Urvasco Energia were used to fund the buy-out of Ms Hernandez's shareholding in GU.

214. It had been originally intended (according to Mr Esparza) that the transfer would be by way of loan from GU to GHU, but on the basis of tax advice from their lawyers, Garrigues, it was decided to increase GHU's capital by €150m through a conversion of its debt to GU.

CAREY SUSPENDS PAYMENT

The days before the decision

215. In late May 2008 a number of press articles appeared on the financial condition of the Urvasco Group. Four have been in evidence, and all appear to have been published on the internet.

216. On 23 May 2008 there was an article on a website called "deia.com" which referred to the construction company Vizcaina de Edificaciones negotiating a refinancing deal "to avert the crisis". It also made reference to the general situation, saying that insolvencies in the development sector were going to become "increasingly common". It further referred to Vizcaina selling land in Bilbao, which Mr Couto said in his evidence related to a sale to a bank called Banesto.

217. On 24 May 2008 an article appeared on "Cyber Euskadi", which GHU refers to as "a small internet newspaper", headed "Grupo Urvasco struggles to avoid receivership".

218. Also on 24 May 2008 an article appeared on "El Correo.com" (a newspaper from the Basque country) headlined "The Urvasco Group asks the banks for help to avoid its collapse". This made reference to an "emergency plan" having been put into motion.

219. Finally, on 28 May 2008 an article appeared in a local Seville newspaper "El Correo de Andalucia" headlined "The developer Urvasco seeks bank facilities to pay its debts". It said that the company had "requested to renegotiate its debt and has started to sell assets in an effort to gain liquidity".

220. Carey submitted that, "Both Mr Couto and Mr Esparza claimed the articles were inaccurate, but the Court is invited to conclude they were substantially correct. They are important corroborative evidence, and evidence in their own right, of the serious deterioration in the Group's financial condition by June 2008 and of the Group's negotiations with its creditors for the rescheduling of indebtedness …".

221. However, for reasons given later in this judgment, in my view articles of this kind appearing on the internet (or in print) are not reliable evidence of the underlying facts relating to a company's financial condition which are the subject of the article. Having said that, the articles have a place in the evidence, because they were seen by Carey, and influenced its actions.

222. Mr Garcia-Tapia referred to the press reports in his email of 27 May 2008 referred to above. There was also reference to press articles about the group's weak financial position in a report which Carey obtained from Informa (a credit reporting agency) on 4 June 2008. It is reasonable to infer that any lender would have been concerned to read such reports which, true or not, painted a worrying picture of the group's financial position.

223. In fact, the evidence is that Mr Losada was himself approached by the press to try to get information out of him. On 26 May 2008 he copied Mr Garcia-Tapia with a request he had received from a journalist from El Economista (a national newspaper in Spain specialising in finance and the economy). According to the email, she told him that she had heard Grupo Urvasco was "hanging by a thread", that it was "re-negotiating with banks in order to avoid suspension of payments", and that it owned 18 hotels managed by Silken and "might need to sell any of those properties in order to get liquidity". She asked Mr Losada whether he knew if the company had anything on sale. As Mr Losada put it to Mr Garcia-Tapia, "We will face trouble unless we speed up the financing process". He was clearly referring to Carey's own efforts to find financing for its commitments under the Loan Agreement with GHU.

224. Further evidence of the fragile perception of the company in the media at this time appears from how the sale of Urvasco Energia was handled by McCann (the PR company) at this time. McCann commented:

> "Much noise is being made by the economic journalists from the Basque Country about a supposedly delicate financial situation of Urvasco: articles in El Correo and Deja, investigations of El Pais, and worse than that, all the supposed data that Cinco Dias have.
>
> In this context, the transaction involving Urvasco Energia can be easily interpreted as a confirmation of the existence of financial problems, understood as a sale to get cash to allow payment of the tranches of your debt."

Although Mr Couto did not accept this, the group was clearly concerned to avoid the sale being interpreted as economic weakness.

225. Evidence of the effect that this was having within Carey came from Mr Farmiloe of G&T, who said that on 3 June 2008, Mr García-Tapia told him during a telephone conversation that he had discovered that Urvasco Ltd was in financial difficulties.

226. It was also on 3 June 2008 that Mr Emilio Iraculis sent Mr Garcia–Tapia an email enclosing balance sheets for the development companies, draft GHU 2007 consolidated accounts, and individual GHU 2007 accounts. He explained that the consolidated accounts for GU were not yet available, but sent aggregated accounts. Carey criticised him in this regard, since the auditors had signed off on the accounts on 31 March 2008, and in any case draft accounts could have been sent. This showed, Carey submitted, that he was reluctant to provide the information because it would raise further concerns about the financial health of the Urvasco Group. However, on balance, I accept the explanation given by Mr Iraculis, which had to do with the fact that fact that the accounts were not finalised because the Urvasco Energia transaction had not formally closed.

The decision to suspend

227. GHU raised a point on disclosure by Carey. I understand that documents were retained by the Spanish authorities in connection with the investigation of Mr Losada, and that a substantial volume of disclosure was given by Carey in September 2012, so very shortly before trial. Some potentially significant documents are still missing, including minutes of two board meetings. I agree with GHU that it is not clear that the court has been provided with the full picture as to the internal deliberations which were taking place in Carey over the relevant period, and as to the communications which were taking place with other parties (e.g. as Carey sought to obtain finance).

228. It is however clear that the information provided to Carey by Mr Emilio Iraculis on 3 June 2008 did not give it reassurance—quite the reverse, as appears from an internal Carey document prepared by Mr del Riego on about 4 June 2008.

> "Based on the financial information on Urvasco in our possession and on all the rumours going around, it seems highly unlikely that the latter will be able to pay the final 30 million pounds necessary to finish the works once Losan has paid out the 70 million pounds to the parties to which it has obligations under the terms of the contract".

229. The document identified two alternative possible courses of action open to Carey. The first was to continue to make advances to GHU under the Loan Agreement. The second was to stop making further advances. On this scenario, Carey would seek to take over the development and finance its completion itself.

230. GHU relies heavily on this document, because it says that it exposes Carey's approach throughout. This is not a case where Carey believed it could establish that default had actually arisen when it refused to pay the April tranche due on 6 June 2008. Instead, it is a case where Carey was motivated only by what it perceived to be its financial interests, irrespective of the contractual rights or wrongs vis-a-vis GU and GHU. It decided on that basis to adopt alternative two, and thereby pull the plug on the investment.

231. In his witness statement, Mr Garcia-Tapia gave a terse account of the decision to suspend payment, which he says was taken on about 4 June 2008:

> "César Losada and I discussed the position in light of the financial information which the Urvasco group had belatedly provided, the press reports, the worsening real estate market position in Spain and the report from Gardiner & Theobald, all of which left us very concerned about the Urvasco group's deteriorating financial health and its ability to complete the Development on time, if at all. It looked to us from the information which we had available as though it was highly probable that a default had arisen under the contracts we signed in December 2007 and that if Carey continued to pay monies to GHU, the fund would increase its exposure and there was no comfort that those monies would be used for the purposes of the Development. As it was, the Carey fund already had about €50 million at risk. Rather than risk more of the fund's monies, we decided on about 4 June 2008 not to pay the April tranche at this stage until GHU had satisfied us in respect of the issues raised by the accounts, the press and Gardiner & Theobald. We informed the LHW Board of the position and that decision, which they supported."

232. Although Mr Garcia-Tapia says here that "it was highly probable that a default had arisen under the contracts", Mr del Riego's contemporary note of the same day talked of the necessity of carrying out a "thorough examination of the terms of the contract signed with Urvasco" if Carey was to stop making advances. In fact, at some time prior to 9 June 2008, Mr Garcia-Tapia came to see Carey's London lawyers. I infer that this was to take advice as to Carey's position, and to draft the letter that was sent on that date. Board minutes from a meeting on 16 June 2008 express a concern on the part of Board members that it was Carey that might find itself in default.

233. Nonetheless, though not accepting all the details, I am satisfied from his evidence and the evidence as a whole that Mr Garcia-Tapia and Mr Losada were indeed concerned about the Urvasco group's deteriorating financial health. In my view, they had reason to be concerned.

234. More generally however, I accept GHU's submission that Carey (and at this time that meant primarily Mr Losada personally) changed its mind about the deal with Urvasco. In an internal G&T email of 13 June 2008, Mr Molefe says that "in a nutshell Losan wants to pull the plug on the job". The email goes on to set out the reasons, which are stated primarily as concerning the financial deterioration of the Urvasco group.

235. But I am also satisfied that the group's financial condition was not the only reason why it decided to pull out. In view of the evidence as to Carey's search for a funder, I find that a significant further reason for its decision to withhold the tranche due on 6 June 2008 was the fact that it was having difficulties in raising its own financing for the investment.

The letter of 9 June 2008

236. As I have said, Mr Garcia-Tapia says that the decision to suspend payment was taken on about 4 June 2008. There were discussions between Mr Couto and Mr Losada round about this time about the group's financial condition. However, I am satisfied

that there was no prior discussion about any suspension, or any prior notice that the advance would not be made. Effectively, the money due just did not turn up.

237. A letter seeking to justify its position was sent by Carey on 9 June 2008. GHU had no advance notice of this letter either. Carey invites me to reject Mr Couto's evidence that he was astonished and upset to receive it. But I accept his evidence. A very unsatisfactory feature of Carey's handling of the situation was that no attempt was made to discuss the matter with Mr Couto first. It was a very unsatisfactory situation generally. Of the initial disbursement under the loan, most had gone for purposes other than the development. Of the subsequent monthly tranches due, only two were ever advanced. The Loan Agreement now effectively in suspension had only been signed some five and a half months before.

238. The letter of 9 June 2008 sent to GHU said that information had come to the attention of Carey which indicated a substantial deterioration in the financial condition and prospects of GHU, Urvasco Ltd and GU since the SPA and the Loan Agreement were signed. As GHU points out, this assertion was based on a comparison of the position as at 31 December 2006 with that as at 31 December 2007 as shown in the draft GHU 2007 consolidated accounts, which for "material adverse change" purposes was a year early.

239. Notwithstanding, the letter said that there was significant doubt as to the ability of GHU, even after a full drawdown under the BBVA facility and the Loan Agreement, to fund the balance of the costs for the completion of the development before 30 April 2009. The prospective shortfall was said to be approximately £20m.

240. The letter said that this information indicated, among other things, that:

> "(a) GHU may be in breach of one or more of the representations set out in clause 8 of the Loan Agreement and deemed repeated on each Subsequent Advance Date;
>
> (b) a BBVA Default may have arisen; and
>
> (b) Practical Completion of the Development is not realistically achievable by the Long Stop Date."
>
> We have therefore concluded that Losan:
>
> (i) is entitled, pursuant to clause 3(c)(i) of the Loan Agreement, not to make available the Subsequent Tranche to which the most recent Project Certificate relates (or any further Subsequent Tranches) unless and until it can be satisfied that no Default is continuing (although we can confirm that these funds are ready for immediate transmission if we can be so satisfied), and
>
> (ii) may now be entitled (if it so wishes) to exercise its rights under clause 4.5(b) of the SPA to rescind the SPA, terminate the Loan Agreement, and demand immediate repayment of the outstanding balance of the Loan advanced by Losan, together with all accrued but unpaid interest."

241. The letter finished by saying that Carey was keen to establish whether completion of the project prior to the Long Stop Date remained viable, and if it was, it said that it remained committed to support the development. It also exercised its right under the Loan Agreement to require GHU to provide a second charge over the property.

EVENTS FOLLOWING SUSPENSION OF THE ADVANCES

242. Over the following weeks, Carey expressed some interest in taking over the development itself by way of an accelerated purchase. Although the possibility was held out by Mr Losada to Mr Couto, and got as far as heads of terms circulated between the lawyers, I have considerable doubts as to how seriously this was entertained by Carey. If it was having difficulty in funding its commitment to GHU, the chances of obtaining finance to take over the whole development must have been slim.

243. However, Mr Losada was certainly keen to obtain the second charge over the property. I infer that there were also internal doubts about the strength of Carey's legal position, and that he wished to keep the possibility of an acquisition by way of accelerated purchase open.

244. On its part, GHU was in a very weak position. Mr Couto must have fully realised that it would be very difficult to find a substitute for Carey should it finally pull out, as it was clearly positioning itself to do. So there followed a period of some weeks during which Carey asked for financial information, and GHU tried to provide it.

245. Meanwhile, work proceeded on the development so far as it was possible for GHU to fund it out of its own resources. I am satisfied that Carey was well aware of the serious consequences of withholding the loan monies. On 4 June 2008, that is the same day that it decided to suspend funding, Mr Fernandez emailed Mr Garcia-Tapia asking him to pay the money at once because a stoppage in activity such as the cranes would virtually bring the works to a standstill. Mr Garcia-Tapia was asked:

> **Q.** If you had been in any doubt before, this left you in no doubt, did it not, that your decision not to pay the certification would have a direct effect on the progress of works? You knew that, didn't you?
>
> **A.** Yes. I mean, to the extent that you were counting on our money. I mean that Urvasco was counting only on our money.
>
> **Q.** It was obvious that if you didn't pay for the previous month's works then it was going to jeopardise progress on the development. It was obvious wasn't it?
>
> **A.** Yeah.

246. On 12 June 2008, GHU responded to Carey's letter of 9 June 2008 saying among other things that the position had improved as a result of the sale of Urvasco Energia, and that GU had decided "to invest the capital gain of the sale in GHU". In fact, however, as explained above, this was done by capitalising an existing loan of €150m from GU, rather than putting the money into GHU as cash. The letter said that GHU remained confident of its ability to achieve Practical Completion by the Long Stop

Date. No grounds for asserting a default existed, it was stated, and Carey was asked to comply with its obligations.

247. On 16 June 2008, a meeting of the Board of Losan Hotels World (the management company) took place. Consideration was given to taking over the development. More significantly, the minutes record that the Board decided to withhold further payments from GHU until its concerns were satisfied.

248. At this time, BBVA was attempting to bolster GHU's position. As detailed elsewhere in this judgment, on 17 June 2008 there was a certificate from BBVA stating that all Urvasco group entities were up to date with payments on their lending. On 23 June 2008, there was a letter from the BBVA confirming the amount available for drawdown under BBVA Facility (€25,631,496).

249. It is however also important to have regard to the wider position at or about this time. In its closing submissions, GHU said that in anticipation of the restructuring negotiations with its banks, the group had made a deliberate decision to hold off on paying bank debt. It cites Mr Couto's evidence:

> "In this scenario there were no buyers for the plots, and this considering that my assets were all first class assets, and I was the first company in which we forced and we put pressure on the banks for them to buy the assets, because there were no other buyers of assets in Spain at the time. And the only way to do this was to force them to do it by going into "mora", or non-payment -- default, sorry in these three months."

250. Similarly, GHU cites Mr Esparza's statement (by reference to the position at 30 July 2008) that:

> "The refinance was to start in September. I had an order of Pablo Couto of not paying the banks."

251. This meant, GHU said, that from mid to late June 2008 GU ceased paying bank debts, which meant that defaults on those debts would begin to arise from mid to late September 2008 i.e. three months later. This was a reference to evidence referred to elsewhere that the debts would then be "*en mora*", and subject to reporting to the Central Bank. (I infer that such reporting may have been a matter of considerable concern, given the likelihood of deteriorating bank balance sheets at this time.)

252. GHU says that stopping paying was a prudent measure taken to stay one step ahead if the situation, and did not reflect an inability to pay at this time. For reasons given elsewhere in this judgment, I treat that suggestion with considerable scepticism. The admission that repayments of bank debt were stopped was heavily relied on by Carey in its closing submissions, and with complete justification in my view.

July 2008

253. As regards the development, on 25 June 2008 IDOM issued its Employer's Agent Report for the May works. On 30 June 2008, LTP Revision 19 was issued with a target date of 20 March 2009. At this time, G&T was continuing to certify as though

nothing had happened. On 11 July 2008, G&T issued its Project Certificate for the May works in the sum of £1,390,737.35. Carey did not pay this either.

254. However, the fact that Carey had now asked for the second charge necessitated yet another "whitewash" procedure in respect of Urvasco Ltd. Carey criticises the cashflow statement prepared by Ms Santamaria (the timing of which clearly put her under considerable pressure), but again nothing turns on the details.

255. A budget for the development was required from IDOM for this purpose, and on 30 June 2008 Ms Santamaria asked for updated estimates. Mr Fernandez emailed back on 9 July 2008 as follows:

> "I find it difficult to talk to Pablo [Couto], so I think that the most convenient thing is to send you the last budget Losan saw, even though we know it isn't up to date. I think it's best to keep it as it is, since submitting a higher budget would give Losan a reason to inquire in even more depth into the issue; they are already insisting quite a bit in their letters, like how Urvasco will finish the project once the 40 million available by certification is used up. I've already spoken about this with Emilio…"

256. I accept the evidence of Mr Emilio Iraculis that there was no intention on the part of GHU to conceal the true budget from Carey. I do however consider that this email is of relevance in relation to the *forzado* issue discussed in detail below. At the least, the sensitivity as to prompting enquiries by Carey is consistent with, and tends to fortify, the conclusion I have reached that the UST was certifying more than was contractually justified.

257. On 11 July 2008, Baker & McKenzie for GHU wrote demanding payment of the April Tranche. Mr Losada replied the same day saying that "in the interests of keeping the project on track … we have today set aside the April Tranche with an independent escrow agent, to be released as soon as the grant of the second ranking security has been 'whitewashed' and effected". According to GHU, the deed establishing the escrow provided that the second charge had to be provided within 15 days, and Mr Losada must have known that it was very unlikely that GHU would be able to complete all the formalities by then. Mr Garcia-Tapia denied in cross-examination that this was an example of Carey stringing GHU along. In any event, the escrow came to nothing.

258. On 21 July 2008, GHU sent a letter to Carey with nine appendices responding in considerable detail to the financial information requested by Carey in its letter of 9 June 2008, and subsequent letters. It asserted that "Not only has there been no material adverse change in the financial position of GHU since the date of signing the Loan Agreement but the financial position of GHU has been improved".

259. The question of material adverse change in GHU's financial condition is dealt with later in this judgment, however there were other points made in the letter on which I should state my views here.

(1) "[A]t the time of writing, we remain confident about the prospects of all three companies in the foreseeable future to the extent such prospects are

determined by factors within our control". A financial plan for GU was attached as Appendix G, "which reflects our confidence in this respect".

(2) "We remain as confident today as we did on 21 December 2007 in our ability) to complete the Development by the Long Stop Date and we continue to use our reasonable endeavours to meet that deadline despite Losan's continued failure to advance the Subsequent Tranches in breach of its obligations under the Loan Agreement."

(3) GHU denied that GU was or had been in discussions with creditors concerning rescheduling of its indebtedness. It referred to "discussions with various funders regarding obtaining financing to re-purchase the shares of a shareholder", which was a reference to the funding of the purchase of Ms Hernandez's shares in GU, but said that "neither these discussions nor any discussions [GU] may have had with other creditors (of which there have been none that are not in the ordinary course of business) have been in the context of "rescheduling of its indebtedness"".

260. As to completion, I accept the second of these points. But so far as they relate to GU's financial condition, it is hard to see how GHU can really have believed the other two to be accurate, except perhaps in a very technical sense. The letter to Carey was dated 21 July 2008. Mr Couto's evidence was that he asked Garrigues, the Spanish law firm acting for the Urvasco group, to introduce him to a company called IREA. A meeting took place at Garrigues' offices on 20 or 22 July 2008—that is, round about the date of the letter.

261. IREA's full name is "Corporate Recovery Inmobiliario de IREA Real Estate SL". The exercise for which IREA was engaged was a full-scale restructuring, probably to be implemented by persuading the banks to take property in exchange for cancelling debt. By now, GU had ceased paying bank debts altogether. IREA's letter of appointment was not dated until 1 September 2008, but I infer that this was because the main actors (including Mr Couto) observed the traditional August holiday.

262. Carey replied by letter of 31 July 2008 taking issue with what was said, and pressing for the second charge.

August 2008

263. In August 2008, Carey was still holding out the prospect of payment of the April tranche, saying that it would be paid once the second charge was in place. The charge was executed on 11 August 2008 as part of a package of securities given by GHU, but despite the assurances which had been given, the money was not forthcoming from Carey.

264. Meanwhile, the contractual processes continued. On 1 August 2008, LTP Revision 20 was issued by the UST with a target date of 30 March 2009 for the hotel, and 9 April 2009 for the apartments.

265. On 7 August 2008, G&T issued the Project Certificate for the June works in the sum of £879,876.20. There were a number of substantial deductions to the sums which had been certified in the Employer's Agent Report, but when Mr Fernandez queried

it, Mr Garcia-Tapia told G&T that, "There is no need to answer [his] email until next week. We need to gain time for our negotiations and they are starting to get nervous". The "negotiations" referred to were apparently those in respect of the accelerated purchase proposal.

266. The interest payment due to Carey on 8 August 2008 was paid by GHU, albeit late. On 19 August 2008, GHU's solicitors wrote to Carey's solicitors confirming payment of outstanding interest and requesting payment of the April, May and June Tranches.

267. On 18 August 2008, the UST issued the Employer's Agent Report for the July works. On 3 September 2008, G&T issued its Project Certificate for the July works in the sum of £2,924,522.90 (the July tranche was not paid by Carey either). This was the last of the project certificates issued by G&T.

September 2008: work on the development stops

268. On 2 September 2008 after they returned from holiday, a meeting took place between Mr Couto, Mr Emilio Iraculis and Mr Fernandez at GU's offices at which the decision was made to suspend construction of the development. I have no doubt that this was inevitable by now because of Carey's continued non-payment. On 8 September 2008, suspension of the works on site took effect. GHU did not pay the interest due to Carey that day.

269. On 9 September 2008, Mr Losada visited the site. This followed a lunch that he had had with Mr Couto in Madrid a few days earlier. As part of their discussions, Mr Losada agreed that Carey would make a payment of £2m to GHU. He said in an email of 12 September 2008 that it would be paid as soon as Carey received confirmation from Baker & McKenzie (GHU's solicitors) that they had instructions to progress the accelerated purchase. Baker & McKenzie did so the same day, but the £2m did not materialise. Carey invites me not to draw conclusions from this episode, but it speaks for itself. I accept GHU's submission that it was an unattractive example of Carey failing to keep its promises.

270. Looking at the wider international picture, very early on Monday, 15 September 2008, Lehman Brothers filed for bankruptcy protection, bringing to a head the global financial crisis. It is hard to imagine a less propitious background, but discussions between Carey and GHU were not broken off, and the reality was that Mr Couto was in no position to do so.

271. If there was to be any new deal between them, BBVA's cooperation would be essential. Mr Couto suggested to BBVA that they should have a joint meeting with Carey, which was arranged for 24 September 2008 at its offices in Madrid. It was attended on GHU's side by Mr Couto, Mr Emilio Iraculis and a lawyer from Garrigues, Mr Antonio Rego. Mr Berasaluce and Mr Emilio Garcia were present from BBVA, and Mr Losada represented Carey. Mr Couto says that he was surprised that Mr García-Tapia was not present, given his prior involvement, and though Mr García-Tapia did not agree, I think that it was surprising, though nothing turns on it.

272. As Carey says, the issue is whether at the meeting Mr Garcia of BBVA said, as Mr Couto claims, words to the effect that, "Losan should not worry about investing their money in the project as BBVA would help Urvasco to finish it if necessary".

According to GHU's closing submissions, Mr Garcia said "that BBVA would fund any shortfall". If correct, this goes to whether the development could and would have been completed, given the admitted shortfall in funding available to GHU (a question I discuss in detail later in this judgment).

273. Despite the evidence from Mr Couto and Mr Iraculis, I do not accept their version of what BBVA promised at this meeting. BBVA was well aware of the group's financial difficulties, and was itself heavily exposed. Mr Couto said that BBVA (which was the group's largest lender) had outstanding loans of about €400m at this time. He suggested that against an amount of that size, the relatively small amount required to bridge the gap in the funding of the London development would not have made much difference to the bank.

274. I take the opposite view of the evidence, and consider it inherently implausible that the bank would have agreed to make further facilities available at this time, something it had declined to do (as explained above) in more benign circumstances the previous year. Furthermore, GU by this time was facing substantial potential losses on derivative transactions entered into with the bank, which the bank was trying to get secured. There is no support in any of the contemporary documents for any such promise by BBVA as GHU suggests. The bank may have been supportive to GHU at the meeting, and it was certainly in its interests that Carey put more money into the London development, but on the totality of the evidence, I am satisfied that it went no further than that.

275. Beginning at about the same time, that is, the end of September 2008, discussions took place between GU and its lending banks regarding restructuring proposals. GHU accepts that at this point a default occurred under the BBVA Credit Agreement on the basis that GU had entered into negotiations with its creditors for the rescheduling of its indebtedness by reason of its actual or anticipated financial difficulties. I deal with this issue below. GHU contends that it does not show that a default had occurred by 6 June 2008. All it shows, according to GHU, is that "almost four months later, at the end of September 2008, GU, anticipating possible future financial difficulties, had started negotiations with its lenders to restructure its affairs and reduce its debt burden".

276. Again, I do not accept this view of the evidence. By the end of September 2008, there was no question of "possible future financial difficulties". According to the report prepared by IREA in November 2008, the total indebtedness of GU as of September 2008 was €2.28 billion (which did not include liabilities under derivatives contracts). GU was facing bankruptcy unless it could persuade its lenders to agree to a massive reduction in its debt. In any case, for reasons set out below, I consider that GU entered into rescheduling negotiations with individual creditors much earlier.

The end of the relationship between the parties

277. On 6 October 2008, Carey informed GHU that it was cancelling the Loan Agreement. Whilst reference was made to previous correspondence, the specific event of default relied on was GHU's failure to pay interest due on 8 September 2008.

278. Mr Couto now had no alternative but to seek another lender, which must have been a near impossible task in the circumstances. On 21 October 2008, GHU entered into a

standstill agreement with Carey to give him time to do so, which was extended on 26 November 2008. These letter agreements are considered further below, and the translations are annexed to this judgment.

279. The legal consequences of the agreements are in dispute. However, there is other contemporary material which shows the position which GHU was taking at this time as regards its liability to Carey in respect of the money already advanced under the Loan Agreement.

280. On 23 December 2008, GHU and Urvasco Ltd entered into an option agreement with BBVA for the purchase of Urvasco Ltd and the development site (Carey was not a party). Nothing came of it, but Carey points out that recital E stated: "By virtue of an event of default under the [Loan Agreement], Losan is not currently advancing monies to [Urvasco Ltd] under the [Loan Agreement]". That amounts to an admission that an event of default had happened under the Loan Agreement.

281. There is also an acknowledgment by GHU of a debt owed to Carey under the Loan Agreement in the sum of €51,008,450. This appears in the notes to its accounts for the year ending 31 December 2008. It is not suggested that either of these statements gives rise to any bar to GHU's claim (either by way estoppel or the analogous doctrine of *actos propios* under Spanish law). Carey however rightly submits that at this time liabilities were being acknowledged which GHU now disputes in this litigation.

282. The report prepared by IREA in November 2008 painted a gloomy picture of the group's financial position, and I do not accept Mr Couto's suggestion that it was prepared on a "Dantesque" basis to give it leverage in the negotiations with the banks. I infer that the banks' room for manoeuvre was in any case limited, because putting the group into liquidation with all the attendant consequences to its employees and creditors was probably politically unacceptable in the face of a severe economic downturn. In the course of the negotiations, a staggering amount of debt was exchanged for GU's real estate assets, thereby taking the debt off the banks' books, but postponing the problem for another day.

The accusations against Mr Losada

283. There is a final chapter to mention in what it is fair to describe as an extraordinary story. The evidence is summarised by GHU, and is not disputed by Carey, and shows the following. It is alleged that Mr Losada was discovered to have fraudulently extracted payments from Carey's funds in the sum of about €23 million by the submission of false invoices for brokerage fees. Mr Garcia-Tapia described how he took it up in a confrontation with Mr Losada on 6 November 2008, and how he was himself dismissed. On 12 November 2008, a board meeting of Losan Hotels World asked Mr Losada to return the allegedly misappropriated money. At the beginning of November 2008, the Spanish police commenced an investigation into criminal complaints made against him and, according to the agreed chronology, criminal charges were subsequently brought. The court was told that these have now been concluded, but was not given any details.

The receiver sells the hotel

284. All efforts by GHU to sell the development failed, and on 8 July 2009 Urvasco Ltd asked BBVA to call in the receivers. PwC was appointed the same day. On 29 December 2009, the property was sold by the receivers to a BBVA subsidiary, the net proceeds of £113,027,657 being just sufficient to repay the indebtedness owed to BBVA.

285. In June 2010, the hotel was sold to a competitor Spanish hotel group, Sol Melia, and building work recommenced. By a twist of timing, in January 2013 in the course of the trial Mr Couto's hotel finally opened. Having invested so much of his time, energy and money in the project, it must have been a bitter moment for him. Melia opened it under its contemporary brand name, "*ME*".

ISSUES OF SPANISH LAW

286. Spanish law has been argued in the case in two respects, the first by Carey, the second by GHU. First, Carey seeks to invoke the Spanish law doctrine of *actos propios* (previous conduct), which it says is a substantive (not procedural) doctrine, which gives rise to an estoppel-type defence. In this case, it is based on the letter agreement of 21 October 2008 between GHU and Carey, as extended on 26 November 2008.

287. The second, based largely on the good faith requirement in Article 1258 of the Spanish Civil Code, is GHU's case that a materiality requirement is to be implied into those provisions of the Loan Agreement relevant to Carey's default case where it is not expressed.

288. Carey's expert was Professor Fernando Gomez, and that of GHU was Professor Mariano Yzquierdo. Both are distinguished professors whose evidence commanded respect. Professor Gomez (who is a member of the Group of Experts on European Contract Law) was the more confident, and had the advantage of fluent English. However, as I shall explain, nothing in this case turns on the difference between them.

289. I should mention that in closing GHU did not pursue its "notice" point, which was an argument that as a matter of Spanish law, Carey was only entitled to invoke clauses 3(c)(i) and 10 of the Loan Agreement as grounds for not making an advance in relation to actual defaults of which it gave notice to GHU at the time.

Actos propios

290. The experts are largely agreed on the principles underlying the doctrine of *actos propios* and the requirements for its application. The two areas of disagreement are (a) whether the doctrine has any application to the facts of the present case, and (b) if it does, whether the requirements are met.

291. The doctrine has been developed by the Spanish courts, particularly the Spanish Supreme Court, and is grounded upon the general principle requiring good faith in the exercise of legal rights. The experts agreed that, in essence:

> "The said doctrine means that nobody is entitled to exercise a claim based on a right or legal entitlement in contradiction of his or her own prior behaviour, when it had an unequivocal significance from which legal consequences arise that are incompatible with the current claim"

292. The experts are also agreed on the main requirements for the application of the doctrine:

(1) There must be previous conduct (the "*actos propios*") of the party now altering his behaviour or bringing a claim or seeking to enforce an existing or alleged right;

(2) There must be inconsistency between the present and the previous conduct, in circumstances that contradict the requirements of good faith;

(3) The identity of the parties involved must be the same; and

(4) There must be reliance by the other party.

293. The experts also agree in relation to the first requirement that in order to qualify as an *acto propios* the relevant conduct must have the following characteristics:

(1) The behaviour must be voluntary and spontaneous, the product of a free decision;

(2) The behaviour must be conclusive and unambiguous, with full and unequivocal meaning;

(3) The behaviour must express the intention to affect or shape a legal relationship or situation, with effects towards other parties; and

(4) The behaviour must be legally valid, that is, it may not consist of legal acts that are void or without legal effect.

294. The application of the doctrine does not amount to a waiver of legal rights and does not extinguish the relevant right or rights. Instead, the effect of the doctrine is to exclude, limit or reduce the exercise of the right or rights to prevent inconsistent behaviour from prevailing. In practical terms this means that a party is not barred from bringing a claim, but if the court finds the doctrine should apply to the claim it will be dismissed.

The parties' cases

295. Carey's case is that under the 21 October 2008 letter agreement, GHU agreed in writing that it would repay to Carey the entirety of the amount borrowed, all of the accrued interest, costs and expenses incurred by Carey in connection with the transaction up to £1,500,000 and an amount of €800,000 "by way of compensation" for Carey's loss of opportunity.

296. Under the 26 November 2008 extension, GHU and Carey agreed to extend the terms of the October agreement. The deadline for payment by GHU was extended until 30 April 2009. GHU agreed to pay additional interest at a rate of 7.5% on the sums payable, as from 21 December 2008 to the date of payment. There is no basis, Carey submits, on which GHU would have agreed to pay to Carey additional interest over and above the amounts agreed in the October agreement, apart from accepting that it was liable to pay those amounts to Carey but wanted more time to do so, before facing legal action from Carey to recover the money owed by GHU.

297. These agreements, Carey submits, are consistent only with GHU admitting and accepting that it owed Carey the money it had borrowed and that it was GHU which was in default and not Carey. This is Professor Gomez's view, and in Carey's submission is the correct interpretation.

298. GHU's case is that the agreement is a contract entered into by GHU and Carey (this is not in dispute). Accordingly, it says, the question of whether the parties' subsequent actions are permitted in light of the agreement which was concluded is primarily to be determined by construing the contract. The relevant question is whether GHU's subsequent conduct is in compliance with, or in breach of, the terms of the contract concluded between GHU and Carey.

299. The experts agree that it is a requirement for the application of the doctrine that there must be inconsistency between the present and the previous conduct of the party against whom the doctrine is sought to be invoked in circumstances that contradict the requirements of good faith. This requirement, GHU submits, is not satisfied in the present case.

300. In order to assess whether this principle is engaged in the present case, it is necessary, GHU says, to have regard to the purpose and context of the agreement. The commercial purpose was to provide a mechanism whereby Carey might be substituted as lender under the Loan Agreement and the SPA. If this happened, then a settlement was to be concluded whereby Carey would be paid the agreed sums, would be substituted as lender and a waiver and release of all claims would be concluded. But, if this did not happen because a replacement funder could not be found and the agreement was allowed to lapse, then it was not to have any permanent effect.

301. In circumstances where no replacement was found, where the agreement was allowed to lapse and where no waiver or release was entered into, it cannot be said that GHU's subsequent acts in rescinding the SPA and bringing claims for damages for breaches of the Loan Agreement contradict its previous conduct in entering into the latter agreement so as to contravene the requirements of good faith.

Discussion and conclusion

302. Other points were also taken by the parties, but in oral closing GHU concentrated on the inconsistency point. To recap, the experts agree that there must be inconsistency between the present and the previous conduct, in circumstances that contradict the requirements of good faith.

303. I accept of course Carey's point that the letters show that at the time of their signing, GHU was prepared to repay what had been advanced, interest, and as Carey emphasises, an amount of €800,000 "by way of compensation". Its stance in these proceedings is the opposite, and to that extent it may be said that its position is an inconsistent one. (It is also a point that can be taken on an evidential basis, and Carey does so.)

304. On the other hand, to ascertain whether there is a real inconsistency, the full terms of what the parties agreed in the letters have to be considered, and considered in context. At the point they were entered into, Carey had cancelled the Loan Agreement. I am satisfied from the evidence of Mr Couto that their purpose was to allow GHU time to

find a replacement funder. Though the period was extended by the letter of 26 November 2008, in the event, GHU was unable to find an alternative funder. In my view, the letters were intended in part at least to operate by way of standstill, which is how they are described in some of the evidence.

305. Professor Gomez accepted, naturally, that parties can agree terms of a settlement or a standstill without admitting liability. Essentially the difference between him and Professor Yzquierdo was as to the proper interpretation of what the parties did agree. The terms of the letters have to be read as a whole, and rather than set them out in this judgment, I have reproduced them in an Annex. These are, of course, translations.

306. As to the letter of 21 October 2008, Carey effectively agreed to refrain from taking legal action against GHU for two months. In the event, the agreement was extended. (The evidence was that though dated 26 November 2008, the extension was in fact signed on 12 January 2009. This is somewhat surprising since it was signed by Mr Losada whose confrontation with Mr Garcia-Tapia about the false invoices happened in November the previous year, but nothing turns on this.).

307. GHU submits, and I agree, that the effect of the letter of 21 October 2008 as extended by that of 26 November 2008 was that from 30 April 2009, Carey had three options: (1) to require compliance by GHU with its obligations under the agreement (i.e. to pay the sums provided for in the agreement), (2) to leave the agreements arising out of the letter as being "without effect", or (3) to extend the terms of the letter.

308. Professor Gomez suggested that the fact that Carey was not presently requiring compliance with the letter agreements in this action did not mean that it could not do so in the future. That would depend, he said, on whether the statute of limitations had run under Spanish law. This in my view is not realistic. Carey has sought in these proceedings to recover the sums due under the Loan Agreement, not the letter agreements. It is obviously much too late now to seek to enforce the letter agreements. It follows, as GHU says, that in substance Carey has chosen to leave the agreements arising out of the letters as being without effect.

309. I also agree with GHU that the suggestion that it has acted inconsistently is contradicted by the last paragraph of the 26 November 2008 letter. This deals first with Carey's position, saying that it cannot instigate judicial proceedings prior to 1 April 2009, but in that event giving GHU up to 30 April 2009 to make payment under the letter agreement.

310. Having set out the position of Carey, the paragraph goes on to set out the position of GHU. It states that:

> "GHU undertakes not to exercise any judicial actions which it may be entitled to by virtue of the Agreements up until 1 April 2009."

The "Agreements" are defined at the beginning of the letter as being the Loan Agreement and the SPA.

311. As GHU says, it appears from this wording that, in the event that payment under the agreement letters was not made to Carey, and the permanent releases and waivers envisaged by the agreement were not implemented, then GHU would after 1 April

2009 be at liberty to proceed with any claims which it had against Carey under the Loan Agreement and/or the SPA.

312. The crucial point is that the letter expressly recognises that GHU may take legal action under the Loan Agreement and/or the SPA. This provision of the 26 November 2008 letter is in my view irreconcilable with Carey's *actos propios* argument. Carey objects that this point was not pleaded or put to Professor Gomez. However, the gist of the argument was put to him, and in any event the provision is plain on the face of the document.

313. For these reasons, I find that the inconsistency requirement upon which both Professor Yzquierdo and Professor Gomez agree is not satisfied in this case, and that consequently the doctrine of *actos propios* has no application.

The materiality point

314. As to the general principles, there is some agreement between the experts. It is common ground that Article 1258 of the Spanish Civil Code imposes an obligation on the parties to act in good faith, and that rights must be exercised in accordance with the requirements of good faith (Article 7.1 of the Spanish Civil Code). It is common ground that the requirement to act in good faith was applicable to the Loan Agreement and that it can give rise to implied duties owed by the parties to each other.

315. Professor Yzquierdo's opinion is that Spanish law will imply a requirement that any breach of clause 9(a) (and of clauses 8(e)(ii), (j), (k) and (w)) of the Loan Agreement would have to be "material" in order to give rise to a default. Professor Yzquierdo's opinion is that materiality is to be assessed by reference to the ability to complete the development by the Long Stop Date and/or GHU's ability to perform its obligations to pay interest and repay principal under the Loan Agreement.

316. Alternatively, even if the contractual regime for termination of the Loan Agreement did apply, Spanish law would not permit the parties to provide for the contract to be terminated upon any breach no matter how miniscule or trivial. Professor Yzquierdo is of the opinion that a number of the defaults now asserted by Carey fall into this category.

317. According to Professor Gomez, if the parties have in their contract specified the circumstances in which the contract can be suspended or terminated for non-performance, then Spanish law defers to the parties' own determination. He accepts that the parties' freedom of contract may be subject to a limited exception that Spanish law would not permit the parties to provide for the contract to be terminated upon any breach no matter how miniscule or trivial. Professor Gomez does not identify any clauses which in his opinion fall in this category. A breach would have to meet a materiality requirement, i.e. an *incumplimiento resolutorio*, in order for a right of termination to arise under Article 1124 of the Spanish Civil Code, but this article is not relied upon by Carey.

318. The assertion that any breach, even an immaterial one, would give Carey the right to refuse to advance the loan, did not appear to me to reflect the balance of the experts' evidence. It was also hard to see how it differed from the position that Carey accepted, namely that the right to refuse would not follow from a breach that was *de*

minimis. In general terms I preferred GHU's case on this point, since it is unlikely that the parties would have intended that *any* breach of the Loan Agreement or of the SPA, even a minor and irrelevant one, would give rise to a default with the potentially drastic consequences which would then follow. In the event, the experts appeared to agree that some level of materiality requirement must be satisfied.

319. However, on GHU's case referring materiality exclusively to ability to complete the development by the Long Stop Date and/or ability to make the payments due under the Loan Agreement, I preferred the analysis of Professor Gomez to that of Professor Yzquierdo. In my view, the evidence of Spanish law is consistent with the formulation proposed by Lord Grabiner QC, that where there is a materiality requirement, the court must consider the effect of the relevant breach or failure, in the context of the relevant obligation. If it is significant, then the materiality requirement is satisfied. This contextual analysis is supported by the view of a leading commentator, who says that "… material means material. If materiality meant only impingement on ability to pay then the test would be stringent since a borrower is only unable to pay if it is insolvent—which is always an event of default in any event" (Philip R Wood, *International Loans, Bonds, Guarantees, Legal Opinions*, 2nd ed, 2007, at 4-008).

320. With deference to the impressive contentions of the experts on this issue, it is not necessary to make any further findings. For reasons I have set out in detail below, where Carey has established a default in respect of which GHU raises the materiality issue, I am quite satisfied that the materiality threshold even as contended for by GHU was passed in respect of each of them.

MATERIAL ADVERSE CHANGE (MAC)

Introduction

321. As the factual narrative shows, the letter of 9 June 2008 by which Carey gave its reasons for declining to make the payment due on 6 June 2008 was predicated on what Carey said were its concerns as to the "substantial deterioration in the financial condition and prospects" of the Urvasco companies. The subsequent contemporary communication was largely about this issue, and GHU's efforts to demonstrate otherwise. The reliance placed by Carey on the contractual representations said to have been made by GU/GHU/Urvasco Ltd as regards material adverse change is, therefore, central to this case.

322. The Loan Agreement and the BBVA Credit Agreement each contained a clause pursuant to which a representation as to the absence of a material adverse change (MAC) in the financial condition of particular companies was made and repeated at specified times. In the case of the Loan Agreement, the relevant companies were GHU and Urvasco Ltd, whilst in the case of the BBVA Credit Agreement, the relevant company was GU (as guarantor under that agreement).

323. Carey's case is that there was a material adverse change in relation to each of GU, GHU and Urvasco and that each of these is a default under the Loan Agreement. GHU disputes these propositions.

324. Certain issues of construction arise, principally as to the meaning of the phrases "financial condition" and "material adverse change". As to the comparator dates to assess whether there has been a MAC, these are 21 December 2007 when the agreements were entered into, and 6 June 2008 when Carey declined to advance the payment due on that date. Carey also says that a material adverse change existed on each subsequent date when GHU claims that it was entitled to draw down a Subsequent Tranche (though this was not elaborated on in argument, and for reasons explained below, Carey does not contend that any date is relevant in the case of GU except 6 June 2008).

325. The main factual issues, therefore, are whether, on the facts, there was a material adverse change in the financial condition of GU, GHU and/or Urvasco Ltd as between 21 December 2007 and 6 June 2008, and if so, whether it falsified a representation made as at 6 June 2008 so as to amount to a default under the Loan Agreement.

The contractual provisions

326. There are interpretation issues as to what is meant by the "material adverse change" clauses in question. The contractual provisions in this regard are not complex. By clause 8(h) of the Loan Agreement, GHU represented on its behalf and on behalf of Urvasco Ltd that:

> "There has been no material adverse change in its financial condition (consolidated if applicable) since the date of this Loan Agreement [21 December 2007]"

By the final sentence of clause 8, this representation was deemed to be repeated on each Subsequent Advance Date by reference to the circumstances existing at that time. The representation was therefore made at the time of the agreement (21 December 2007), and repeated on the contractual date of drawdowns. There is no dispute between the parties that one such date was 6 June 2008.

327. By clause 16(10) of the BBVA Credit Agreement, GU (as guarantor under that Agreement) represented that:

> "In the case of the Guarantor only, there has been no material adverse change in its financial condition (consolidated if applicable) since the date on which the Original Financial Statements were drawn up."

This form of words made it clear that the representation was not made by GHU or Urvasco Ltd which were also parties to the agreement. Unlike in the case of those companies, in the case of GU there is a dispute as to whether a representation was made on 6 June 2008.

328. A starting comparator date of 31 December 2003 was raised by Carey as an alternative in respect of GU because of the reference in clause 16(10) of the BBVA Credit Agreement to the "Original Financial Statements". That agreement was of course entered into in 2004, hence the reference to the 2003 year end. This was long before Carey came on the scene. It seems very unlikely that GHU and Carey can have intended this to have had any practical effect. Since however Carey says that it

makes no material difference, there is no need to consider this point further, and this was accepted on Carey's behalf in oral closings.

329. These clauses tie into the Loan Agreement as follows. Clause 10(b) of the Loan Agreement provides that a misrepresentation is an event of default. It stipulates that:

> "An event of default occurs if:
>
> …
>
> (iii) Any representation, warranty or statement by the Seller [GHU] under or pursuant to the Loan Agreement is or proves to have been untrue when made in any material respect, unless the underlying circumstances are remedied within ten Business Days of a notice from the Purchaser [Carey] requiring such remedy; or
>
> (iv) any BBVA Default occurs."

330. "BBVA Default" is defined in clause 1 of the Loan Agreement as "any 'Default' as defined under the BBVA Credit Agreement". The effect of the reference to a "BBVA Default" in clause 10(b) is therefore to cross-refer to the position under the BBVA Credit Agreement.

The parties' cases on this issue

331. In essence, the parties' cases are straightforward. Carey, on which the burden of proof lies, says that it is plain that there was a severe deterioration in the position of each of GU, GHU and Urvasco Ltd between 21 December 2007, when the agreements were entered into, and 6 June 2008 when Carey withheld payment under the Loan Agreement. This resulted in a material adverse change in their financial condition which (in the case of GHU and Urvasco Ltd) falsified the representation under clause 8(h) of the Loan Agreement, and (in the case of GU), falsified the representation under clause 21.4 of the BBVA Credit Agreement which was, in turn, a default under clauses 10(b)(iii) and (iv) of the Loan Agreement.

332. GHU, on the other hand, maintains that Carey has afforded too much weight to the overall economic situation, and that when one looks at the available financial information mid-year 2008 in respect of the individual companies, it can be seen that no material adverse change occurred as regards any of them. It submits that the claim does not come close to being proved on the factual and expert evidence.

333. If contrary to this contention, Carey can prove the allegation, then as regards GHU and Urvasco Ltd it is not in dispute that there was a default under the Loan Agreement as at 6 June 2008. As regards GU however, GHU's case is that Carey has not established that any MAC representation was made in relation to GU's financial condition on 6 June 2008, and it should fail on that ground in any event.

<u>The interpretation of the "material adverse change" clauses</u>

334. The use of material adverse change clauses is common in financial documentation in differing contexts, including takeovers and mergers, and loan agreements, as in the present case. In the latter context, they may relieve a lender of its continuing

obligations in the event of a significant deterioration in the financial condition of the borrower which threatens its ability to repay but which is short of an insolvency. However, there is little case law, perhaps reflecting the fact that (unlike an insolvency event which is usually clear cut) the interpretation of such provisions may be uncertain, proof of breach difficult, and the consequences of wrongful invocation by the lender severe, both in terms of reputation, and legal liability to the borrower.

335. In the United States, it has been said that there are no appellate decisions interpreting MAC clauses, and that the few trial court opinions that exist have failed to establish a consistent interpretation. It is said that the Delaware Chancery Court—the leading forum for corporate merger litigation—views MAC clauses as *sui generis*, and has never found a MAC to have occurred (Schwarz, "*A 'Standard Clause Analysis' of the Frustration Doctrine and Material Adverse Change Clause*", 57 UCLA L Rev 789 (2010)).

336. On the other hand, this point should not be overstated. The clause can be important, and the circumstances may be such that it is obvious that the borrower's financial condition has deteriorated to the extent that the repayment of advances is in serious doubt. In such circumstances, the lender may be exonerated from what amounts to throwing good money after bad. In admittedly somewhat extreme circumstances, the court in *BNP Paribas SA v Yukos Oil Company* [2005] EWHC 1321 (Ch) had no difficulty in holding that events had had a "Material Adverse Effect" on the ability of Yukos to repay a bank loan.

337. In fact, the lender in this case (Carey) never exercised its rights under the MAC provisions in the Loan Agreement. It suspended advances on the basis of concerns it expressed as to whether there had been a material adverse change. Over a period of some time, GHU provided further information which was intended to satisfy these concerns. Carey terminated the Loan Agreement on the ground of non-payment of interest some months later without ever having resumed lending.

338. The matter has remained in dispute ever since. In this litigation, Carey contends that there was a MAC at the time the 6 June 2008 advance was due, with the consequence that it was not in default in refusing to make it. An argument by the borrower, GHU, that the lender, Carey, was precluded as a matter of Spanish law from adopting this position because it was not stated at the time was not pursued. However, all other points are pursued. It is therefore necessary to analyse the matter in the light of the agreements, the facts, and the expert evidence.

339. Whilst the thread running through MAC clauses is the same, their terms are subject to many variations. In the case, for example, of the Loan Market Association's draft clause, parties are given a number of suggested options. These are set out in Zakrzewski, *Material adverse change and material adverse effect provisions: construction and application*, (2011) Law and Financial Markets Review, 344. Of course, the parties need not adopt these suggestions. In practice, the terms of the clause are likely to receive attention in the course of negotiations whichever form of precedent is used.

340. The approach of the English courts is to give effect to what the parties have stipulated in their agreement, applying well settled rules as to the interpretation of contracts. The principles have been considered in a number of recent cases including

Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101, and *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 (and in the case of a MAC clause in the employment context in *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 1189 (QB)).

341. In *Rainy Sky* at [21], Lord Clarke pointed out that the language used by the parties will often have more than one potential meaning. The exercise of construction is a "… unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other".

342. He added however that, "Where the parties have used unambiguous language, the court must apply it". The court does not rewrite the language which the parties have used in order to make the contract conform to its view of business common sense (ibid at [23]). Further, English law does not have a principle of good faith performance such as Article 1258 of the Spanish Civil Code which has featured in this case.

343. In the present agreements, there are a number of different provisions to fit together. Conventionally in loan agreements subject to English law, a representation as to material adverse change is repeated by the borrower at the time of each drawdown. Also, and not necessarily in the same terms, material adverse change may be stipulated as an event of default (entitling for example the lender to accelerate repayment).

344. This was, in fact, the structure of the BBVA Credit Agreement. The event of default was in wider terms than the representation, and predicated on the "opinion" of the bank. However, Carey was unable to rely on this more widely drafted provision since the bank's opinion so far as expressed at the time was supportive of the borrower. It relies therefore on the borrower's representation as to material adverse change. But whilst a misrepresentation under the BBVA Credit Agreement results in a default under the Carey Loan Agreement, in terms of timing the representation is repeated at the time of advances by *BBVA*. The relevant advances were of course to be made by *Carey*. The implications of this mismatch are dealt with below.

345. The Loan Agreement between Carey and GHU was subject to Spanish law. (It is not suggested that there is any difference of interpretation between English and Spanish law in this regard.) It contained substantially the same representation as in the BBVA Credit Agreement, but given by GHU and Urvasco Ltd, not GU. The court therefore is concerned with MAC clauses in plain vanilla form, the company in question representing that there has been no material adverse change in its financial condition (consolidated if applicable) since the date of the agreement, which for these purposes is 21 December 2007.

346. The specific points on construction at issue between the parties are as follows. Carey's case is that the term "*financial condition*" is a general phrase which has no inherent limitations. It is not, for example, limited to particular parts of company

accounts such as net current assets or profits. It allows the court to consider all aspects of the company's finances including balance sheet items (assets and liabilities), profit and loss account items and cash-flow or liquidity items, and the impact on these of the state of the markets in which the company was operating.

347. GHU, on the other hand, submits that the purpose of a company's accounts (and, in the case of the year end, the financial statements which include notes, an audit report and directors' report) is to provide a picture of the financial state of the company. One would therefore ordinarily expect that any consideration of a company's financial condition would begin with an assessment of its position as shown in financial statements as at the relevant date.

348. Similarly, GHU says that as a matter of ordinary language "financial condition" does not encompass other matters such as the prospects of a company or external economic or market changes. Where a MAC clause is intended to extend to such matters, then these will be expressly stated in the clause. In the present case, the clauses are limited to changes in "financial condition". GHU says that Carey's expert witness Mr Beltrán was wrong to have had regard to general economic and market patterns in support of his analysis.

349. On a construction of the clauses in question, I consider that GHU's emphasis on the company's financial information is correct. Some light is shed by other provisions of the BBVA Credit Agreement. This includes as an event of default in clause 21.17, "Any event or series of events occurs which, in the opinion of the Agent, might have a Material Adverse Effect". This is defined to include a material adverse effect on the business or financial condition of an obligor. The inclusion of events which have a material adverse effect on the company's *business* covers a broader scope than the MAC which is limited to the company's financial condition. For reasons I have explained, Carey could not invoke this provision. There was no similar clause in Carey's own Loan Agreement.

350. Further, there is a contextual argument that supports GHU's construction. The language of the MAC clauses uses the words "*consolidated if applicable*" in relation to financial condition. I agree with GHU that this appears to be a reference to consolidated accounts. In my view, it shows that the parties understood that "financial condition" would be principally assessed by reference to accounts and, in particular, consolidated accounts where applicable.

351. In my opinion, an assessment of the financial condition of the company should normally begin with its financial information at the relevant times, and a lender seeking to demonstrate a MAC should show an adverse change over the period in question by reference to that information. The financial condition of a company during the course of an accounting year will usually be capable of being established from interim financial information and/or management accounts. On the broader construction proposed by the lender, the enquiry becomes wide ranging and imprecise. For that reason (as explained below) I prefer the approach of GHU's expert to that of Carey's expert.

352. I agree with the lender however that the enquiry is not necessarily limited to the company's financial information. There may be compelling evidence to show that an adverse change sufficient to satisfy a MAC clause has occurred, even if an analysis

limited to the company's financial information might suggest otherwise. The present case provides an example. GHU accepts that from mid to late June 2008 GU ceased paying bank debts. (There is a question which I will have to address as to the position at the relevant date, namely 6 June 2008.) Clearly, the act of ceasing to pay bank debts may be highly relevant to the question whether a material adverse change has occurred in GU's financial condition.

353. That is the first interpretation point. The second is a broader one as to *materiality*. GHU submits that the purpose of a MAC clause in the context of a loan agreement is ultimately to protect the rights of the lender to payment of interest and repayment of principal. Accordingly, a material adverse change in financial condition should be assessed by reference to those changes in a company's balance sheet position which are relevant to the company's ability to meet such obligations.

354. Carey submits that it is wrong to limit the enquiry into financial condition to matters which go to the ability of the borrower to meet its future obligations under the Loan Agreement. It points out that one of the parties making the MAC representation, Urvasco Ltd which was the SPV set up for the development, had no payment obligations under the Loan Agreement, and that another, GU, had no direct repayment obligations under the BBVA Credit Agreement in respect of which it was a guarantor.

355. I reject Carey's reasoning in this respect. As GHU says, GU's obligations (albeit as guarantor) were nonetheless payment obligations. Urvasco Ltd had its own obligations under the agreements of 21 December 2007 in respect of the development. There is not, in my view, a difficulty in treating the "financial condition" of these companies as being generally focused on matters which go to their ability to meet those obligations.

356. There is some academic writing on this point which supports this view. The *Encyclopaedia of Banking Law* says at F[1862] that, "It is considered that normally an adverse change in financial condition would be material if the change would have caused the bank not to lend at all or to lend on significantly more onerous terms, eg, as to margin, maturity or security". Zakrzewski (ibid at p. 350) puts it slightly differently, considering a change to be material that substantially affects the borrower's ability to repay, or, more generally, significantly increases the risks assumed by the lender. In other words, to be material, the adverse change must be material in a substantial way to the borrower's ability to perform the transaction in question.

357. I agree with this approach. Unless the adverse change in its financial condition significantly affects the borrower's ability to perform its obligations, and in particular its ability to repay the loan, it is not a material change. I would emphasise the word "significant". Unless the clause is read in this way, a lender may be in a position to suspend lending and/or call a default at a time when the borrower's financial condition does not fully justify it, thereby propelling it towards insolvency. Suitably modified, the same test applies where the obligation is one of guarantee.

358. The final point of contention between the parties is as to *pre-existing circumstances*. GHU submits that if a state of affairs at the time of drawdown was already subsisting at the date of the loan agreement, it will not give rise to a MAC. An event which is continuing between the two dates by definition will not constitute a change in

financial condition between the two dates. Also, if the lender was aware of the state of affairs at the time of entry into the loan agreement, it will be taken to have entered into the contract notwithstanding their existence. This latter point, GHU submits, applies equally in relation to a state of affairs which is *likely* to occur at the time of entry into the loan agreement, since it cannot be said that the occurrence of the change is such as would have caused the lender not to lend at all or on materially different terms.

359. Carey submits that the true construction of the clauses cannot depend upon the state of mind of the lender, which is, it says, the effect of GHU's argument. It relies on the fact that there is no English authority for the proposition that even if that was Carey's state of mind, it would thereby be prevented from relying on the MAC clause.

360. However, there is US case law on an analogous provision in a takeover agreement which in my view supports the borrower's contention. In *IBP Inc v Tyson Foods Inc* 789 A2d 14 (Del Ch 2001) 65, the Delaware Court of Chancery construed the "material adverse effect" clause in the relevant agreement "… as best read as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally significant manner".

361. The court's reference to "unknown events" is consistent with how the issue has been treated in academic authority. According to one commentator, "General and/or sectoral economic decline that was known to, or should have been foreseen by, the party relying on the clause when he entered into the contract is unlikely to be held to constitute a material adverse change unless the wording of the clause is particularly clear on the point" (Hooley, *Material Adverse Change Clauses After 9/11*, chapter 11 of *Commercial Law & Commercial Practice*, ed Worthington, 2003).

362. Similarly, it has been said that "… the lender cannot trigger the clause on the basis of circumstances of which it was aware at the date of the contract since it will be assumed that the parties intended to enter into the agreement in spite of those conditions, although it will be possible to invoke the clause where conditions worsen in a way that makes them materially different in nature" (see Rawlings, *Avoiding the Obligation to Lend*, 2012 J.B.L. 89). In my view, this states the law correctly.

363. Finally, I should note one construction point which was not in dispute. In order to be material, any change must not merely be temporary. This is consistent with the approach which the courts have taken in relation to MAC clauses in company acquisition agreements: see the above quotation from *IBP v Tyson Foods Inc*, and also an English case, *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573 at 605.

364. In summary, authority supports the following conclusions. The interpretation of a "material adverse change" clause depends on the terms of the clause construed according to well established principles. In the present case, the clause is in simple form, the borrower representing that there has been no material adverse change in its financial condition since the date of the loan agreement. Under such terms, the assessment of the financial condition of the borrower should normally begin with its financial information at the relevant times, and a lender seeking to demonstrate a MAC should show an adverse change over the period in question by reference to that information. However the enquiry is not necessarily limited to the financial

information if there is other compelling evidence. The adverse change will be material if it significantly affects the borrower's ability to repay the loan in question. However, a lender cannot trigger such a clause on the basis of circumstances of which it was aware at the time of the agreement. Finally, it is up to the lender to prove the breach.

Carey's case as to representation in respect of GU

(1) Carey's amended case as to timing

365. On the contractual terms in question, to make good its MAC case, Carey must show a representation at the relevant date, which is 6 June 2008, the date when the tranche of the loan due to be advanced by Carey to GHU was not advanced. Carey's case is that it was not in breach of the loan agreement, because it was not obliged to continue to lend at that time, on the basis that GHU was in default within the terms of the Loan Agreement because the MAC representation was false. The timing of the representation, true or false, is in dispute between the parties as regards GU, though not as regards GHU and Urvasco Ltd.

366. The relevant agreement for present purposes is the BBVA Credit Agreement entered into in 2004 and amended and restated on 21 December 2007 by which BBVA extended facilities to Urvasco Ltd. I have set out some of the relevant terms above. As guarantor, by clause 16.10 GU represented that "… there has been no material adverse change in its financial condition (consolidated if applicable) since the date on which the Original Financial Statements were drawn up". A representation which was incorrect in any material respect when made or deemed to be repeated is a default under clause 21.4 of the BBVA Credit Agreement (part of the events of default clause which deals with "Misrepresentation"). By clause 10(b)(iv) of the Loan Agreement with GHU, an event of default occurs under that agreement if any BBVA default occurs.

367. Those are the provisions that Carey relies on. It is now necessary to consider further the terms of the BBVA Credit Agreement as to the *time* of making such a representation.

368. Clause 16.28 deals with this issue under the heading, "Times for making representations". The provision is in conventional terms. Its effect is that the representations made at the time of the agreement were deemed to be repeated by GU on three occasions. These were, first, the date of each Request (which as defined in the agreement was essentially the date of the request for drawdown), second, on each Utilisation Date (again defined, but essentially the date of drawdown) and third—and this is the material part of the provision for present purposes—on the "first day of each Interest Period". This term, as I shall explain shortly, was also defined.

369. In its written opening submissions, GHU said that "Carey's pleading appears to proceed on the assumption that such a representation [that is, as regards material adverse change] was made by GU in around June 2008 (Defence paragraph 56A). However, there is no plea of when such a representation was made, or was deemed to have been made, by GU. This part of the pleading is for this reason defective and fails to disclose a proper cause of action …". The submissions on the point go on to state that they are without prejudice to that contention.

370. In its written opening submissions, Carey countered that, "As GHU recognises, the pleading is based on the making of a representation at least in early June 2008". It went on to assert that there being no agreement to the contrary, the first day of the Interest Period in respect of the 5 December 2007 drawdown under the BBVA Credit Agreement following the first period of six months, was on 6 June 2008. In other words, it was asserting that the third of the times identified in clause 16.28 was applicable. Factually, it is not in dispute that there was a drawdown (or more precisely two drawdowns under facility B and C of the BBVA Credit Agreement) of about €3.4m on 5 December 2007. I have referred to it in the factual narrative.

371. The trial then began, and there was no application by Carey for permission to amend, but the point was out in the open. I am satisfied that both parties went into this trial well aware of the strengths and weaknesses in their respective positions, and both parties had the opportunity during the trial to explore the issue so far as they considered appropriate.

372. In its closing submissions, GHU returned to the issue, again asserting that Carey's pleading was defective. Further, it asserted that Carey was wrong in its contention that 6 June 2008 was the first day of the Interest Period in respect of the 5 December 2007 drawdown.

373. Carey then applied for permission to further amend paragraph 56 of its Defence to assert the representation it had alleged in its opening submissions. For reasons which I gave at the time, and need not repeat, I granted permission to amend, and permission to GHU to plead a consequential amendment to paragraph 40 its Reply. The issue, therefore, no longer turns on a pleading point, but is whether Carey's contention is correct. Carey's amendment is limited to 6 June 2008, because the six month period from 5 December 2007 and thereafter for which it contends does not cover the remaining drawdown dates under the Loan Agreement prior to its cancellation.

(ii) The parties' cases

374. As I have indicated, by clause 16.28 of the BBVA Credit Agreement, the MAC representation by GU was "deemed to be repeated … on … the first day of each Interest Period". Clause 9 of the agreement deals with Interest Periods. Clause 9.1 deals with the length of interest periods. Clause 9.1(c) provides that "… each Interest Period will be six months or any other period agreed by [Urvasco Ltd] and [BBVA]".

375. Carey submits that, there being no agreement to the contrary, the first day of the Interest Period in respect of the 5 December 2007 drawdown following the first period of six months, was on 6 June 2008.

376. GHU submits that the true position is entirely different. In relation to the loans under the BBVA Credit Agreement, the agreed Interest Periods were from 1 January to 30 June and 1 July to 31 December in each year. Further, where a drawdown was made during an Interest Period, interest would be due from the date of the drawdown to the end of the relevant Interest Period.

377. Alternatively, GHU relies on clause 9.2 of the BBVA Credit Agreement which states that, "Unless [Urvasco Ltd] otherwise requests, an Interest Period for a Loan will end

on the same day as the current Interest Period for any other loan. On the last of those Interest Periods, those Loans will be consolidated and treated as one Loan."

(iii) Discussion and conclusion on the date of representation issue

378. GHU relies on the evidence of Ms Santamaria, GU's financial controller, which is to the effect that interest on the BBVA advances ran from 1 January to 30 June and 1 July to 31 December in each year. Furthermore, it relies on documents which show, in effect, that BBVA charged interest on the 5 December 2007 advances by reference to these periods. Thus, it says, this was the period "agreed" within the meaning of clause 9.1(c).

379. The documents concerned are BBVA documents. GHU submits that they clearly show that in relation to loans under the BBVA Credit Agreement, the agreed periods were from 1 January to 30 June, and 1 July to 31 December in each year, so that there were two six monthly interest periods making up the whole year. Where a drawdown was made during an interest period—and that applies to the drawdown of 5 December 2007—interest would be due from the date of the drawdown to the end of the relevant period. So as regards the 5 December 2007 drawdown, interest accrued until 31 December 2007, which was the end of year interest period, and then the new interest period started on 1 January 2008, and again on 1 July and so on.

380. Therefore, on the basis that the MAC representation was made on the date of each request, the Utilisation Date and first date of each Interest Period, in relation to the drawdowns made on 5 December 2007, the representation would, in fact, be deemed to be made on 1 July 2007 and/or 5 December 2007 (for the period 1 July to 31 December 2007), 1 January 2008 (for the period 1 January to 30 June 2008), and 1 July 2008 (for the period 1 July to 31 December 2008). No representation, GHU submits, was deemed to have been made on 6 June 2008 as alleged by Carey.

381. There are a number of documents in point. Interest statements show, GHU submits, that where a drawdown was made during an interest period, the interest period for that drawdown would run to the end of the existing period, and then fit into the six monthly scheme. An example is a statement from BBVA with a date of 31 December 2007 dealing with facility B under the agreement, which was the facility concerned with the hotel. The statement shows the "periodo de liquidacion"—which it is not in dispute translates as "calculation period"—in respect of interest. This is stated as 1 July 2007–31 December 2007. The statement shows the amount of principal outstanding, increasing according to the various drawdowns.

382. There is no doubt that a significant point for present purposes is the reference in the document to "26 days". The same reference appears on the equivalent document relating to facility C, which referred to the apartments. This, GHU submits, shows interest in respect of the 5 December 2007 drawdowns being accounted for on the basis that interest was to accrue until the end of the existing period on 31 December 2007, and then starting a new interest period on 1 January 2008. I am not sure that this was in dispute, and in any case is clear from the face of the document. From 5 December 2007, a period of 26 days takes one to 31 December 2007.

383. The same conclusions, GHU says, can be drawn from the subsequent interest statement for facility B, which shows the period of calculation from 1 January 2008–

30 June 2008. Since the starting figure on this statement is the same as the closing figure on the previous statement, it follows that the 5 December 2007 drawdown is included within the new interest period beginning on 1 January 2008. There is no document in the files in relation to facility C, but there is no reason to suppose it would be any different. The same position is shown in the interest statements for facilities B and C for the period of calculation from 1 July–31 December 2008.

384. In response, Carey submits that there never was any agreement as to periods, and the evidence does not support such an agreement. It may have suited the bookkeeping arrangements of BBVA to have half year and end year arrangements, but that does not mean that the interest period was amended. As to clause 9.2, it is submitted that this is simply a boilerplate provision designed to bring under the umbrella of an interest period multiple drawdowns. There is nothing in clause 9.2 which enables GHU to say that the interest period commenced on 1 January 2008.

385. I express my conclusions on this issue as follows. It is important to appreciate that Carey alleges and pleads that the relevant representation was made <u>on</u> 6 June 2008. That is consistent with clause 16.28 of the BBVA Credit Agreement which makes it clear that representations are expressed or repeated on particular dates.

386. It is also to be noted that it is coincidence that an argument is available to Carey as regards GU's financial condition on that date. Drawdowns under the BBVA Credit Agreement were not made at regular intervals. The evidence is that they were made at irregular intervals, depending on the state of play between BBVA and the Urvasco group at the time. The drawdowns on 5 December 2007 could easily have been made on some other day, or indeed some other month, and if so, the foundation for Carey's material adverse change case as regards GU would not exist. Of course, this does not in any way prevent Carey relying on the contractual provisions if it can show that they apply.

387. Carey's contention is that GHU cannot make out any agreement that the interest period was to run other than by reference to the date of the drawdown, that is, 5 December 2007. However, as lender, it is Carey that is asserting that there has been a material adverse change. The onus of proof lies on Carey to prove its case under clause 16.10 and the other relevant provisions of the BBVA Credit Agreement.

388. There is ample evidence, in my opinion, to demonstrate that the agreed Interest Periods were from 1 January to 30 June and 1 July to 31 December in each year. "Agreed" in this context means agreed between BBVA and Urvasco Ltd. Carey is not a party to this agreement. Apart from Ms Santamaria's witness statement, this clearly appears from the BBVA interest statements themselves. These show that interest on the 5 December 2007 drawdowns was calculated on a 26 day basis until 31 December 2007, with a new Interest Period beginning on 1 January 2008.

389. There is nothing commercially surprising about such an agreement. On the contrary, it would be commercially surprising if a situation obtained by which there were multiple different interest periods under the BBVA Credit Agreement, depending on the date of the drawdown. In any case, in my view, and as GHU submits, the evidence shows what was agreed. It shows, as GHU submits, that the agreed Interest Periods were from 1 January to 30 June and 1 July to 31 December in each year. Any doubt on the matter is dispelled, in my view, by clause 9.2, providing that unless

Urvasco Ltd otherwise requested— and no one suggests that it did—an Interest Period for Loans under the Agreement ended on the same day as the current Interest Period for any other Loan.

390. Finally, it is fair to say that Carey could (as BBVA did) have incorporated in its own Loan Agreement a representation as to material adverse change by GU (which also gave a guarantee of that agreement), and provide that it was to be repeated at each drawdown under that Loan Agreement. That would have made commercial sense, but it did not do this, and has to rely on the position as it was as regards another lender under another agreement.

391. For all these reasons, the burden of proof lying on it, I am satisfied that Carey cannot show that on 6 June 2008, GU made a representation to BBVA pursuant to clause 16.10 of the BBVA Credit Agreement, as it asserts in its amendment to the defence. Its MAC case in respect of GU fails for that reason.

392. Since it has been fully argued in the course of the proceedings, I shall however determine Carey's factual case as to a MAC in the case of GU, and make findings.

The expert evidence

393. This is not a case in which bankers or the like gave expert evidence as to what the market would regard as material adverse change. The expert evidence was evidence on accountancy from Mr Beltrán for Carey and Mr MacGregor for GHU. Each expert produced a Report and a Supplemental Report. Neither of them held themselves out as experts on material adverse change clauses as such, and indeed the purpose for which permission to adduce the evidence was given was "Spanish accounting". They both agreed that the proper construction of the terms "financial condition" and "material" is a matter for the court.

394. As well as different conclusions, there was a difference of approach between them, which is well summarised in the reading list agreed between the parties, which also constitutes a good synopsis of their evidence, and the parties' respective cases. It is as follows.

395. Mr Beltrán's conclusion is that by reference to the accounts to 31 December 2008 each of GU, GHU and Urvasco Ltd suffered a MAC in their financial conditions in the course of 2008 compared with 21 December 2007. Mr Beltrán's analysis which then leads him to conclude that these MACs had occurred by 6 June 2008 is based on the weakness of the condition of GU, GHU and Urvasco Ltd as at 21 December 2007, the nature and extent of the changes in 2008 and his consideration of the business model of GU, the development of the macro-economic and sector and market indicators during 2008, and other sources of evidence including problems with payment of creditors in the first half of 2008, the sale of Urvasco Energia, statements made in the 2008 accounts, the engagement of IREA and statements made in the IREA restructuring plan and in press reports. Mr Beltrán considered the financial information for GU and GHU at 30 June 2008 (as contained in the IREA restructuring plan) but concludes that it is not sufficiently reliable for the purposes of comparison with the earlier audited accounts.

396. Mr MacGregor disagrees with Mr Beltrán's approach. He does not consider that it is possible to extrapolate from the accounts at 31 December 2008 to determine whether a MAC had occurred at 6 June 2008. Mr MacGregor's approach is based on an analysis of the available financial information for GU and GHU at 30 June 2008 (as contained in the IREA restructuring plan) and for Urvasco Ltd in its 31 May 2008 management accounts. Mr MacGregor considers that, although there are some limitations to this information, it represents the best means of the assessing the companies' financial conditions at 6 June 2008. Mr MacGregor also considers that adjustments should be made to the audited and interim figures in order to ascertain the financial conditions of the companies. On this basis, Mr MacGregor does not consider that there had been a MAC in the financial condition of any of GU, GHU or Urvasco Ltd by 6 June 2008.

397. As the agreed reading list puts it, a significant number of the issues between the experts arise from this difference of approach and from their respective views as to the reliability, relevance and analysis of the financial information available to them.

398. In view of the submissions made to me, I need to say something as to my appraisal of Mr MacGregor and of Mr Beltrán. Carey criticised Mr MacGregor, saying that he was not independent, and was "prepared to gloss or spin the facts".

399. Some of the points made in support of this criticism are, on analysis, criticisms which go to his treatment of particular items as a matter of accounting, on which there is room for a difference of opinion. They provide no support for Carey's criticism.

400. Carey also criticise his approach to the evidence as to the overall position. As an accountant, Mr MacGregor was of course concerned with financial information. In his first report of 16 December 2011, he said that, "In my opinion, it is possible to constitute reliable financial information for each of the companies at a date that is proximate to 6 June 2008 and from my analysis … it is clear that the deterioration between 31 December 2008 and 31 December 2007 occurred after 6 June 2008 and that in fact there was no deterioration by 6 June 2008".

401. In cross examination however, he accepted that there was a gradual deterioration in the financial condition of the companies up until June 2008. He added that in the post-June period, it seemed to get materially worse. Carey submitted that by resiling from a conclusion as stark as the one he had previously reached in his report, he fundamentally undermined that report, the entire thrust of which was that the position had not deteriorated (and, in some cases, had even got better) in the first half of 2008.

402. GHU responded that insofar as this was a change of position (and I note that Mr MacGregor accepted that it was a change of position), it showed no more than he was prepared to modify his views in the light of points put to him.

403. On the whole, I agree with GHU's assessment, and reject the proposition that Mr MacGregor's report was thereby fundamentally undermined. I do agree however with Carey that his conclusions have to be read with his oral evidence in mind. It was clearly important evidence. Further, I consider that it was inevitable in the light of the other evidence in the case. The question is whether the admitted gradual deterioration up to 6 June 2008 amounted to a material adverse change as compared to 21

December 2007 in the financial condition of one or more of the companies in question.

404. So far as Mr Beltrán is concerned, GHU submitted that he was an unimpressive witness, and that it is telling that in Carey's closing submissions relatively little reliance was sought to be placed on his reports. As is said (correctly in my view), in oral evidence his explanations were often unclear and muddled. In fact, Carey itself fairly accepted in its own closing submissions that "… his answers were sometimes long and not always directly responsive to the point that was being addressed by the question" (while maintaining that he was at all times helpful and straightforward).

405. In fact, I found Mr Beltrán's account of the background in the construction industry to be helpful. He was well qualified to give it because of his great experience in the real estate field. But so far as the issue I have to decide is concerned, the problem (as GHU says) was his approach. His starting point was that the year end accounts to 31 December 2008 showed that a material adverse change had occurred by that time. He did not however prepare balance sheets for any of the companies as at June 2008. He relied on the surrounding circumstances, and in particular the state of the Spanish economy as he saw it, and in particular the construction sector where his special expertise lies, to infer that the change must have taken place by 6 June 2008.

406. The limitation of that approach is that though of significance as background evidence, in itself it does not necessarily tell one about the financial condition of GU (and this mainly applies to GU), which may have performed better (or worse) than the rest of the construction sector. As I have said in discussing the correct interpretation of the contractual provisions, the financial condition of the companies in the context of these provisions should primarily be determined from the available financial information in respect of the company concerned.

407. The Urvasco group's audited accounts on which Mr Beltrán based his approach are as at year end. However, there are financial statements for the relevant companies at or about mid-year 2008. In the case of GU and GHU, these are contained in the IREA restructuring plan, and are as at 30 June 2008. In the case of Urvasco Ltd there are accounts as at 31 May 2008 prepared in connection with the "whitewash" necessary to provide Carey with the second charge. Mr MacGregor sought to construct consolidated balance sheets and use the aggregated profit and loss accounts for GHU and GU at 30 June 2008 based on the IREA financial information. In the case of Urvasco, he considered the 31 May 2008 management accounts. On that basis, he prepared an analysis of the financial condition of each of the companies as at 6 June 2008 and then compared this with their financial conditions at 31 December 2007 for the purposes of identifying whether there were any changes in their financial condition.

408. I should mention that Carey criticised GU for not having produced audited accounts as at 6 June 2008. In my view, there is no basis for this criticism. It is not usual for interim information to be audited. That apart, as GHU submitted, it was not up to GU or indeed any other company in the group to disprove a MAC alleged by its lender by having to produce audited accounts at the relevant dates. The onus of proof is firmly on the lender.

409. I accept GHU's submission that it is not possible to construct an accurate analysis of the balance sheet and profit and loss account as at 6 June 2008 starting from the year end accounts to 31 December 2008. Nor is it reasonable to assume that information about the financial conditions of the companies at 31 December 2008 is necessarily informative about their financial conditions more than six months earlier, particularly at a time of a changing business environment and economic change and uncertainty such as in 2008.

410. It is plain, and GHU accepts, that the information on which Mr MacGregor based his exercise has significant inadequacies. Nevertheless, in principle, it is the financial information which states the position close to the material time, that is, 6 June 2008. I consider that Mr MacGregor was right to take it as his starting point. It is clearly preferable to Mr Beltrán's starting point, namely the year end accounts.

411. However, there are caveats which apply as regards GU (though not to the same extent as regards GHU and Urvasco Ltd). The first is that the admitted inadequacy of the base information means that it has less weight than (for example) had it consisted of audited accounts. Second, I do not accept all Mr MacGregor's figures, and there is an element of judgment as to what is included. Third, I have to consider his reconstruction of GU's financial information in the context of all the other evidence, and ultimately have to decide the issue on all the available evidence.

412. I need at this point to mention two other criticisms which GHU makes of Carey's case on MAC. First, it must prove a material adverse *change*. Its case, GHU says, is heavily based on matters which took place in the first half of 2008, without undertaking a proper analysis as to the extent to which those matters represented a change from the position prevailing at 21 December 2007. Second, the material it relies on is diffuse and difficult to analyse. There is, in my view, force in both these points. Mr Beltrán did not convincingly analyse the change in his reports, and I preferred GHU's analysis. Nevertheless, as I shall explain, some of the material that Carey relies on is of considerable weight in itself, particularly when considered in its overall context.

413. A final and important general point as to the evidence on the MAC issue is as to accounting standards. New Spanish GAAP came into force at the beginning of 2008. Significant changes were made, including as to the treatment of property sales, and derivatives liabilities, to bring Spain within current international standards. This means that it is not possible to compare directly accounts at year end 2007 with those at year end 2008.

414. I now consider Carey's case in relation to the three companies. In its written closing submissions, it considers the position company by company. In my view, it was right to do so because it is necessary to distinguish between the three companies. In fact, by far the greatest part of Carey's submissions went to the position of GU.

<u>Alleged MAC (GU)</u>

The parties' cases

415. The starting point for Carey's case is that the financial condition of GU suffered such a severe deterioration in the course of 2008 that it is unrealistic to suggest that there

was not a material adverse change in that year as a whole. As it puts it, the issue for the court is whether the change had taken place by 6 June 2008 or, if not, by the time that one of the later Subsequent Tranches is said to have become due by GHU. (The point as to later tranches is not pleaded, and no longer advanced.)

416. Carey's closing submissions as regards GU challenge Mr MacGregor's approach to the available financial information. I begin therefore by setting out his summary conclusion as contained in his first report of 16 December 2011:

(1) He determined the relevant financial information as at 30 June 2008 which is the closest date to 6 June 2008 for which he was able to determine information;

(2) Although there were some limitations to this information and certain adjustments had to be made to ensure that the information is comparable on a like for like basis with that of 31 December 2007, he concluded that it was sufficiently reliable to show the financial condition of GU at 30 June 2008. In any event, he considered it more reliable than using the financial statements at 31 December 2008 to show the financial condition at 30 June 2008;

(3) He concluded that the key financial metrics showed an improvement in financial condition at 30 June 2008 over 31 December 2007;

(4) In particular, current assets, net assets and net profit were all higher at 30 June 2008 compared with 31 December 2007;

(5) He therefore concluded that there had not been a significant change in GU's ability to meet its financial obligations, in particular, its obligations under its Guarantee of the Loan Agreement and under the BBVA Credit Agreement.

417. As I have said, this—and particularly the second and third points—have to be read with his cross examination in which he accepted that there was a gradual deterioration in the financial condition of the companies up until June 2008, adding that in the post-June period, it seemed to get materially worse. The question of an "improvement" is no longer on the table.

418. A primary question for decision therefore is when the deterioration took place in 2008. The parties' cases in that regard were as follows. Carey says that the evidence shows clearly it was in the first half of 2008 and by 6 June 2008. GHU says that the evidence shows a gradual decline in the first half of 2008, and then matters got "quite seriously worse". The following factors featured in the parties' submissions.

GU's 2008 accounts

419. Carey points to the fact that GU suffered a loss of €126m for the year ending 31 December 2008 compared to a loss of €16m for the year ending 31 December 2007. Its net equity declined from €120m to negative €34m. It also says that GU became exposed in 2008 to very significant losses on open derivatives contracts. It says that while part of the changes would have been caused by the new Spanish GAAP which came into force in respect of the 2008 accounts, the nature and size of the changes is consistent only with a substantial deterioration in the underlying financial condition of

GU. Indeed, all of the major indicators in GU's audited accounts changed very substantially for the worse in 2008.

420. GHU's case on this point is that there were two major components of this loss of €126m in 2008. First, the sale of land to the banks as part of the restructuring process caused a loss of approximately €50m (see the note to the 2008 GU accounts). Mr Beltrán accepted that this took place from September 2008 onwards, so it was not a loss which was realised at 6 June 2008. This submission appears to me to be correct.

421. The second component was the provision for the change in fair value of the derivatives of €82.6m (see the note to the 2008 GU accounts). This was not a loss which was realised at 6 June 2008. Accordingly, an analysis of the items in the GU 2008 accounts relied on by Mr Beltrán in support of his conclusion that there had been a MAC in relation to GU by 31 December 2008 does not lend any support to a conclusion that this MAC had occurred by 6 June 2008.

422. I consider that Carey's submission comparing the year end accounts as at 2007 and 2008 is correct to the extent that the deterioration was plainly severe. But it does not follow that (as it goes on to submit) the sheer size of the deterioration in 2008 as a whole in itself makes it very likely that a large and material part of it had taken place by 6 June 2008. In that regard, I accept GHU's point that the major components of the 2008 end of year loss are derivatives and land sales, and not necessarily attributable to matters which resulted in realised losses as at 6 June 2008. More generally, I also accept its point that there is no analysis by Carey of the financial condition of any of the companies as at 6 June 2008 by reference to their balance sheet position as at that date.

423. This 2008 year end loss is only one of the points that Carey relies on. The others are as follows.

KPMG's qualified opinion to the 2008 accounts

424. Carey relies on the fact that because of the negative consolidated equity before minority shareholders and negative working capital, the auditors qualified the 2008 accounts stating that:

> "…these circumstances reveal uncertainty as to the Group's capacity to continue its business so as to realise its assets and settle its liabilities for the amounts and according to the classification by which they are recorded on the accompanying consolidated annual accounts, which have been prepared assuming that the business will continue."

425. GHU points out that this is addressing the position at 31 December 2008 and not at 6 June 2008. Moreover, it says, the qualification was the function of the losses incurred by GU during 2008, and logically it does not add anything to an analysis of those losses.

426. GHU also points out that the 2008 accounts were prepared on a going concern basis and were stated by the auditors (KPMG) to give a true and fair view. Accordingly, KPMG had to be satisfied at 15 June 2009 (when the report was signed) that GU was a going concern. Mr MacGregor explained that the rule of thumb is that when an

auditor accepts financial statements and signs them off on a going concern basis he must be satisfied that the company will continue as a going concern for the later of 12 months after the balance sheet date or six months after the date of the audit report. Thus, although there was a qualification, KPMG were nonetheless satisfied that GU would continue as a going concern until at least the end of 2009. I do not think that this evidence was in dispute, and in any case accept it.

427. GHU says further that the 2007 GU accounts were also prepared on a going concern basis and were not qualified. Although the audit report in the accounts is dated 31 March 2008, the evidence shows that the accounts were in fact finalised some time later probably during June 2008 (see, in particular, the reference in the directors' report to the closing of the sale of Urvasco Energia). This means, GHU says, that as at June 2008 KPMG considered that GU was a going concern and, moreover, that they were satisfied that it would continue as a going concern until at least the end of 2008.

428. So far as Carey relies on the qualification as relevant to the position as at 6 June 2008, this last point carries particular weight in my view. I consider that it is made good on the evidence, noting that GU did (and still does) continue as a going concern. That neutralises to a considerable extent Carey's submission in this respect. I do however accept that the auditors' qualification of the GU accounts remains relevant as part of the background.

Further points made by Carey

429. Carey goes on to place considerable reliance on the directors' report in the 2008 GU accounts. This is an important part of the evidence with which I deal below. Carey also points to the fact that from September 2008, GU was in negotiations with its banking creditors for a rescheduling of its debts by reason of its financial difficulties. The report put together by IREA and Garrigues in November 2008 it says (rightly), paints a picture of a business in serious financial trouble. (That report, it is to be noted, is based on the interim figures to 30 June 2008, which Carey criticises Mr MacGregor for relying on.)

430. Carey points to the solution adopted by the group's bankers, which was to take land assets and cancel the loans connected with them. All this is factually correct, but these matters post-date 6 June 2008, and do not give much support to the proposition that there was a MAC on that date.

Mr MacGregor's analysis of the figures

431. Mr MacGregor has sought to identify the relevant financial information for GHU, Urvasco and GU as at 6 June 2008 in order to produce a profit and loss statement and balance sheet. Specifically:

(1) For GHU, he has analysed the financial position of GHU both on an unconsolidated and consolidated basis:

a) As to the unconsolidated position, he has used the 30 June 2008 interim accounts which he considers are a reasonable proxy for the position as at 6 June 2008. He makes a comparison of the position between 31 December 2007 and 6 June 2008.

b) As to the consolidated position, he has used the aggregated 30 June 2008 accounts which were included in the reports prepared by IREA in October and November 2008. Again, he considers that 30 June 2008 is a reasonable proxy for the position at 6 June 2008. He makes a comparison of the position between 31 December 2007 and 6 June 2008.

(2) For Urvasco Ltd, Mr MacGregor has used the 31 May 2008 management accounts (which were prepared by KPMG) and which he considers are a reasonable proxy for the position as at 6 June 2008. A summary of this information, adjusted to allow for proper comparison, is compared with the position as at 31 December 2007.

(3) For GU, Mr MacGregor has again used the 30 June 2008 information included in the reports prepared by IREA to prepare aggregated accounts. Again, he makes a comparison of the position between 31 December 2007 and 6 June 2008.

432. In relation to GU on a consolidated basis, GHU summarises his findings in its closing submissions as follows:

(1) Net current assets of €1,534,411,047 at 30 June 2008 had increased from net current assets of €1,073,431,002 at 31 December 2007.

(2) Total net assets of €203,251,319 at 30 June 2008 had increased from total net assets of €196,156,673 at 31 December 2007.

(3) When adjustments are made to allow proper comparison between the positions at 31 December 2007, 30 June 2008 and 31 December 2008, there is a reduction from adjusted total net assets of €197,892,337 at 31 December 2007 to €186,252,690 at 30 June 2008. This is not, however, a significant reduction.

(4) Adjusted net profit of €125,852,894 at 30 June 2008 compares with a loss of €22,899,353 at 31 December 2007.

433. As Carey points out, Mr MacGregor's figures show on their face that the financial condition of GU improved in the first half of 2008. On this basis, GU was a highly profitable business in the first half of 2008, making a profit of €170,312,554 despite the fact that it had made losses the previous year. This implies that all the deterioration in the company's position took place in the second half. GU's current assets improved by approximately €460 million in the first six months of 2008. On the face of it, therefore, the group's ability to pay its debts would have improved substantially, and yet, as Carey says, it was reliant on the prospect of the sale of Urvasco Energia to stave off its banking creditors in the period between March and June 2008.

434. I agree with Carey that in the light of all the evidence, this is not a credible conclusion. In cross examination, in the light of the material he had seen since his report, Mr MacGregor effectively agreed, accepting that there was a deterioration in

the financial condition of the company up until June 2008, but saying that it was "gradual", and that in the post-June period, it seemed to get materially worse. On this basis, I consider that the figures cannot be fully accepted, though GHU stood by them in closing.

435. There are various factors that may explain this, without impeaching Mr MacGregor's basic approach. One may be that he did not see the relevant trial balances. Carey submits that these suggest fewer sales in the first half of 2008 than recorded by IREA. GHU says that it is possible that the IREA financial information was prepared on the basis of 2007 Spanish GAAP, whereas the trial balance information may well not have been prepared on the same basis. This is supported by the fact that in relation to the hotel companies, there are, with one small exception, no differences between the information shown in the IREA financial information and that shown in the trial balances.

436. I consider however that the more substantial point in this respect was made by Carey as follows. In terms of GU's financial condition, it is important to know how many new sales took place in the first half of 2008, and how much actual cash these had generated. This was particularly important because the change in Spanish GAAP resulted in a very large volume of sales—€135,216,000—which had been recorded in 2007 being reversed out of that year (see note in the GU 2008 accounts under "Ordinary income from the sale of properties"). They were subsequently accounted for in 2008 (and, Mr MacGregor appears to have assumed, in the IREA figures to 30 June 2008). The effect of this was that the sales figures for 2008 would not accurately reflect the state of the market in that year because a significant portion of the turnover in 2008 reflected customers who had agreed to buy properties in 2007.

437. A further point is that there is no provision made by Mr MacGregor for the impairment of stocks, whilst such a provision (of €77,746,575) is included in the 31 December 2008 accounts. Carey says that a provision should be made based on what it says was the fall in the value of land in Spain in the first half of 2008. Mr Beltrán's evidence that the valuation of land in Spain decreased by 9.3 per cent during the first half of 2008.

438. I accept a number of the points which GHU makes in this regard. The evidence is that the Group's property holdings were generally of a good quality, and for that reason a figure relating to the whole country is of limited use. Further, a fall in value would only require provision in the accounts if it took the value of the land below its original cost (see note 4(i) to GU 2008 accounts). Mr Beltrán accepted that he did not know as at June 2008 whether the cost of GU's land and developments exceeded the net realisable value of that land. As he admitted in cross-examination, "So I don't know if it was 70, 30, 40, 50, 80, I don't know".

439. On this basis, GHU submits that it is not open to Carey to contend that such a provision should be included as at 30 June 2008 having not led any proper evidence on this point, and certainly there is no proper evidential basis on which the court could conclude that such a provision should be included.

440. Despite these submissions, it is not in my view realistic to suppose that no provision against fall in land value should be included in the period up to 30 June 2008. I am

not however satisfied (in relation to another of Carey's points) that further provision needed to be made as regards interest payable.

441. There are further disputes as regards Mr MacGregor's figures which can be treated under separate headings.

Urvasco Energia

442. The effect of the sale of Urvasco Energia has been a significant issue between the parties. The facts in this regard are set out in the factual narrative, to which reference may be made. By coincidence, the sale completed on 6 June 2008, in other words the same day as the Subsequent Tranche in respect of the April works was due from Carey.

443. The dispute between the parties concerns how the gain from the sale of Urvasco Energia should be treated. At times, Carey appeared to submit that it should be left out of account altogether, since it was a one-off item. It also relied on the fact of the sale to show that GU was in severe financial straits. However, I consider that in itself the sale of the company says little about the state of GU's finances. Further, I accept GHU's criticism of Carey's treatment of the topic of adjustments made by Mr MacGregor as regards the sale, which does not distinguish between matters which are relevant to the IREA interim financial information, and adjustments which he made for the purpose of comparing the 2007 and 2008 accounts.

444. In any event, it is clearly correct that the gain from the sale of Urvasco Energia is relevant in assessing the financial condition of GU and GHU as at 6 June 2008, and is potentially an important point in support of GHU's case. Whilst accepting that there were cashflow problems in the first half of 2008, GHU submits that as at 6 June 2008, these problems were much less acute given the completion of the sale of Urvasco Energia that day for net proceeds of €135.9m. Looked at on the relevant day, it is wrong therefore to say that GU and GHU had "very severe cashflow problems".

445. Carey's case in response is that this issue has to be seen in the light of the fact that the banks which had lent to the group were assured that the sale would resolve the group's financial problems. Mr Couto did not accept this, but there is ample evidence in the contemporary emails of banks being told that the sale of the company would ease the position. In fact, Carey submits that the cash injection only brought temporary liquidity to GU, the effect of which lasted only for a matter of weeks. As regards GHU, it says that the company got no practical benefit from the transaction, since (as set out above) an inter-company loan on its books was converted into equity. There was no substantial cash injection into the company.

446. GHU's answer is that this does not detract from the point that the sale led to an improvement in GU's financial condition as at 6 June 2008 compared to what its financial condition would have been without such a sale. This was because the sale realised a substantial profit for GU and generated liquidity which could then be used for other purposes. It offers no support for the conclusion that a MAC had occurred by 6 June 2008. On the contrary, the sale of Urvasco Energia led to an improvement in GU's financial condition as compared to the position prior to such sale.

447. Carey's response is that in its closing submissions GHU now admits that GU ceased paying bank debts from mid to late June 2008. That, it points out, was only days after receiving the proceeds from the sale of Urvasco Energia. It refers to what appears to be an internal email of 9 June 2008 within Kuxta (one of the savings banks) which suggests that it had been told that the sale would allow the group to service its payments for 12 months or more, but that was clearly not the case.

448. My conclusion on this issue is as follows. Whilst I accept GHU's contention that the proceeds of the Urvasco Energia sale were substantial, and to that extent improved GU's position temporarily, I am satisfied that they were nowhere near enough to satisfy GU's needs. I agree with Carey that this is demonstrated by the admitted fact that shortly afterwards GU ceased paying bank debts. It is not difficult to see why that happened. So far as reliance was placed on Urvasco Energia, the overall impact of the sale was much less than the directors had hoped, or their creditor banks had been led to believe. It may be that this is the meaning of the passage in the directors' report to the 2008 GU accounts (set out below) which refers to the capital gains on the wind farm division being "watered down". Further, the position was not improved by the fact that (as I have explained) some of the proceeds had to be used to buy out Maricar, who was one of GU's founding shareholders.

Derivatives liabilities

449. There is an issue between the parties as to the relevance of derivatives liabilities. It is common ground that the derivatives contracts are set out in the 2008 GU consolidated accounts at note (15). The change in the "fair value" of these instruments held over the course of 2008 resulted in a loss of €82.6m being recorded in GU's profit and loss account as at 31 December 2008. As GHU puts it, the requirement to include this impairment reflected a change from the position in the 2007 accounts as a result of the new accountancy rules introduced in Spain. This is a reference to changes to Spanish GAAP which were effective from 1 January 2008. The result was that changes in fair value had to be shown on the face of the balance sheet and profit and loss account. The IREA financial information did not include provision for any such change as at 30 June 2008, and for that reason it is not reflected in Mr MacGregor's figures.

450. The parties make a number of points as regards derivatives liabilities. GHU says that Carey has not placed reliable information before the court from which the amount of any fair value provision as at 6 June 2008 can safely be determined. It says that the material which is available indicates that the majority of the changes in fair value in the course of 2008 are likely to have occurred in the second half of the year rather than in the first half of the year.

451. Carey says that the markets to which the derivatives were related moved consistently against GU and GHU in 2008 such that the amounts which each would have to pay to settle its open positions increased substantially. The two principal variables to which the speculative derivatives were related had experienced very substantial falls in the first half of 2008. It does however accept that there is no figure for the value of the derivatives at 6 June 2008, and but says that GHU ought to be able to say what the relevant values were.

452. I consider these issues below in relation to GHU, but need not consider them further at present, because I have reached a conclusion as to MAC in the case of GU which

does not depend on such change as there may have been in the fair value of GU's derivatives in the period 21 December 2007 to 6 June 2008. By closing, and in the light of the evidence, the derivatives issue was principally relevant to GHU.

Discussion and conclusions on alleged MAC (GU)

453. I do not think it is in dispute that there was a material adverse change in the position of GU at year end 2008 as compared to year end 2007, and in any case I am satisfied that there was. The question is whether Carey can show that it had occurred by 6 June 2008. As the above discussion shows, there are a number of factors to take account of. I will start with what can be described as Carey's "speculative business model" point.

(i) The "speculative business model" point

454. Carey submits that at the end of 2007, GU was very severely exposed to a downturn in the Spanish property market because its business model involved taking on extremely high levels of debt both to purchase land and thereafter to develop it. As a result, GU needed access to more borrowing, which relied on the continued buoyancy of the Spanish property market. As Carey put it, "This was a gamble which GU chose to take and is the reason why the business was speculative". It failed when the downturn in the Spanish property market which had started, Carey says, towards the end of 2007, continued and worsened in 2008. Some of this submission is based on Mr Beltrán's evidence and some on that of Mr Couto, and contemporary emails. Leaving aside the sentence referring to a "gamble", I do not think that (in substance) it is factually greatly in dispute.

455. Carey goes on to submit that the "main risk to its business to which GU was exposed at 21 December 2007 became a reality in the first half of 2008. The effect of this was that GU began to suffer increasing liquidity problems".

456. Whether or not this is accurate, the "speculative business model" point (which featured significantly in Carey's case) gave rise to important issues. These concern Carey's state of knowledge when it entered into the Loan Agreement with GHU on 21 December 2007 (given, as not in dispute, that the property crisis had begun to manifest itself by that date), the risks which Carey assumed in entering into the agreement, and an issue generally as to whether things *changed* in the sense necessary to constitute a MAC.

457. In short, GHU submits that when Carey entered into the Loan Agreement on 21 December 2007, it—and by "it" is meant Mr Losada who ran Carey at the time, and to a lesser extent Mr Garcia-Tapia—was well aware of GU's business model. They knew about the group's heavy debts, its difficulty in raising finance, and the gathering crisis in the property market in Spain. Carey nevertheless decided to enter into the agreement. It did so because it considered that the proposed transaction was very attractive and that the returns which it offered outweighed the risks which it had identified.

458. Thus GHU submits that Carey's case as to problems with its bank creditors in 2008 is nothing to the point, since it was to be anticipated at the time of the agreement. GHU says that Carey's heavy reliance on correspondence between GU and its lenders in the

first half of 2008 is flawed because it does not address the question which the court has to decide, namely, whether there was a change in financial condition between 21 December 2007 and 6 June 2008. The answer to this question, it says, (correctly in my view), requires a comparison of the position as at the two dates.

459. The argument proceeds as follows. As a consequence of what GHU says was Carey's failure to address this question, it has largely ignored the material relating to the period prior to 21 December 2007. In fact, an examination of the material shows that the communications which Carey relies on in the first half of 2008 as showing GU's poor financial condition were similar to communications which took place in the second half of 2007. The material relating to the two periods is of similar type. It is not therefore any evidence of a change in financial condition.

460. Carey sought to answer this point in its responsive closing submissions. It said that GHU had not itself undertaken any comparison exercise, but in my view, and in agreement with GHU, it was for Carey to do this if it wished to rely on the point. More substantially, Carey refers to differences in the nature of communications with BBVA before and after 21 December 2007, also making reference to Caja Extremadura.

461. I express my views as follows. A feature of the case is the number of banks with which the group had facilities (by the end of 2006, GU had funding arrangements in place with forty six banks). It is not difficult therefore to find remonstrations by lenders in the email record, and in my view, these are of themselves of limited assistance on the MAC issue. I accept that an important part of Mr Esparza's role throughout was, to put it colloquially, keeping the group's banks happy, and that liquidity was always an issue for the group. I also accept GHU's point that there are communications with the banks prior to 21 December 2007 which are at least not dissimilar to the ones that came afterwards.

462. Nevertheless, I am satisfied that GU's problems with its bank creditors did get much worse during the first half of 2008. This appears from the changing tone of some of the communications, and I give particular weight to those with BBVA. It is consistent with the rest of the evidence. It is also of some note that a bank guarantee was called by Heineken on 3 April 2008 in the sum of €4.8m in connection with the Seville development. This shows that the London development was far from being Mr Couto's only pressing problem. So while I accept GHU's submission that none of the bank material is sufficient in itself to prove a material adverse change, it is in my view part of an overall picture of deterioration in GU's financial position after 21 December 2007.

(ii) Carey's state of knowledge when it entered into the Loan Agreement with GHU

463. However, GHU submits that insofar as "the risk became a reality in the first half of 2008", as Carey puts it, this was a risk that Carey was prepared to accept in entering into the Loan Agreement. This, GHU submits, is all part and parcel of Carey's failure to demonstrate what is required to be demonstrated in this respect, namely a material adverse change in the financial condition of GU between 21 December 2007 and 6 June 2008.

464. For reasons given above, as a matter of law, a lender cannot trigger such a clause on the basis of circumstances of which it was aware at the time of the agreement. In determining whether GHU is right to say that this applies in the present case, I need first to deal with a point that was made by Carey in oral closing. It was said that the evidence shows "that at all times GHU was in the business of concealing the truth from Carey". There is no evidential basis for that proposition, and I reject it. In any case, prior to the agreements of 21 December 2007 being signed, there was the usual disclosure and due diligence. Carey had lawyers and monitoring surveyors acting for it, and there is no evidence that any of the enquiries they made were in any way thwarted.

465. I have not, of course, heard from Mr Losada during this trial. I did however hear extensive oral evidence from Mr Couto and Mr Garcia-Tapia. There is also some documentary evidence roundabout the time of the Loan Agreement which is relevant. The existence of liquidity issues was discussed at Carey's board meeting on 27 November 2007, and referred to by Mr Garcia-Tapia in his evidence.

466. Carey was itself well aware of the existence of the property crisis when it entered into the Loan Agreement. Mr Ramos accepted this in his evidence, saying that:

> "The real estate sector had started to decelerate in Spain, we had had some news already about some companies having some trouble, so we were discussing the possibility of assuming this construction risk, and Grupo Urvasco was one of the main real estate developers in Spain at the moment, obviously we all had in mind how things were developing in the real estate sector at that moment."

467. Mr Couto said that he was very open with Mr Losada about the fact that he was having problems getting further finance from BBVA, and that he needed money to finish the project, and I accept his evidence. The group's fragility must, in any case, have been obvious. The fact that it was reduced to seeking finance from Carey at all made clear that its sources of bank finance had dried up. In that regard, Carey was well aware that the initial £30m advance (nearly half the total loan) was mainly going to be used for general group purposes. As I have explained, only €4.28m went into the London development. Carey plainly did not know the full picture, but I am satisfied that it was well aware of the group's financial problems at this time.

468. However, there are limits as to how far this point takes GHU's case. As Lord Grabiner QC, leading counsel for Carey put it, if the group was in a hopeless state as at 21 December 2007, and Carey knew it, why would it do the deal? (It will be recalled that its right to a second charge over the property was of limited value, since it ranked behind that of BBVA.) There is no evidence that either Mr Couto or Mr Losada appreciated the extent to which the property crisis would deepen. There is a suggestion in Mr Beltrán's report that at this time the general consensus was that the market was experiencing a slow depreciation, and that demand would recover albeit slowly in subsequent years. Perhaps both of them were expecting (or hoping for) a soft landing.

469. Unfortunately, the evidence in this case clearly demonstrates that there was to be no soft landing. It was only in 2008 that the full force of the bursting of the property bubble on GU's business became apparent. I am satisfied that neither Mr Couto nor Mr Losada could have anticipated this, and in my opinion Carey did not assume the

risk of it happening. In short, although the position of GU was poor at the end of 2007, during 2008 it got much worse, and the question is how much worse by 6 June 2008.

(iii) Carey's knowledge of difficulty in paying contractors

470. A similar point arises as regards Carey's reliance on the difficulty of paying contractors during the course of 2008. As is described in the factual narrative, Urvasco Ltd already had difficulty paying contractors during the second half of 2007. GHU submits that whilst Carey may not have been aware of the details of payment difficulties with individual contractors, it would have been reasonable for it to conclude from the fact that GHU said it needed more funding which it had not been able to obtain from BBVA that there were such difficulties.

471. It relies on a passage from Mr Couto's evidence:

> "A. (Interpreted): This is what I said to Cesar Losada: if I don't have the money to finance the hotel, it may be assumed that it's because I don't have money to pay. This involves people cannot be paid and that's why I am looking for finance. And I don't want to put money from my company in the project. If you ask me whether I gave him a complete itemised list of everything that I had pending for payment, no, I did not, because nobody requested that."

472. I do not accept GHU's case in this respect. It does not, in my view, follow from the passage in Mr Couto's evidence relied upon. I have set out the position in the factual narrative. A postscript to an email sent by Mr Fernandez to Mr Couto on 13 October 2007 shows how serious matters had become even prior to the agreement with Carey. It said, in the context of non-payment of contractors, that, "We have a high risk of the work being stopped, attachment proceedings being started and Urvasco Ltd closing". There is no evidence that Carey was aware of the extent of the problem, and no reason to infer it from the fact that GHU was seeking further finance.

(iv) Press reports

473. As I have described in the factual narrative, in late May 2008 a number of press articles appeared on the internet dealing with the financial condition of the Urvasco group. The details are set out above, and to give the flavour it suffices to say that on 24 May 2008 an article appeared on "El Correo.com" (a newspaper from the Basque country) headlined "The Urvasco Group asks the banks for help to avoid its collapse". This made reference to an "emergency plan" having been put into motion.

474. Carey says that the articles were substantially correct, and are important corroborative evidence, and evidence in their own right, of the serious deterioration in the Group's financial condition by June 2008. Mr Couto denied their accuracy.

475. I agree with the submissions of GHU on the general lack of weight of press reports in proving a material adverse change. Articles of this kind appearing on the internet (or in print) are of variable quality, and are not reliable evidence of the underlying facts. They amount to a report by the author on the basis of source material, which may be reliable, or which may not be reliable. Furthermore, there is no particular strength in numbers, since a report can multiply where there is in reality only a single story, and a

single source. Such reports cannot in my view do much in themselves to substantiate a claim by a lender that the financial condition of a borrower has been the subject of material adverse change.

476. However, it is correct to say that in this case the content of the articles is consistent with the overall picture. The articles are in any case relevant because they were seen by Carey at the time, and as I have said, it is reasonable to infer that any lender would have been concerned to read reports which, true or not, painted a worrying picture of the group's financial position.

(v) The directors' reports

477. In support of its case on MAC, Carey places considerable reliance on the directors' report to the 2008 GU accounts. These were of course signed off in the following year. It is necessary to set out a substantial passage as follows:

> "In view of the serious economic situation mid-year, the companies in the development and construction group decided to restructure the group companies, selling most of our inventories to financial institutions as a way of reducing our bank debt and paying our debts to suppliers. The aim was to avoid any procedures that could prolong the situation, entail high costs and jeopardise recovery by our creditors of their debts,
>
> The decision was based on the quality of our inventories, in both land and units of finished work and work in progress.
>
> The financial situation had been gradually deteriorating since the last quarter of 2007, such that in the spring of 2008 we decided to sell our wind power division to ease the pressure and meet our liabilities then outstanding and those falling due within a 12-month horizon, for which we had the amounts left over from the operation, the handovers of dwellings and what the new sales could bring in. But the economic situation showed no signs of improving, rather quite the opposite, the capital gains on the wind farm division were watered down, handover of housing became extremely complicated owing to the lack of confidence in the sector, numerous buyers pulled out, delivery times were delayed and no sales whatsoever were obtained for developments in progress. With a financial charge [debt] of 1,834 million Euro, with scarcely any funds coming in, in September 2008 we began the restructuring process explained in the first paragraph."

478. GHU submits that the report does not show that a MAC had occurred in the financial condition of GU in the period between December 2007 and the beginning of June 2008. Rather, it is consistent with GHU's case that there was a gradual decline in the first half of 2008, and then matters got "quite seriously worse".

479. Further, GHU submits that a directors' report is not itself financial information and its purpose is essentially to provide a review of the year, to comment on significant issues which have occurred during the year, and to give the directors' view on the outlook for the business. A directors' report given in March 2009 on the accounts as at 31 December 2008 therefore does not represent any concrete or reliable evidence as to the financial condition of the company at 6 June 2008.

480. Contrary to GHU's submissions, I consider that the directors' report should be treated as part of the company's financial information for present purposes. I further agree with Carey that the directors' report to the 2008 accounts is significant evidence, because it states the directors' view of affairs as at mid-year 2008, in other words, at or about the material time. They were in a position to know the state of affairs better than anyone else, and I consider that the report gives significant support to Carey's case.

481. The same mid-year 2008 timing is recorded in the 2008 directors' report for a company called Vizcaína de Edificaciones. The evidence is that Vizcaina was a construction company based in Bilbao in Spain, and one of GU's most significant subsidiaries in the development side of the business. It said:

> "In the light of the graveness of the economic situation midway through the financial year, the group of promotion and construction companies decided to implement a restructuring process for the group companies, proceeding to sell the majority of our portfolio of inventories to financial entities, as a way of reducing our bank debt and enable [sic] us to pay our debts with suppliers. The objective was to avoid processes which would entail lengthy resolution periods, elevated costs and an end result in which our creditors would be severely damaged regarding the reparation of their debt. [...]"

482. I agree with Carey that the final sentence shows that the purpose of the restructuring was to avoid a formal insolvency process. It is also a clear statement of the nature of the restructuring, namely a sale of inventories (in other words, its property holdings) to financial entities, as a way of reducing bank debt. This was described at trial as a debt for assets swap, and later in the year this is exactly what happened.

483. GHU says that it does not add anything to what is said in the GU directors' report. However, I consider that it at least confirms it, and is more explicit in terms of its reference to the decision being taken midway through the year, and as an alternative to an insolvency process. These reports are contemporaneous, are made by the directors who were in a position to know the facts, and are made in a formal context. By the time the accounts were signed off, the directors were doubtless concerned to justify the restructuring, which was well underway by then, and which clearly resulted in large losses for the banks. It is right to say that there must be an element of hyperbole in the reports, in that the reference to "no sales whatever" is inconsistent with other evidence (Carey did not submit otherwise). For example, the IREA Report recorded that some 35% of buyers were pulling out of sale transactions before completing. (The reference to a reduction of 30/40% in the value of real estate assets as against mortgage valuations is more plausible.)

484. Nevertheless, the directors stated unequivocally that the restructuring decision was reached "in view of the serious economic situation mid-year". Although it is correct (as GHU says) that there is a reference to "gradual deterioration", the deterioration is said to be "such that in the Spring of 2008 we decided to sell our wind power division". (In fact, as the factual narrative shows, that decision was taken in January 2008.) But, the report goes on to state, the situation showed no signs of improving, rather "quite the opposite". I agree with Carey that, when placed against the other evidence, the directors' reports in respect of GU and Vizcaina can reasonably be

understood as referring to problems in the construction side of the business which already existed by 6 June 2008.

(vi) The suspension of bank repayments

485. As noted above in the factual narrative, GHU accepts that in anticipation of the restructuring negotiations with its banks, a deliberate decision was made to hold off on paying bank debt. As stated in GHU's closing submissions, this meant that from mid to late June 2008 GU ceased paying bank debts which meant that defaults on those debts began to arise from mid to late September 2008. As GHU put it in oral closing, if one knows that one is going to go to the banks and invite them to come to the table, it makes little sense to be paying individual banks piecemeal in advance of that process. In the light of that, it is difficult to see that a material adverse change had not occurred from mid to late June 2008 in the case of GU.

(vii) Conclusion as regards the GU MAC

486. The question I have to decide is whether there was a material adverse change in the financial condition of GU at 6 June 2008 as compared with 21 December 2007. I will not repeat the detailed points made above. This period is a very short one, only five and half months. Plainly, in normal circumstances it will be difficult for a lender to show a material adverse change over such a short period of time. Carey has not analysed the financial condition of any of the companies as at 6 June 2008 by reference to their balance sheet position as at that date, which might normally be fatal to such a claim.

487. However, the circumstances of this case are unusual, because (as I have found), it was only in 2008 that the full force of the bursting of the property bubble on GU's business became apparent. It is necessary to stand back from the detail at this point. The business was highly leveraged, property sales were drying up, and the future was in doubt, to the extent that from mid to late June 2008 GU ceased paying its bank debts. As the directors themselves put it in their report to the 2008 accounts, the economic situation mid-year 2008 showed no signs of improving, rather quite the opposite, which is what led to the restructuring. In this particular case, I do not think that the balance sheet position is decisive. I am satisfied that Carey or any lender which knew the facts would have regarded these as changes from the financial condition of GU as it was at 21 December 2007, and would have regarded them as both material and adverse. That is the conclusion which I reach on the facts as regards GU. I do so leaving out of account the disputed position under the derivative contracts. It would be difficult to pinpoint a precise time after 21 December 2007 when the deterioration in GU's financial condition became a material adverse change, but I am satisfied on the totality of the evidence that it had occurred as at 6 June 2008.

Alleged MAC (GHU)

488. Most of the argument at trial in respect of MAC has focused on GU. I now come to consider Carey's case in respect of GHU. Earlier in this judgment, I described the position of the relevant companies. I shall not repeat the detail, but note that GU's business is construction, whereas GHU (itself a holding company) is, as its name implies, in the hotel business. This means that the bursting of the property bubble is of less direct relevance in its case.

489. Carey said in written closings that, "The material in relation to GU is relevant to the financial condition of GHU and Urvasco which were dependent on funding from elsewhere in the Group. Thus, if GU's financial condition deteriorated, the effect would be felt by the companies below it in the corporate chain". However, as Carey put it in oral closings, the language of the provision requires an analysis of the financial condition of the relevant company.

490. In its written closings, Carey defined the question correctly in my view, saying that having determined the issues of construction which arise in relation to the agreements, the court must determine whether, on the facts of this case, there has been a relevant material adverse change in the financial condition of any of GU, GHU or Urvasco. If so, it must determine whether or not any MAC it finds was a default under the Loan Agreement. As GHU said to the same effect, each of the companies has to be looked at individually, and the results are not necessarily the same.

491. The expert evidence of the parties is important in this respect. On his analysis of the available financial information as at 30 June 2008 which I have explained above, Mr MacGregor, GHU's expert, concluded that there was no material adverse change in GHU's financial condition between 21 December 2007 and 6 June 2008.

492. Carey's expert, Mr Beltrán, comparing the position at year end 2007 and 2008, concluded that although the change was not as clear as in respect of GU, there was a MAC in GHU's financial condition in the course of 2008. He mentioned the effect of a financial deterioration in GU on GHU, and made a number of points on GHU's audited consolidated figures to 31 December 2008. His evidence does not purport to show that a MAC in the case of the other two companies would result from a MAC in the case of GU.

493. In cross-examination, Mr Beltrán dealt with GHU as follows. He said that the "main reason" why he considered that there was a MAC in GHU's financial condition during 2008 was because of the changes in the fair value of derivatives contracts and exchange losses:

> **A.** My approach, and the reason why I say there was a MAC, is because although EBITDA covered financial expenses in the past years -- and I am saying this because, for instance, in 2007 if you see the figure of financial expenses, that includes some financial expenses to the group, which in any case GHU was not paying, so in my view it would not affect the position of GHU --
>
> **Q.** To summarise --
>
> **A.** -- and that change in 2008. But the main reason is I have a new liability compared to last year of €49 million, plus €33 million, which is also an actual liability, due to the loan with BBVA that was -- that they had to pay a larger amount at maturity because of the depreciation of the sterling against the euro.

494. I start with my findings as to the points that Mr Beltrán made on the accounts:

(1) GHU's net equity position was in fact improved at 31 December 2008 compared with 31 December 2007. This was largely the result of the capitalisation of the €150m debt due to GU in June 2008. The relevant facts

are described in the factual narrative where I deal with the sale of Urvasco Energia.

(2) In relation to profits, there was a loss before tax of €127.014m in 2008 compared with a loss of €36.404m a year earlier. Mr Beltrán accepted in cross examination that the main components of that loss were changes in the fair value of derivatives of €49.575m and exchange differences of €33.057m. I deal with derivatives and exchange losses below.

(3) GHU's operating income at 31 December 2008 was slightly higher than at 31 December 2007. There was a decline in operating profit in the region of 20% which Mr Beltrán accepted was not significant.

(4) The impairment of €6,789,769 on a future right to take a lease purchased by GHU is said by GHU to have accrued after 6 June 2008. Carey has not shown (as it asserts) that it resulted from a failure by GHU to comply with its contractual obligations earlier in 2008 (assuming that would make any difference).

(5) The write-down in the value of GHU's hotel subsidiaries in 2008 does not demonstrate an adverse change, because the auditors considered that the write-down should have been made in 2007.

(6) In any event, a comparison between the 2007 accounts and the 2008 accounts has to take into account the change in the basis of preparation following the change in GAAP.

495. Leaving aside derivatives and exchange losses, I am satisfied that there was no possibility of showing a material adverse change in the case of GHU on the above material.

Exchange losses

496. Mr Beltrán's point on exchange losses is the subject only of mention in the part of Carey's closing submissions dealing with GHU. It may be noted that the exchange differences component of €33.057m of GHU's 2008 year end loss includes the euro equivalent of the £26,408,685 unrealised exchange loss in Urvasco Ltd. As Carey says, the exchange losses arising largely in Urvasco Ltd reflected the fact that Urvasco Ltd was liable to repay BBVA in euros but that it accounted in sterling, so that as the latter weakened in 2008, it would need more sterling to repay the same amount of euros.

497. However, as GHU submitted in my view correctly, these are unrealised and uncrystallised losses. They did not result in a cash outflow, and did not reflect liabilities which had to be settled by GHU or Urvasco Ltd as at 30 June 2008. The actual amount of the liabilities of GHU and Urvasco Ltd would depend on future movements in the exchange rate up to the date when the liabilities fell due for payment. In any case, some of the BBVA loan could have been repaid using euro proceeds out of the sums payable under the SPA. Even if it was appropriate to take into account a provision for movement in foreign exchange on the loans at 30 June 2008, which in my view it was not, it was not in dispute that such provision would only be in the region of €9m. That is not sufficient to make a material difference.

The parties' cases on derivative contracts

498. In oral closing, Mr Tom Smith for GHU said that in relation to GHU the MAC issue really boiled down to the derivatives. In the light of the points made above, and the evidence of Mr Beltrán, I do not think that this was in contention by the end of the trial, and in any case I agree with him.

499. As I have said, it is common ground that the derivatives are set out in the 2008 GU consolidated accounts at note (15). The change in the "fair value" of these instruments held over the course of 2008 resulted in a loss of €82.6m being recorded in GU's profit and loss account as at 31 December 2008. The categories of derivatives are set out below. Broadly, those with GU as counterparty were interest rate swaps, and those with GHU as counterparty were FX forward agreements and listed options. According to the accounts, the interest rate swaps were used for hedging purposes, and an internal GU document mainly describes the others as speculative. In the case of GHU, changes in the fair value of derivatives of €49.575m were carried to its profit and loss account.

500. As between the experts, Mr MacGregor was of the view that these losses should be removed from the audited figures for the purposes of determining the financial condition of the companies. In any event, he considered that much of the losses were attributable to the second half of 2008. In his report, Mr Beltrán disagreed, saying that the derivative transactions should be considered and that a significant amount of the losses were attributable to the period up to 6 June 2008.

501. The fundamental point made by GHU is in fact a different one. It maintains that Carey has not placed reliable information before the court from which the amount of any fair value provision as at 6 June 2008 can safely be determined. It also says that the material which is available indicates that the majority of the changes in fair value in the course of 2008 are likely to have occurred in the second half of the year rather than in the first half of the year.

502. In response, Carey says that the markets to which the derivatives were related moved consistently against GU and GHU in 2008 such that the amounts which each would have to pay to settle its open positions increased substantially. It says that the two principal variables to which the speculative derivatives were related had experienced very substantial falls in the first half of 2008. It does however accept that there is no figure for the value of the derivatives at 6 June 2008, and but says that GHU ought to be able to say what the relevant values were.

The derivatives contracts

503. The position as regards the derivatives contracts is complex. It was largely set out in Carey's written submissions on a stand-alone basis. At my request, the parties sought to agree the facts, and I am grateful for their efforts in that regard. They did achieve a considerable measure of agreement as to the basic facts, that is, as to the making and structure of the contracts, and their subsequent fate. This is in itself complex. It reflected the willingness of the bank counterparties to defer or modify liabilities, doubtless having regard to payment prospects. The position can be stated as follows by reference to three categories of instruments.

504. Foreign exchange forward agreements In 2008, BBVA and GHU had four open sterling/euro derivative transactions under which GHU was obliged to purchase sterling from BBVA with euros at a fixed strike price (€17,889,701 at 31 December 2008). On 17 November 2008, GHU and BBVA agreed that each could terminate these transactions early. The settlement date for the transactions was extended in due course to March 2009. On 16 March 2009, the parties entered into a new sterling/euro put/call agreement originally maturing on 30 June 2009, when it was varied to July 2009. By an agreement dated 29 July 2009, it was agreed that in return for the provision of certain security, the debt would not be repayable until 29 July 2015 (it was subsequently extended further to 23 February 2016).

505. Listed options The second category ("Transaction II") relates to listed options again between GHU and BBVA (€31,079,061 at 31 December 2008). Transaction II was entered into on 27 March 2007, and combined two elements, namely an interest rate swap with a nominal amount of €10m running from 29 March 2007 to 29 March 2012 (GHU being the payer of the variable rate), and what was dubbed a "worst of, knock-out" option, under which BBVA was entitled to require GHU to purchase the worst performing of a basket of three quoted shares (one being BBVA itself). This option had a maturity date of 30 March 2009. By an agreement dated 29 July 2009, GHU acknowledged that it owed BBVA a debt of €38m payable on 29 July 2015, the date subsequently being extended to 23 February 2016.

506. Interest rate swaps The final category is interest rate swaps (€43,838,382 and €713,627 at 31 December 2008). These were transactions entered into with Banco Vasconia and BBVA designed to protect GU and GHU against rises in the EURIBOR interest rate above (about) 4 per cent. If it fell below that, payments would fall due from GU/GHU, and vice versa. It is not necessary to go into further detail, save to note that according to a table produced by Mr MacGregor, the majority (54.69%) of the interest rate derivatives are attributable to contracts expiring in 2010, and a small percentage expire as late as 2022.

507. For completeness, there is another transaction called Transaction I which was a euro/US$ swap and which was cancelled on 17 March 2009, resulting in a small loss of €19,784.

Relevance of changes in the fair value of the derivatives

508. GHU submits that in determining the "financial condition" of GU and GHU as at 6 June 2008, it is not appropriate to include provision for change in fair value of the derivatives as would be required if financial statements were being prepared in accordance with 2008 Spanish GAAP at that date.

509. It is necessary to distinguish, GHU submits, the question of a provision for change in fair value of derivatives as included in audited financial statements from the actual liability of GU/GHU under the instrument in question. Thus:

(1) In the case of instruments such as the sterling/euro contracts and the share options, the liability of GHU was either to some extent or entirely fixed from the outset (as the strike price was fixed). In these cases, the fair value provision represents the (notional) loss which GHU would suffer by having to purchase currency/shares on the maturity date at a price which is worse than

the market price. A change in fair value does not mean that GHU's liability under the transaction has changed.

(2) In the case of instruments such as swaps, GHU/GU had an ongoing right and obligation to receive and make payments. In these cases, the fair value of the swaps represents the hypothetical disposal value of the contracts in the event that the contracts were sold before their expiry date. Again, a change in fair value does not mean that GHU's underlying rights and obligations had changed.

510. Carey does not accept this. As to the liability being fixed at the outset, it said that it was true that maximum exposure was fixed, and would be hit if the share price fell to zero. But in between the strike price and zero, the amount of the loss varied by reference to the share price, and would be changing all the time. Similarly, in relation to currency contracts, though GHU's submission was correct in that the amount of sterling GHU was obliged to purchase at maturity was fixed, its loss would vary depending upon the ruling exchange rate at the relevant moment.

511. These points are obviously correct in themselves, in that whilst the amount that GHU would have to pay may be fixed, its loss at maturity would depend on the extent of adverse movements of the underlying currencies/stocks. They do not however negate GHU's submission that fair value provisions are not the same as liability to pay cash under the relevant transaction, and that a change in fair value provision does not equate to an increase in such liability. The fair value provision in the audited financial statements represents a notional loss. I do not think that this was disputed.

Evidence as to fair value as at 6 June 2008

512. To come back to GHU's fundamental point, Carey has not adduced evidence as to fair value as at 6 June 2008. It did make submissions as to the marked to market value of the derivatives at various dates. These were produced in the form of a table in its closing submissions (which was subject to amendment orally). The dates in question were 1 January 2008, 26 September 2008, 13 November 2008, and 31 December 2008. It said in closing that with the addition of an item omitted from the table, GU's total liabilities were over €100m, on the basis of what it says were the marked to market values on 31 December 2008. As I understand it from the table, the element of GHU's liabilities is said to be about €56.2m.

513. Although its written closings refer to the lack of a *precise* figure from the documents from the marked to market values of the various derivatives as at 6 June or 30 June 2008, in fact no figure has been put forward by Carey.

514. In this regard, Carey criticised GHU on the basis that it had refused to agree the marked to market values in a draft statement of agreed facts which Carey prepared. However, I was taken to the document in respect of a valuation on 13 November 2008 in respect of the euro-sterling contracts. Carey relies on this to assert a marked to market value on that date. As GHU pointed out, when one looks at the document the limitations of the valuation are apparent. The document states:

> "The valuations of the Transactions described in this Agreement are representative and are not binding for any of the Parties. They are provided for

merely informational purposes. BBVA does not assume responsibility for any error that it may have committed in the calculation of said valuations. In the event that the Parties mutually decide to terminate any of these Transactions in advance in the future, the value of each one of said Transactions may be lower or greater than what is indicated, according to the market variables at said time. BBVA does not make any declaration about the future evolution of the market variables that affect the Transactions."

515. In the circumstances, no criticism can be made of GHU for refusing to agree Carey's draft document as to the value of the derivatives or whether they were out of the money. It was described at the hearing as a "travelling draft" and this is a fair description. In any case, it is for Carey to prove its case.

516. Carey further sought to ascribe the lack of evidence to inadequacies of the financial management of the group. It criticised Mr Couto, Mr Esparza, and Ms Santamaria for failing to comply with their own risk management standards. It says that GU was seeking to portray itself to the outside world as being carefully and competently managed, but internally it was chaotic.

517. I reject Carey's case in this regard. Having seen the individuals give evidence, I am quite satisfied that however competent they were, they were in no position to monitor the complex derivatives arrangements that the companies had entered into. I further accept their evidence that they were persuaded to enter into these contracts by the banks. This combination of unsophisticated buyer and complex product has unfortunately become a familiar story since the 2008 financial crisis. In my view, no criticism is to be attached to GU or GHU in this regard.

Changes in fair value over 2008

518. Carey submits that the court should nevertheless find that the marked to market liability of the derivatives taken out by the group and by GHU had increased very substantially between 21 December 2007 and 6 June 2008. While it no doubt continued to increase in the remaining part of 2008, it says that the two principal variables to which the speculative derivatives were related had experienced very substantial falls in the first half of 2008.

519. It says that the vast majority of the loss as at 31 December 2008 was attributable to transactions linked to currency and shares. The loss was not comprised of hedge transactions, but of speculative transactions. So far as the share options were concerned, nearly 40% of the fall in value of BBVA's for the whole of 2008 occurred by 6 June. On the currency swaps, nearly 35% of the fall of the value in sterling had occurred by 6 June 2008. Whatever may have been the position after 6 June, it is obvious that by then, significant losses had been occurred and the trend of share prices and sterling was down.

520. Carey has produced figures as follows. The BBVA share price (BBVA was one of the basket of three quoted shares under the options) in 2008 was:

(1) €15.9291 on 2 January;

(2) €12.9123 on 6 June;

(3) €11.6922 on 30 June;

(4) €11.3559 on 26 September;

(5) €8.32 on 30 December.

521. The sterling/euro exchange rate in 2008 was:

(1) £1/€1.3611 or €1/£0.7347 on 1 January;

(2) £1/€1.2515 or €1/£0.7990 on 6 June;

(3) £1/€1.2651 or €1/£0.7905 on 30 June;

(4) £1/€1.2584 or €1/£0.7947 on 26 September;

(5) £1/€1.178 or €1/£0.849 on 13 November;

(6) £1/€1.0442 or €1/£0.9577 on 31 December.

522. So far as the interest rate swaps entered into by (primarily) GU are concerned, GHU produced figures. It maintained that it was not possible as at 6 June 2008 to work out what GHU's final position once the swaps had expired would be. However it says that:

(1) EURIBOR rose in the first half of 2008 and then fell substantially in the second half of 2008 to 3.45% at 31 December 2008.

(2) The effect of that would have been that as EURIBOR rose in the first half of the year, GU/GHU would be entitled to receive payments under the swaps.

(3) But as EURIBOR then fell in the second half of the year that position would be reversed and GU/GHU would be liable to make payments.

523. I do not think that the above numbers were disputed by either party, but there was also evidence in this regard. The directors' report to GU's 2008 accounts which is discussed above stated (in addition to the passage already quoted) that:

> "… the plummeting share prices and nose-diving of EURIBOR at the end of the year led us to record a charge in the fair value of financial instruments, which may be adjusted following an upturn on the prices of some shares rise and depending on the evolution of EURIBOR. On the other hand, the depreciation of the pound against the euro has affected the profit and loss account to a considerable consent, owing to exchange hedging acquired."

GHU relies on this as showing that the problem arose primarily at the end of the year.

524. In cross-examination, Carey's expert, Mr Beltrán, confirmed that he had not obtained any valuations of the derivatives at 6 June 2008, the passage in question being as follows:

> **Q.** On the subject of derivatives, is it right that you have not yourself obtained any valuations of the derivatives as at 6 June 2008?

> **A.** I have done, as it can be seen in my report, some estimates and roughly I know -- I know, I mean, this is very difficult because, as I said, there isn't a valuation at 6 June and it's not that simple, for instance, in the baskets of shares, that you just estimate or extrapolate, as I think I understood counsel suggests, that proportionally to the share price, we should estimate the fair values. It's not that simple. You need to include factors such as volatility of the share in the previous days, periods, et cetera. But –
>
> **Q.** So I think the answer to my question is: no, you have not obtained a valuation of the derivatives as at 6 June 2008; is that right?
>
> **A.** It was not available and I was not in a position, I was not able to –
>
> **Q.** The answer is no?
>
> **A.** With the information, with the information I had, I was not able to perform that analysis and that fair value.

525. This evidence suggests that a value cannot simply be extrapolated from figures as to currency or share prices at particular dates. In any case, valuation of derivatives products like these is something that clearly requires expert explanation.

526. Mr Beltrán accepted that he was not an expert in derivatives. He was asked about the question of loss in respect of the listed options (which incorporated an interest rate swap with a nominal amount of €10m running from 29 March 2007 to 29 March 2012):

> **Q.** So it follows that under this transaction, no loss would crystallise before 29 March 2012; do you accept that?
>
> **A.** Here I have to be very clear. As counsel said, this a very complex agreement. I tried to gain an understanding, as far as I could, and my understanding in this specific agreement is that there was a derivative with a mix of interest rates and a basket of shares, and -- and this is I am placing and relying on experts that have told me, but really it is not something that I am placing much importance in my report, is that the impact really mainly is in the basket of shares, and that there is a strike price that –
>
> **Q.** I'm about to move on to that in a minute.
>
> **A.** This is what I can tell you. Really, I am not an expert in derivatives, I am not in a position to go deeper than I am explaining.

527. Finally, it is to be noted that Mr Beltrán said in cross-examination, "I agree that the main part of the loss in the derivatives was caused in the second half of 2008, I agree with that".

Discussion on the derivatives issue

528. In the result, there is no evidence as to the fair value of the derivatives at 6 June 2008. Thus an essential building block of a MAC case based on change in the value of the derivatives is missing. I agree with GHU that even if a change in the fair value of

derivatives is relevant to an assessment of financial condition of the companies at 6 June 2008, there is no reliable information available to the court from which the amount of any fair value provision as at 6 June 2008 can safely be determined. Save that as at 21 December 2007, GU and GHU each had open (and speculative) derivatives positions, I do not consider that the evidence supports even the limited findings of fact that Carey invites the court to make in relation to the derivatives in paragraph 1096 of its closing submissions.

529. I am further satisfied that Carey is not entitled to blame GHU for the absence of the required information as it seeks to do. If a point on derivatives was being relied on by Carey in support of its case on MAC, then as GHU says, the burden lay on Carey to establish the points with the necessary evidence.

530. This is sufficient to find against Carey on its case based on derivatives. Since the point was argued, I should also say something about my views as to the relevance of changes in the fair value of the derivatives, though I do not decide the issue on this ground.

531. During the course of the trial, I was inclined to agree with Carey that assuming that a change in fair value could be established as at 6 June 2008, this would be a relevant factor in determining whether there had been a material adverse change in the financial condition of the company concerned. Insofar as GAAP requires a change in fair value in derivative instruments to be shown in a company's accounts at year end, this (as Carey pointed out) is clearly intended to provide transparency. There seems on the face of it no reason why (in principle) a similar calculation should not be made as at 6 June 2008, where one is seeking to ascertain changes in the financial condition of the company as at that date.

532. However, I am satisfied from GHU's closing submissions that the position is not so clear cut. Mr Beltrán accepted that the ultimate touchstone is whether the ability of the company to meet its financial obligations was seriously damaged and, in particular, in relation to the present case, whether the ability to pay the principal and interest under the Loan Agreement was seriously damaged. GHU agrees with this part of Mr Beltrán's approach, and for the reasons explained in the discussion on the interpretation of the MAC clauses, I also agree with it.

533. GHU goes on to say that a change in the fair value of the derivatives as at 6 June 2008 is not a matter which goes to the ability of either GHU or GU to meet its obligations under the Loan Agreement or the BBVA Credit Agreement, and therefore should be left out of account.

534. I agree with GHU that there is a distinction between a change in fair value reflected in a company's profit and loss account, as happened in this case as at 31 December 2008 in accordance with Spanish GAAP, and a change in the liabilities of the company concerned. Fair value, as GHU says, is an accounting construct for the purposes of international accounting standards based on a hypothetical disposal to a hypothetical buyer in circumstances where no such disposal is proposed or may even take place.

535. The difference in this notional loss and the actual position is illustrated in respect of these instruments by what happened as between GU/GHU and the banks concerned. This is described in the summary set out above. As at 31 December 2008, the banks

essentially put off maturity of the instruments. Plainly, this was because GHU/GU would have been unable to meet the liabilities if called upon to pay. It is clear that they (in fact the principal bank concerned was BBVA) treated liability under the derivatives very flexibly. In the result, under the sterling/euro contracts and Transaction II, GHU will not have to make any payment until 2016. The interest rate swaps mature over a number of years up to 2022.

536. However, I think that there is a limit as to how far this point can be taken. A material adverse change in a borrower's derivatives exposure, if it can be demonstrated, may, in my view, go to show a material adverse change in the borrower's financial condition for the purposes of a MAC clause. GHU ultimately accepted that there is bound to be a degree of judgment involved, and there cannot be a hard and fast rule. So, it was accepted that if one has a derivative that is about to mature, the position may be different than in relation to a derivative which is going to mature some time in the future. Otherwise, it was said, one has to assume that derivatives are going to continue through to maturity. The question is one of value in respect of a future and contingent right to an asset which is changing in value over time.

537. In my opinion, the position depends on the particular facts of the case. An apparently serious exposure to derivatives may, on analysis, be less so, and vice versa, when considered against its effect on the borrower's ability to repay the loan in question, which is the question which is relevant to materiality. The likelihood of margin calls, or compulsory close out prior to maturity, may be relevant.

538. That the question is fact-sensitive can be illustrated in the present case by reference to Transaction I. This is the last transaction set out in the list above. It incepted on 27 November 2006, when GHU and BBVA entered into a currency option transaction being a euro/US$ swap. In oral closing Carey submitted that it had been omitted from its calculations, and when it was included, it increased liability as at 31 December 2008 by €6.3m. This was said to be its marked to market value payable by GHU to BBVA at that date.

539. It is correct that this transaction is not included in the table prepared by Carey in its written closing submissions. However, it is not in dispute that the transaction was cancelled on 17 March 2009, so shortly after year end, and resulted in a small loss of €19,784. Thus, although Carey cited this transaction as giving rise to a substantial additional liability, in the result it was of negligible effect.

Conclusion on derivatives and the GHU MAC

540. For the reasons set out above, Carey has not made out its case in this respect (1) on the evidence, because there is no reliable information available to the court from which the amount of any fair value provision as at 6 June 2008 can safely be determined, and (2) because the evidence suggests that as at 6 June 2008, GHU's notional losses on its derivatives contracts did not significantly affect its ability to repay the Carey loan.

541. I should add for completeness that the issues as regards derivatives in relation to GHU apply also to GU, though as I have explained the question of GU's derivatives contracts has not formed part of my conclusion as regards the MAC in the case of GU.

542. It follows that Carey has not made out its MAC case in respect of GHU as at 6 June 2008. This date, rightly in my view, was the focus of the trial, and though it did say in closing that, "the Court should find that there was a material adverse change in the financial condition of GHU between 21 December 2007 and 6 June 2008 (and, indeed, on each subsequent date when GHU claims that it was entitled to draw down a Subsequent Tranche)", a case was not developed by Carey in relation to the tranches due after 6 June 2008. In the absence of specific submissions I do not make findings as to later dates, and because of my findings on other issues, it is any case academic.

Alleged MAC (Urvasco Ltd)

543. I have drawn attention in this context to the difference between the business of GU, which was in construction, and GHU, which was in hotels, and the business of Urvasco Ltd was different again. The company was incorporated to purchase the London site and build the hotel. Its shares were wholly owned by GHU, and would have been sold to Carey had the transaction completed. During the relevant period, that is 21 December 2007 to 6 June 2008, the building works were proceeding. Urvasco Ltd incurred liabilities to contractors and in respect of the BBVA Credit Agreement. The funds it received came solely from BBVA, Carey and the Urvasco group itself. The building works stopped after Carey withheld funding. A case of material adverse change in the financial condition of Urvasco Ltd has to be seen in this light. The position as regards Urvasco Ltd did not feature at length in the written submissions or the oral argument.

544. I explained above the difference in the approach of Mr MacGregor and Mr Beltrán in respect of Urvasco Ltd. In fact, the parties' submissions were relatively straightforward. Carey's case is that Urvasco Ltd's financial condition, as revealed purely in its accounting documents, deteriorated substantially in 2008. This was largely, it says, because of a very large exchange loss as sterling weakened against the euro. Carey says that the changing exchange rate "cannot be written off as irrelevant", because the exchange rate loss presented Urvasco Ltd with a substantial issue as the gap between the amounts it would receive on completion and the amount it had to repay to BBVA widened.

545. Carey says that Urvasco Ltd made a substantial operating loss in 2007 of £6.644m. However, in 2008, this loss increased to £26.8m. Of this loss, £6.5m had accrued by 31 May 2008. This was according to the interim accounts for Urvasco Ltd prepared in the context of the "whitewash" procedure carried out in relation to the granting of a second-ranking charge to Carey. Thus, the loss for the whole of 2007 was matched by the loss in the first 5 months alone of 2008.

546. Carey says that Urvasco Ltd had negative net equity of £2m at 31 December 2007 which had increased nearly sevenfold by 31 December 2008 when it was negative in the amount of £13.8m. Of this deterioration, more than half had taken place by 31 May 2008 at which point the equity was negative in the amount of £8.5m.

547. It is not I think in dispute that the loss reflected the declining value of sterling. The losses at 31 May 2008 principally comprise unrealised losses on foreign exchange in relation to the BBVA loan and the Group loan account, which arose because the company's account currency was sterling. The loss on foreign exchange to 31 May

2008 was £6,407,536 which is the great majority of the total loss of £6,535,982 (see the 31 May 2008 management accounts).

548. I have mentioned the position as to exchange losses in the context of GHU above. These were unrealised and uncrystallised losses, did not result in a cash outflow, and did not reflect liabilities which had to be settled by Urvasco Ltd as at 31 May 2008. As GHU says, they represented losses that might be incurred, if at all, when the BBVA loan came to be repaid. The actual liabilities depended on future movements of exchange rates. I am satisfied that they were not accrued losses at 31 May 2008.

549. So far as the net equity position is concerned, a significant part of Urvasco Ltd's liabilities consisted of intra-group lending. In fact, these amounted to liabilities of £27,844,723. This was the subject of evidence at trial, and I accept the evidence of Ms Santamaria that the intention always was that these loans would be capitalised on completion. This was because on completion, Carey would acquire the shares. £15 million of that lending was in fact capitalised on 31 July 2008 as part of the "whitewash" arrangements. GHU says, and I accept, that it was always open to the Group to capitalise these loans as required and, in these circumstances, a negative net equity position was not itself an indicator of a poor financial condition of Urvasco Ltd. I reject these submissions of Carey, therefore.

550. Carey goes on to submit that "the meat of Carey's case is not based on the numbers in Urvasco's accounts because its financial condition is inherently bound up in the progress and status of the partially complete Development (which was its only asset). Thus referring only to net current assets and net assets as GHU does in its skeleton is to ignore the difficult issues for GHU, namely the financial disarray on the Development".

551. On that basis, it raises issues which have been discussed in other sections of this judgment, as to the non-payment of contractors, what it calls the "cash flow hole", the increasing budget as a result of which there was a greater need for funds, and a point in relation to one of the contractors, Cantillon, which at one stage served a statutory demand.

552. As a result, Carey submits, Urvasco Ltd's financial condition had deteriorated materially since December 2007. Completion of the development was crucial to its financial condition but Urvasco Ltd lacked sufficient funding to achieve this even on the September 2007 budget. Further, the cost of completion was getting more expensive and was not going to be achieved by the Long Stop Date because of the serious lack of design and progress. The increase in the costs of the development gave rise to a funding gap. (Again, these issues are discussed in other sections of this judgment.)

553. I am doubtful that these factual matters relating to the development are capable of demonstrating a material adverse change in Urvasco's financial condition. Mr MacGregor's approach is to be preferred to that of Mr Beltrán for reasons set out earlier. In any case, I accept GHU's submission that these matters are not in themselves evidence of a change in the financial condition of Urvasco Ltd between 21 December 2007 and 6 June 2008, and I reject Mr Beltrán's suggestions to the contrary.

554. Carey relies on the Cantillon statutory demand in this context, saying that Urvasco Ltd's financial problems are particularly evident in the way it dealt with Cantillon. But the question is whether they go to show a *change* in Urvasco Ltd's financial condition between December 2007 and June 2008. The factual position is that on 10 January 2008, a claim form was issued by Cantillon against Urvasco Ltd to recover £461,089.58 owed pursuant to an Adjudicator's decision dated 28 November 2007. Despite reminders from Mr Fernandez, this amount had still not been paid by 20 March 2008 when Cantillon issued Urvasco with a statutory demand. (It was paid shortly afterwards) This issue therefore well pre-dated the Loan Agreement, and does not assist Carey.

555. The availability of funding to complete the project is also relied on by Carey, and in particular by Mr Beltrán, who described it as the main factor. Again, I have analysed the factual content of this issue elsewhere. The facts are complex and interlocking, and the result is that I have accepted that such a gap existed. However, to place reliance on the funding gap for MAC purposes involves taking into account the ability of the company to fund future prospective liabilities which it has not yet incurred. I am satisfied that this is impermissible as matter of principle, and would introduce uncertainty. There is a further question as to whether it would amount to a change, given the existence of the gap from the outset of the relationship, compared with the extent of the gap as at 6 June 2008 so far as ascertainable.

556. I agree with GHU that an assessment of the financial condition of a company at a particular date for MAC purposes does not require or allow regard to be had to the ability of the company to pay future prospective liabilities which it has not yet incurred. This is particularly the case where, as here, the company is a wholly owned SPV without resources of its own and, when incurred, the liabilities would be funded by its parent company. I do not consider that the funding gap which I have identified results in a misrepresentation by Urvasco Ltd under the MAC clause.

557. I find that Carey has failed to establish a material adverse change as regards Urvasco Ltd as at 6 June 2008. In relation to the dates of Subsequent Tranches, I refer to what I said above in relation to GHU.

Overall conclusion on MAC

558. My overall conclusion in respect of Carey's material adverse change case is as follows. I find that Carey has proved a material adverse change in the financial condition of GU between 21 December 2007 and 6 June 2008. However, it has not shown the making of a representation in this regard on 6 June 2008. Carey has not proved a material adverse change in the financial condition of either GHU or Urvasco Ltd. In the result therefore, its case in this respect fails.

EVENT OF DEFAULT: BEGINNING NEGOTIATIONS FOR RESCHEDULING

559. The BBVA Credit Agreement, which was subject to English law, contained within its definitions of "Events of Default" a clause which (with drafting variants) is common in such agreements. Apart from insolvency events which are covered elsewhere in the provision, it was agreed that an event of default would occur if, by reason of actual or anticipated financial difficulties, a "Material Company" (which by clause 21.1(b)

included both GU and GHU) began negotiations with any creditor for the rescheduling of any of its indebtedness.

560. Set out in full, under the heading "Insolvency", clause 21.6 of the BBVA Credit Agreement provides that an event of default occurs if:

> "Any of the following occurs in respect of a Material Company:
>
> (a) it is, or is deemed for the purposes of any law to be, unable to pay its debts as they fall due or insolvent;
>
> (b) it admits its inability to pay debts as they fall due;
>
> (c) it suspends making payments on any of its debts or announces an intention to do so;
>
> (d) by reason of actual or anticipated financial difficulties, it begins negotiations with any creditor for the rescheduling of any of its indebtedness; or
>
> (e) a moratorium is declared in respect of any of its indebtedness."

561. For convenience, I have underlined the words of the sub-clause which are relevant. Although this is not spelled out in its written closings, Carey's case is that this was a "BBVA default" under clause 10 of the Loan Agreement, and if it otherwise makes out its case, I do not understand this to be in dispute.

562. It is important to note that GHU admits that an event of default occurred in this case. This was inevitable given the negotiations with GU's banks at the end of 2008, which led to extensive debt for asset swaps. The report commissioned by GU from IREA (who are restructuring specialists) in connection with the negotiations includes insolvency as a possible outcome. The issue is *when* the event of default happened. GHU says that no negotiations for a debt rescheduling within the meaning of clause 21.6(d) took place until (at the earliest) late September 2008 and, accordingly, no event of default occurred prior to then.

563. Carey on the other hand says that the group was in serious financial problems much earlier, and from early 2008 was in negotiations with individual banks about rescheduling debts. While there may not have been negotiations for a wholesale restructuring, the negotiations fall (it is submitted) within the ambit of this sub-clause, which applies to negotiations with *any* creditor. The significance of this is that if Carey is correct, it can show a default at or prior to 6 June 2008 when it stopped lending. I do not think that any of this is in contention.

564. The answer given by GHU is twofold. It says, first, that the sub-clause only applies to a *formal* debt restructuring, and that none of the pre-September 2008 negotiations fall into that category. The second answer goes to Carey's state of mind at the time of the Loan Agreement on 21 December 2007. GHU says that Carey must have known that GU's liquidity problems of which it was aware would have necessitated discussions between GU and its lenders on a continuing basis. Carey, it submits, is estopped from resiling from a position which it accepted at the time.

The construction of the sub-clause

565. The terms of sub-clause 21.6 of the BBVA Credit Agreement are simple, and as GHU says, three elements must be proved:

(1) The company in question must begin negotiations with any creditor;

(2) The negotiations must be for the rescheduling of any of the company's indebtedness.

(3) The negotiations must have begun by reason of actual or anticipated financial difficulties.

566. The purpose of such a clause is not unlike that of the material adverse change clause discussed in the previous section of this judgment, and the same kind of considerations apply. If matters have reached the stage that the borrower is in negotiations for the rescheduling of other indebtedness, the lender may have grounds to refuse to continue to make advances which would risk being rescheduled themselves.

567. Though the clause is common, no case-law was cited to me in connection with this provision. It gives rise to a number of interpretation issues, including what is meant by "rescheduling". GHU drew attention to two sources that I found useful. The first is a guide called *External Debt Statistics: Guide for Compilers and Users*, published by the IMF on June 25, 2003. It provides guidance for the measurement and presentation of the external debt statistics of countries, and so is concerned with sovereign debt, rather than corporate debt.

568. Chapter 8 draws attention to three types of debt reorganisation, namely debt rescheduling, debt forgiveness and debt conversion. The relevant one for present purposes is "rescheduling". It is stated that:

> 8.10 Rescheduling refers to the formal deferment of debt-service payments and the application of new and extended maturities to the deferred amount. This may be conducted: (1) through the exchange of an existing debt instrument for a new one, as in refinancing or debt exchanges; or (2) through a change of the terms and conditions of the existing contracts (this is often simply referred to as rescheduling, as opposed to refinancing). Rescheduling may or may not result in a reduction in the present value of debt, as calculated by discounting the old and new payment schedule by a common interest rate.

Earlier the chapter refers to debt rescheduling as, "A change in the terms and conditions of the amount owed, which may result, or not, in a reduction in burden in present-value terms".

569. Elsewhere, the IMF has defined debt rescheduling as "… a bilateral arrangement between the debtor and the creditor that constitutes a formal deferment of debt service payments and the application of new and generally extended maturities" (the IMF, *Balance of Payments and International Investment Position Manual*, Appendix 2, A2.11).

570. More generally, Rhodes, *Syndicated Lending, Practice and Documentation*, 4th ed., describes "rescheduling loans" in the glossary at p.564 as:

> "altering the terms and conditions of existing loan agreements because of the inability of the borrower to meet the established interest and/or principal repayments."

571. Carey's case is that sub-clause 21.6 is a very widely expressed provision which does not require formality, or a coming together of all the creditors. It is enough to trigger the provision if there is a commencement of negotiations with any creditor for the rescheduling of any indebtedness. As it was put, the fact that it can be done informally in a coffee shop, is neither here nor there.

572. In response, GHU submits that the word "rescheduling" is not about a call to a credit manager, or a cup of coffee over which there will be a chat about giving a bit more time to pay. To treat that type of dealing by a phone call or an email as a rescheduling, which is effectively Carey's case, would be completely unworkable. A highly leveraged company such as GU, it was submitted, must be making calls of that sort every day. Rather, the term "rescheduling" in this context captures the idea of a formal rescheduling of a company's debt book. GHU emphasises the necessity for formality.

573. My view as to these contentions is as follows. As is explained in Shutter, *A Practitioner's Guide to Syndicated Lending*, pp.314-316, the interests of the creditor and borrower are different in respect of this type of provision. The creditor is concerned to safeguard its position prior to the formal commencement of insolvency proceedings. The borrower's concern is not to agree a clause which imposes impractical restrictions on its ability to conduct business.

574. A borrower in the business context may have constant dealings with respect to its indebtedness, postponing it, renegotiating it, refinancing it, and so on. For this reason, I accept GHU's proposition that the term "rescheduling" implies a degree of formality. Adopting the approach of the IMF in its *External Debt Statistics: Guide for Compilers and Users*, "rescheduling" refers to the formal deferment of debt-service payments and the application of new and extended maturities to the deferred amount.

575. However, the reference to formality may be of limited assistance to GHU in this case. This is because sub-clause 21.6(d) of the BBVA Credit Agreement provides that an event of default occurs if the company *begins* negotiations with *any* creditor for the rescheduling of any of its indebtedness. It is not limited to the commencement of negotiations with creditors generally with a view to formally rescheduling the company's whole debt book. The primary protection to the borrower against the clause being given an unreasonably wide ambit is to be found in the fact that beginning negotiations for rescheduling will only constitute an event of default if it happens "by reason of actual or anticipated financial difficulties".

576. In the context of a clause dealing in other respects with insolvency, I consider that the "difficulties" envisaged must be of a substantial nature. That aside, the true construction of such a clause must depend upon its drafting, and, in common with all questions of contractual construction, the factual matrix of the agreement in question. I have set out the English law rules above in the context of material adverse change.

577. In the present case, part of that matrix concerns the nature of the Urvasco group's business. At the end of 2007, it owed about €2.3 billion to over forty banks, mostly Spanish banks. The business, even in a benign economic climate, required constant negotiations with financial institutions. Such negotiations would not, in my view, constitute an event of default, whether or not resulting in a formal agreement. Carey (as lender) was in any case well aware of the group's position in this respect in general terms. Carey's case, it seems to me, and the case I have to decide, is whether negotiations with particular creditors for the rescheduling of any of its indebtedness occurred, not in the ordinary course of its business, but by reason of actual or anticipated financial difficulties.

578. Carey's case is that in the first part of 2008, the economic situation in which the Urvasco group found itself deteriorated sharply, and that such negotiations did take place, well before the breach admitted by GHU when formal negotiations opened with its banking creditors in September to achieve a global settlement that would save the group. Carey relies on negotiations with three banks (each of them *cajas*) to make good its case as follows.

Caja Rioja

579. Mr Esparza described the position in relation to Caja Rioja in his evidence:

> "42. The negotiations with Caja Rioja in March and April 2008 related to a mortgage on some land in Vitoria. The principal was due on 21 April 2008 and so we wanted to renew the mortgage on new terms. As the original loan had been provided without any security, Caja Rioja was keen to obtain security and this was given in the form of the amortisation of the principal being drawn from the sale proceeds of Urvasco Energía and a mortgage on another plot of land in Vitoria. The email correspondence referred to in paragraphs 6.1 to 6.3 [of Schedule 2 to the Defence], and particularly my email dated 18 April 2008, merely reflected my strategy for ensuring that we obtained the renewal of the loan."

580. The position is that on 31 March 2008, Caja Rioja emailed Mr Esparza reminding him of the forthcoming expiry of the loan, and apologising for the aggressive nature of the communication because, as the bank officer put it, "I do not intend to put you under more pressure than you are already under".

581. Mr Esparza clearly was under pressure. On 3 April 2008, he responded apologising for the delayed answer, saying that "in these turbulent times my mind is elsewhere". He said that GU wanted to renew the loan, suggesting that he had "not yet settled [his] financial problems at this moment". He said that a settlement was dependent on the energy sector sale, which was a reference to the sale of Urvasco Energia. The terms of his email link the renewal of the debt, in my view, to financial problems at the group, even if his hope was the sale of Urvasco Energia would provide a solution to them.

582. When asked about this email in cross-examination, Mr Couto referred to the crisis in the sector, describing business as at a standstill. A crisis was also referred to by Mr Esparza a few days later in an email of 18 April 2008 to Caja Rioja, though he also referred to the "goal of meeting our service cost of the debt". By then, he had

requested renewal. Repayment was to await the receipt of the proceeds from the sale of Urvasco Energia (referred to as the wind farms). Mr Esparza said:

> "Dear Manuel: In light of the upcoming expiration of the loan that we have with your bank, I already informed you that, for that date, I do not have the means to resolve this and that is why I requested the renewal. Caja Rioja, as you informed me, is going to treat it as payable and wait until we cancel it with the income from the wind farms; income that will come about in mid-May. On that day we will want another loan of the same amount in which we will include collaterals that we will release from bridge funding that will be in place up to the sale of the wind farms. There are sites in Castro that will remain with very small mortgages, some tertiary sites in Vitoria and other kinds of guarantees, not only personal.
>
> In the end, as I told you, given the actual crisis situation in the sector, we will sacrifice our most valuable present assets, with the goal of meeting our service cost of the debt while this storm lasts; an avalanche of loan amortizations will rather modify our financial strategy."

583. GHU says that this amounted to no more than the roll-over of existing indebtedness and the agreement of terms for the new loan facility following the maturity of the old loan maturity. It is not evidence, it says, of negotiations for a debt rescheduling, and there is in fact nothing to suggest that delayed payments over this period were formally rescheduled.

584. However, I consider that implicit in the email is the recognition that financial difficulties were being experienced because the crisis in the construction sector. GU was negotiating with Caja Rioja to avoid amortisation of the debt, and the debt was in the event deferred.

Ibercaja

585. The loans from Ibercaja included, in particular, a loan to a GU company called Viviendas de Malaga Vimasur with a limit of €16,680,000 relating to a plot of land in Torremolinos. This loan matured on 31 January 2008.

586. On 22 February 2008 Mr Esparza emailed Ibercaja referring to the efforts being expended to service the group's debt and the proposed sale of Urvasco Energia. He said that Mr Couto was working full-time to "calm GU's financial trajectory", including the matter which worried them most, servicing the debt. He said:

> "As I have already told you, we are currently unable to mortgage so much as a single square metre of Chamartin; any entry in the Property Register could lead to a tax cost of 30.35 million euros for us. In addition, it is very hard to give real guarantees in respect of staff who are connected to Madrid properties, especially mortgage guarantees in respect of buildings or land> That is because certain entities that supported us in land investments, but with no particular interest in taking part in the project, saw themselves forced - due to the crisis - to renew that finance with mortgage guarantees or mortgage pledges. That is why we include offices, some land, and even part of our art collection."

A request was made to extend any claim for repayment for a period of one month, by which was meant a legal claim brought in the courts.

587. An email of 22 April 2008 from Ibercaja to Mr Esparza refers to the loan, saying that it would go into default on 30 April 2008. It said that the "signing of the novation must occur as soon as possible". The evidence at trial was that loans that were three months or more overdue were treated as being "*en mora*" (i.e. in default) and had to be reported by the bank concerned to Banco de España, which is Spain's central bank.

588. GHU submits that this is a roll-over of existing lending into new lending, and cannot be said to constitute negotiations for a debt rescheduling. However, I consider that the evidence shows that the request for an extension was more than a simple roll-over, and happened because of the actual or anticipated financial difficulties which GU faced.

Unicaja

589. On 28 November 2007, Unicaja sent an email to Mr Esparza regarding the renewal of a loan of €12.5m. The loan, which had been used to purchase land in Malaga, matured on 20 February 2008. On 15 January 2008 Unicaja emailed Mr Esparza again seeking some information for the purposes of the renewal.

590. On 15 February 2008, there was an email exchange between Mr Esparza and Unicaja regarding the terms of the renewal, in which Mr Esparza referred to the "complicated" position of the group. It seems that Unicaja was willing to renew the loan following its maturity. As to the terms, it proposed a reduction in the amount of the loan of €1.5m (i.e. to €11m) and then quarterly repayments of €1.5m to €2m. On the other hand, GU's proposal was to renew for €11m and then to agree to repay €4.8m.

591. Unicaja sent Mr Esparza an email on 8 April 2008 as follows:

> "Julio, the debt on the credit account matured on 20/02, that is longer than what would be reasonable considering all the efforts made to pay it.
>
> We sent a policy for you to sign and you have not signed it yet. Could you please pay the debt due or at least urgently sign the policy in order to avoid judicial debt collection that could be imminent.
>
> I tried informing you of this situation weeks ago, I know you are willing to solve this problem, but it has not been settled."

592. Perhaps in view of the threat of legal action, an agreement was signed between GU and Unicaja in April 2008 for the new loan. The loan was renewed for €11m and under the terms of the new loan GU agreed to pay €2m within two months and a further €2m after four months.

593. GHU says that these were negotiations for the terms of a new banking facility following the maturity of an existing facility. They were not, it submits, negotiations for a debt rescheduling begun by reason of GU's actual or anticipated financial difficulties. Indeed, there was no debt rescheduling: all that happened was

that a facility matured and the terms of a new facility were negotiated and entered into. Although Carey asserts that this was not a simple rolling-over of a loan, GHU says that it was in fact just that.

594. I do not accept GHU's submission that these were not negotiations with a creditor within the meaning of sub-clause 21.6(d). They were negotiations with a creditor, namely Unicaja, for the rescheduling of a loan. It is artificial, in my view, to analyse the situation as the maturing of one facility, and the negotiation and entry into of a new facility. The email of 8 April 2008 makes it clear that the agreement of new terms was linked to non-payment of the existing facility, and the consequent threat of legal action.

Conclusion

595. The evidence establishes, in my view, that in 2008 growing financial difficulties were forcing GU to negotiate with its creditors in terms that went beyond rescheduling in the ordinary course of its business, which I accept had been a feature of its business in previous years. What was happening also went well beyond dealing with the kind of liquidity problems of which Carey had a general awareness as at the time of the Loan Agreement. For that reason, I reject GHU's contention that any estoppel arises by reason of Carey's knowledge of liquidity problems at this time.

596. It is necessary to place these negotiations in context. Lenders generally were being told that the position would improve when the proceeds of sale of Urvasco Energia were received. This was accepted by Mr Esparza (who was GU's Head of Finance) in cross-examination:

> **Q.** What was happening here was that creditors were being asked, and they were agreeing, to hold off on the basis that they would, in due course, be paid out of the proceeds of the sale of Energia; that's what was happening in all of these conversations you were having with the banks? Is that fair?
>
> **A.** Yes, I spoke to them about this, yes.
>
> **Q.** Throughout the first half of 2008, you were delaying payments by agreement with lenders and other creditors?
>
> **A.** Yes.

597. It is also relevant, in my view, to have regard to subsequent events. GHU accepts that from mid to late June 2008 GU ceased paying bank debts. It argues that the directors were planning ahead, because they knew that there were problems, and that they decided to take pre-emptive action, which it says is not at all unusual in the context of a restructuring. As it was put, "If one knows one is going to go to the banks and invite them to come to the table, it makes little sense to be paying individual banks piecemeal in advance of that process".

598. However, in the period prior to mid to late June 2008, this implies that agreements were reached with individual banks to defer repayment. On the evidence, such agreements clearly were reached, and I infer that this was to avoid the debts becoming

en mora in circumstances in which GU was having difficulties in repaying them. Whilst it is correct that the antecedent negotiations were not negotiations for a wholesale restructuring of GU's debt, clause 21.6(d) applies to negotiations with *any* creditor. In the case of Unicaja at least, there is clear evidence that these negotiations resulted in a formal agreement deferring GU's liabilities, insofar as this is necessary for the sub-clause to apply. It follows that an event of default occurred as regards the negotiations with Unicaja, and in my view probably with the other two banks as well. I am further satisfied that Carey has established an event of default in this respect as at 6 June 2008.

FURTHER BBVA DEFAULTS

599. This part of the case deals with allegations by Carey of defaults under the BBVA Credit Agreement which it says gave rise to further defaults under the Loan Agreement between GHU and Carey. Carey calls them "further" defaults, because they are further to its case that there was a default under the BBVA Credit Agreement as regards material adverse change in GU's financial condition/rescheduling negotiations. These "further" defaults relate mainly (but not entirely) to the position pre-21 December 2007, that is, before the date it entered into the Loan Agreement with GHU.

600. The further defaults alleged are:

(1) The use by Urvasco Ltd of sums it borrowed from BBVA under the BBVA Credit Agreement for purposes other than the Development.

(2) The late payment by Urvasco Ltd of interest and fees due to BBVA under the BBVA Credit Agreement.

(3) The failure by Urvasco Ltd to maintain sufficient funds in an account designated as the Debt Service Account under the BBVA Credit Agreement.

(4) Breaches by Urvasco Ltd of Building Contracts and Professional Appointments which took place prior to 21 December 2007. These breaches take the form of non-payment by Urvasco Ltd of sums due to the contractors and Professionals engaged on the Development.

(5) The failure by Urvasco Ltd to inform BBVA of the various breaches of the BBVA Credit Agreement identified in the sub-paragraphs above.

601. The basic answer given by GHU is each case is the same, namely that BBVA was well aware of the position, and did not take objection. BBVA did not give evidence at trial, and the evidence on this point was primarily that of Mr Couto and Mr Esparza, which I accept in this regard. There is not much factual dispute, and my findings are as follows.

602. On 27 November and 5 December 2007, about €8.8m was drawn down under the BBVA Credit Agreement, of which €4.4m was transferred by Urvasco Ltd to other companies in the group. These drawdowns therefore pre-date the 21 December 2007 Loan Agreement with Carey. I accept the evidence of Mr Couto and Mr Esparza that BBVA knew that drawdowns under the BBVA Credit Agreement were being used for purposes other than the development. In fact, the evidence goes beyond that, because

a considerable part of the drawdown of 27 November 2007 (the date may have been 26 November 2007 but it makes no difference) was used to pay interest due on 30 June 2007 to BBVA. I infer that this was at the bank's insistence. In any case, it plainly could not assert any breach in that regard.

603. So whilst it is true that the money did not all go into the development, and that payment of interest and fees was made to BBVA late, in that interest due on 30 June 2007 was not paid until 27 November 2007, fees were overdue as at 17 December 2007, and interest due on 31 December 2007 was not paid until 9 January 2008 (again out of a drawdown under the BBVA Credit Agreement), BBVA was clearly well aware of the position.

604. BBVA was also necessarily aware of the position in relation to the Debt Service Account, because this was an account maintained with BBVA. I accept Mr Esparza's evidence which was that:

> "… as BBVA was aware, the way that we operated was that we would have funds transferred into the Debt Service Account as and when payments were required from it … I was never told by any representative of BBVA that there were insufficient funds in the Debt Service Account and that funds needed to be transferred in. Furthermore, at no point did any representative of BBVA ever inform me that Urvasco might be in breach of the BBVA Credit Agreement on account of this."

605. Carey's case as regards breach of building contracts and professional appointments is a reprise of its case that Urvasco Ltd failed to make payments due to contractors and consultants. However, it is raised as a breach of contract here by reference to the period *prior* to 21 December 2007 when its contract with GHU was entered into. I am satisfied that BBVA would have been aware that these parties must have been paid late. It was an inevitable consequence of the fact that nothing was advanced by BBVA between June and November 2007. In any case, I am satisfied that Mr Esparza made it clear to BBVA in an email of 25 October 2007 in which he speaks of "not being able to make some crucial payments for a whole heap of people involved in the project".

606. The fifth default alleged is the failure of Urvasco Ltd to inform BBVA of the other four alleged breaches. With all respect to Carey, this allegation defies common sense. It is plain (for example) that BBVA was well aware as to the position of the Debt Service Account since it itself held the account, and the same applies generally for the reasons I have given.

607. GHU's riposte is that any breaches were waived by BBVA and consequently cannot be relied upon by Carey as defaults. Carey maintains however that the "short answer to this defence is that the contractual requirements for waiver under the BBVA Credit Agreement … were not satisfied. There was no express and specific waiver in writing from BBVA or communication by BBVA to all parties to the BBVA Credit Agreement that it had made such a waiver. This disposes of the defence."

608. However, the law is in my view correctly stated by Cooke J in *Credit Agricole Indo-Suez v BB Energy BV* [2004] EWHC 750 (Comm) referring to a very similar provision at issue in that case (at [32]–[33]):

> "When one looks at a clause of this kind, however, the position is this. This clause, along with any other clause, can be the subject of waiver, and the requirement for a waiver to be in any particular form is one which can itself be waived. These clauses, inevitably, give rise to little more than an evidential requirement to establish that there truly has been a waiver in the case in question."

See also to the same effect *RGI International v Synergy Classic Ltd* [2011] EWHC 3417 (Comm) at [51], Hamblen J.

609. I am satisfied that BBVA waived any breaches that there may have been of the BBVA Credit Agreement as at 21 December 2007, and that there was no default under that agreement. The whole purpose of the arrangements (in which BBVA participated and in which it had a strong interest, not just because of its own lending for the project, but as the main lender to the Urvasco group) was to allow Carey to come into the project as lender (and purchaser). It would have been completely self-defeating from BBVA's point of view if, by reason of defaults as at 21 December 2007 under its Credit Agreement, Carey was effectively under no liability to lend.

610. Given the commercial background, it is not surprising that on 17 June 2008 BBVA certified that the GU companies were "up to date with payments on all their loan transactions with this Bank". BBVA also produced a letter of 23 June 2008 addressed to Urvasco Ltd confirming that the amount available under the BBVA Credit Agreement was €25,631,496. These were clearly issued to assist GHU in its ongoing discussions with Carey.

611. Carey says that the certificates simply confirm that Urvasco Ltd was up to date with payments (but nothing more) and identify the amount undrawn under the BBVA Credit Agreement respectively. Neither document waives any prior breaches either expressly or, even, impliedly. GHU is forced to say, it says, that this is "the effect" of these two documents. That is not good enough for a waiver under the BBVA Credit Agreement which has to be "in writing" and "specifically". The latter requirement it says precludes any general or implied waiver.

612. In my view, the certificates support GHU's case on waiver in respect of these "Further BBVA Defaults". However, for the reasons I have already given, I find that such waivers had already occurred. I am satisfied that Carey's claim under this heading fails.

CAREY'S CASE OF ALLEGED "DEVELOPMENT DEFAULTS"

Introduction

613. The letter of 9 June 2008 in which Carey set out its reasons for refusing to advance the tranche of the loan due concerned the financial condition of the Urvasco group. The letter was concerned with what Carey has called "financial defaults". As I have held, Carey has made that case good by reference to the rescheduling negotiations which caused an event of default under clause 21.6(d) of the BBVA Credit Agreement. This was not a breach which was identified in the letter. But as I have said, GHU did not contend in closing that notice of defaults had to be given in order for defaults to be relied on, or that Carey is restricted to reliance on what was set out

in the letter of 9 June 2008. Whether a creditor could usually adopt such a position is beside the point. In this particular case, it is common ground that the creditor can rely on defaults existing at the material date, whether or not they were raised at the time.

614. In the course of these proceedings, Carey has advanced an alternative case to its case on "financial defaults" based on what it calls "development defaults". These have to do with the way the building project was handled as regards the provisions in the contractual documentation that placed obligations on GHU. The allegations are largely based on materials disclosed by GHU in the litigation, as interpreted by expert witnesses. (The matters relied on by Carey under the heading called "further BBVA defaults" which I have just dealt with are in the same genre.)

615. GHU maintains that this amounted to an *ex post* attempt to justify the withholding of the loan proceeds, and that it has added greatly to the length and costs of the proceedings. Carey maintains that the information which was provided on disclosure should have been provided at the time under the contractual provisions. For the present, it is not necessary for me to express a view on this. However, as a statement of fact, much of the trial was taken up with an examination of the course of the building works, sometimes in considerable detail.

616. The list of development defaults relied upon by Carey extends to ten categories. (It claims that the evidence has disclosed that there are more.) There are, it asserts, two main themes running through most of the defaults: (a) the failure by Urvasco Ltd to pay the contractors and professionals working on the development and (b) problems with progress on the development. These failures it is said led to breaches in their own right. They also led to a series of failures by GHU to procure that Urvasco Ltd or IDOM provided accurate and complete information about the development to Carey or G&T. They are therefore, Carey says, at the heart of the "development defaults".

617. As Carey says, it is unusual to have a case where there are so many contested breaches, and it is certainly unusual in the Commercial Court. But this, it says, is GHU's choice. In my view, it is rather a consequence of the number of points relied on by Carey. Where it has established a breach under a particular head, I have sought to apply a proportionate approach, and have not necessarily examined in the same detail all the other breaches asserted under that head.

618. The ten categories of development defaults relied upon by Carey taken from its written submissions are as follows, and all are in dispute.

(1) Urvasco Ltd did not pay contractors monies as and when they fell due. Carey was not informed. As such, GHU failed to procure that Urvasco Ltd promptly informed G&T of breaches of Development Documents by Urvasco Ltd. This was a breach of the SPA, Schedule 3, clause 1.3(c)(i) and clause 9(a) of Loan Agreement, each of which was a default under clause 10(b)(ii) of the Loan Agreement. The existence of breaches of the Development Documents by Urvasco Ltd also falsified the representation made by GHU under clause 8(e) which is a default under clause 10(b)(iii) of the Loan Agreement.

(2) The Employers Agent Report (EARs) in respect of the April, May and June works failed to provide the information required by paragraphs 1.3(a) and 1.4(a) of Schedule 3 to the SPA. The obligations in relation to the EARs were

imposed on GHU by the SPA, Schedule 3, paragraph 1.3(a) under which GHU was obliged to procure that Urvasco Ltd would provide (or would procure IDOM to provide) the required information. A breach of clause 1.3(a) of the SPA is a default under clause 10(b)(ii) of the Loan Agreement.

(3) The EARs in respect of the April, May and June works contained information relating to the development which was false or failed to contain information which rendered false other information which was provided. This falsified the representations made by GHU under clause 8(k) of the Loan Agreement which is a default under clause 10(b)(iii) of the Loan Agreement.

(4) GHU failed to procure that Urvasco Ltd provided documents to which G&T was entitled pursuant to the SPA, Schedule 3, clause 1.4 of the SPA. This was a default under clause 10(b)(ii) of the Loan Agreement.

(5) GHU failed to procure that Urvasco Ltd used reasonable endeavours to procure that the development was completed by the Long Stop Date (30 April 2009) by complying with its obligations under the Development Documents. This was a breach of the SPA, Schedule 3, clause 1.1 and clause 9(a) of Loan Agreement, each of which was a default under clause 10(b)(ii) of the Loan Agreement.

(6) GHU failed to notify Carey that the Long Stop Date had become incapable of satisfaction or that completion was or was likely to be delayed beyond the LSD. This was a breach of clause 4.4 of the SPA which was a default under clause 10(b)(ii) of the Loan Agreement.

(7) GHU failed to procure that Urvasco Ltd notified Carey about claims made against Urvasco Ltd. This was a breach of the SPA, schedule 3, clause 1.3(c)(i) and clause 9(a) of Loan Agreement, each of which was a default under clause 10(b)(ii) of the Loan Agreement. One such claim, the service of a statutory demand, also rendered false the representation made in clause 8(w) of the Loan Agreement which was a default under clause 10(b)(iii) of the Loan Agreement.

(8) GHU failed to advance the Subsequent Tranches paid by Carey to Urvasco Ltd for the purposes of the Development. This was a breach of clause 8 of the Intercreditor Letter which was a default under clauses 10(b)(ii) and (iv) of the Loan Agreement.

(9) The representation made by GHU in clause 4 of the Intercreditor Agreement (that, as at 21 December 2007, there had been no breaches of the BBVA Credit Agreement) was false by reason of earlier breaches of the BBVA Credit Agreement. This was a breach of clause 4 of the Intercreditor Letter which in turn was a default under clause 21.4 of the BBVA Credit Agreement which was a default under clause 10(b)(iv) of the Loan Agreement.

(10) GHU was in breach of the BBVA Credit Agreement after 21 December 2007 in a number of specific respects. These were defaults under clause 21.3 of the BBVA Credit Agreement and were therefore defaults within clause 10(b)(iv) of the Loan Agreement.

619. In its submissions, Carey presented these ten categories of alleged breaches under five generic headings. As GHU said, the case as to breach of contract is diffuse, and in an effort to give some structure, Carey produced at an early stage of the hearing a "Guide to the Construction Aspects of the Case". This states that disputes about the facts are less extensive than appears at first blush. Generally, I think it is correct that despite the complex nature of its submissions, each of breaches alleged by Carey raises for decision relatively few factual points of real significance.

620. I shall deal with the allegations under Carey's five generic headings. These were, failure to pay contractors and failure to notify the same to G&T/Carey, failure to provide information or provision of inaccurate information, failure to notify claims made against Urvasco Ltd, inability to reach the Long Stop Date, and use by GHU of the Subsequent Tranches.

The "disarray" point

621. Before getting into the detail, I should deal with a general point that was made by Mr Manus McMullan QC, who presented the development aspects of the case on Carey's behalf. In summary, its case is that in the months before 6 June 2008, the development was beset with problems—defects, lack of progress, delays, disputes with trade contractors, suspensions of work, and failures to pay contractors and professionals. Further, it is submitted that Carey (or its monitoring surveyors) ought to have been told of these problems, but it was not. Consistently during the trial he described the development as being in "disarray".

622. I accept that at some times and to varying degrees it is fair to say that there was disarray in the development. Not too much should be made of such a high level description, however, because the question I have to decide is whether Carey can prove a breach of contract. I give relatively little weight to some of the causes cited by Carey. There was no inherent reason why the "construction management" methodology (by which Urvasco Ltd entered into contracts with contractors rather than having a contract with a single contractor which subcontracted) should not have worked. It did, I accept, add a degree of complexity, but it had the practical advantage that some of the contractors were Spanish and the group was used to working with them.

623. Nor (as I have made clear above) do I accept Carey's criticism of the IDOM team, or their working methods, though there could, I accept, have been greater attention given to recording things in writing, producing regular budgets, and so forth.

624. I am satisfied that the principal cause of the disarray was (as Carey submitted) late payment on the part of GHU, particularly late payment of contractors. At this time, the construction market in London was still buoyant, and contractors were not short of other opportunities. This combination must have made the project very difficult for Mr Fernandez to manage. He accepted this in the following exchange in his oral evidence:

Q. Had you ever been on a site that was so difficult to manage?

A. No.

> **Q.** Had you ever been on a site where there were so many payment problems?
>
> **A.** With threaten of suspension and these kinds of things, I have not like this.

625. As regards the position as at 6 June 2008, an email from Mr Fernandez of 10 June 2008 said that payments required in June 2008 were up to €8m. He said that in addition to this amount, because they had *forzado* the certification, a further €4m would need to be paid within 3 months. GHU responds that if Carey had paid the April tranche of £2,258,784.70 (€3,226,835.29) on 6 June 2008, then combined with the sum of €4.456m actually paid by GHU to Urvasco Ltd in June 2008, there would have been little if any remaining arrears to contractors. However this assumes that €4.456m would still have been made available by GHU had Carey advanced the April tranche, an assumption which in view of the history is far from self evident.

Alleged development breach (1): failure to pay contractors and failure to notify the same to G&T/Carey

Carey's case

626. I begin by summarising Carey's case as it appeared in its closing submissions. The case is that at 6 June 2008 there were numerous breaches by Urvasco Ltd in its relationships with the contractors and professionals engaged on the development. The evidence shows, it says, that Urvasco Ltd failed consistently in the months leading up to 6 June 2008 to make payments to them in accordance with its obligations.

627. In essence, Carey says that Urvasco Ltd was in breach of its payment obligations to contractors and professionals under its contracts with them. This, it contends, gave rise to the following four defaults under the Loan Agreement:

(1) GHU agreed, in clause 1.1(a) of Part 2 of Schedule 3 to the SPA to procure that Urvasco Ltd used its reasonable endeavours to procure that the development was carried out by the Long Stop Date by, amongst other things, complying with its obligations under each Building Contract and each Professional Appointment in a proper and timely manner. This did not happen. This was a default under clause 10(b)(ii) of the Loan Agreement.

(2) GHU represented on each Subsequent Advance Date that there was no outstanding breach of any Development Document (Loan Agreement, clause 8(e)). The breaches of the Development Documents pleaded by Carey falsify this representation. This was a default under clause 10(b)(iii) of the Loan Agreement.

(3) GHU agreed, in clause 1.3(a) of Part 2 of Schedule 3 to the SPA, to procure that Urvasco Ltd supplied (or procured IDOM to supply) an Employer's Agent Report which reported on the status of the development and contained at least the information identified in paragraphs 1.3(a)(i) to (vi). Carey says that the compliance by Urvasco Ltd with its contractual obligations was an integral part of the status of the development. The failure to include information about breaches of the Development Documents was a breach by GHU of its obligation under clause 1.3(a). This was a default under clause 10(b)(ii) of the Loan Agreement.

(4) GHU undertook, in clause 9(a) of the Loan Agreement, to comply with Schedule 3 of the SPA. By clause 1.3(c) of Part 2 to that Schedule GHU was obliged to procure that Urvasco Ltd promptly informed G&T of any breach or alleged breach under any Development Document. Contrary to the requirement of clause 1.3(c), Carey was not notified of the breaches. GHU was therefore in breach of both the SPA and the Loan Agreement, each of which is a default under clause 10(b)(ii) of the Loan Agreement.

GHU's case

628. GHU's response turns on the construction of the provisions, and the materiality issue, but it raises other points as well. In summary it says that:

(1) Carey has not proved that Urvasco Ltd was in breach of its payment obligations to a range of contractors and professionals on the development on 6 June 2008 and thereafter.

(2) A breach of the obligation in paragraph 1.1(a) of Schedule 3, Part 2 to the SPA may only occur <u>after</u> the Long Stop Date had passed. This provision is therefore of no application in the present circumstances.

(3) Carey has not proved, for the purposes of paragraph 1.1(a) of Schedule 3, Part 2 to the SPA, any causal link between the payment failures alleged and an inability to complete the development by the Long Stop Date.

(4) Paragraph 1.1(a) of Schedule 3, Part 2 to the SPA has an express materiality threshold; that threshold was not met by the matters alleged by Carey.

(5) Clause 8(e)(ii) of the Loan Agreement is subject to an implied materiality threshold; that threshold was not met by the matters alleged by Carey.

(6) Paragraph 1.3(a) of Part 2 to Schedule 3 to the SPA did not impose an obligation on GHU/Urvasco to report the non- or late-payment of contractors or professionals.

(7) Alternatively, on its proper construction or as an implied term, paragraph 1.3(a) of Part 2 to Schedule 3 to the SPA is subject to an implied materiality threshold; that threshold was not met by the matters alleged by Carey.

(8) On its proper construction or as an implied term, paragraph 1.3(c)(i) of Part 2 to Schedule 3 to the SPA did not require Urvasco and any "Approved Contractor" to identify breaches of Development Documents other than those which were likely to have a material effect on the completion of the Development by the Long Stop Date; that threshold was not met by the matters alleged by Carey.

(9) Clause 10(b)(ii) of the Loan Agreement is subject to an implied materiality threshold; that threshold was not met by the matters alleged by Carey.

(10) Clause 10(b)(iii) of the Loan Agreement is subject to an express materiality threshold; that threshold was not met by the matters alleged by Carey.

The contractual terms

629. It is convenient to group the contractual terms relied upon by Carey in the same way as GHU has done to identify how Carey puts its case. First, however, it is necessary to set out the definition of a number of terms.

630. The term "Development" is defined in clause 1.1 of the SPA to mean the "design and construction of a building comprising a hotel and apartment block and all ancillary works in connection therewith …".

631. "Development Documents" are defined in the SPA Schedule 3, clause 1.1 as:

(1) A "Building Contract", being any contract for the design and/or construction of the Development between Urvasco Ltd and any "Approved Contractor". The term "Approved Contractor" is defined as any one of the contractors engaged by Urvasco Ltd in connection with the Development.

(2) A "Professional Appointment" being an agreement for the appointment of a "Professional" by Urvasco Ltd. "Professional" means any one of the Professional Team being the Architect (Foster & Partners), the Employer's Agent (IDOM), the Engineering Consultant (BDSP) and the Structural Engineer (Buro Happold).

(1) Paragraph 1.1(a), Schedule 3, SPA, and clause 10(b)(ii) of the Loan Agreement

632. Paragraph 1(a) of Schedule 3, Part 2 to the SPA states:

> "The Seller [i.e. GHU] will procure that the Company [i.e. Urvasco Ltd] uses reasonable endeavours to procure that the Development is carried out so that the Date of Practical Completion shall have occurred by the Long Stop Date by:
>
> (a) Exercising its rights and complying with its obligations under each Building Contract and each Professional Appointment;
>
> ... in a proper and timely manner and in each case, in all material respects".

633. The "Date of Practical Completion" is defined in the SPA as "the date upon which the Development, as a whole, achieves Practical Completion which shall be as specified in or upon the issue of the last Certificate of Practical Completion". The term "Practical Completion" is defined as "the stage at which the Development as a whole is complete except for omissions and minor defects ...".

634. Carey asserts that GHU's alleged breaches of paragraph 1.1(a) Schedule 3, SPA, amounted to defaults under clause 10(b)(ii) of the Loan Agreement, which provides that an event of default occurs if:

> "(ii) the Seller breaches or fails to observe any other provision of the Loan Agreement or any other document to which the Seller or the Nominee [i.e. LVA] are both parties and fails to remedy such breach or failure within five Business Days or a notice from the Purchaser requiring such remedy;"

(ii) Clauses 8(e) and 10(b)(iii) of the Loan Agreement

635. By clause 8 of the Loan Agreement, representations are made by GHU, in respect of itself and Urvasco Ltd, on the First Tranche Date and each Subsequent Advance Date by reference to the circumstances existing at that time. Subject to various points not presently relevant, the parties agree that "Subsequent Advance Date" would include 6 June 2008. They include by clause 8(e):

> "There is no outstanding breach of any term of any Development Document and no person has disputed, repudiated or disclaimed liability under any Development Document or has evinced an intention to do so".

636. Carey asserts that GHU's alleged breaches of the representation in clause 8(e) of the Loan Agreement amounted to defaults under clause 10(b)(iii) of the Loan Agreement which states that:

> "An event of default occurs if: …
>
> (iii) Any representation, warranty or statement made by the Seller under or pursuant to the Loan Agreement is or proves to have been untrue when made in any material respect, unless the underlying circumstances are remedied within ten Business Days of a notice from the Purchaser requiring such remedy …"

(iii) Paragraph 1.3(a), Schedule 3, SPA and clause 10(b)(ii) of the Loan Agreement

637. Paragraph 1.3(a) of Part 2 to Schedule 3 to the SPA makes provision for the production of Monthly Reports (these are the Employer's Agent Reports which were made by IDOM) to the Monitoring Surveyors (that is G&T) "on the status of the Development" as follows:

> "The Seller shall procure that the Company shall (or shall procure that the Employer's Agent shall) supply to the Monitoring Surveyors within 10 Business Days after the start of each calendar month, a report (each an "Employer's Agent Report") by the Employer's Agent (with such inputs by other members of the Professional Team as may be appropriate) on the status of the Development".

Paragraph 1.3(a) lists in sub-paragraphs (i) to (vi) matters which must be included in the Employer's Agent Reports.

(iv) Paragraph 1.3(c)(i), Schedule 3, SPA, and clause 10(b)(ii) of the Loan Agreement

638. Paragraph 1.3(c) of provides:

> "The Seller shall procure that the Company promptly informs the Monitoring Surveyor upon becoming aware of:
>
> (i) any breach or alleged breach under any Development Document …"

GHU's construction points

639. GHU takes a number of construction points in relation to these contractual provisions. First, its case is that a breach of the obligation in paragraph 1.1 of Schedule 2, Part 2, could only occur after the Long Stop Date had passed. This, it submits, is clear from

the use of the future perfect tense: "The Seller [i.e. GHU] will procure that the Company [i.e. Urvasco Ltd] uses reasonable endeavours to procure that the Development is carried out so that the Date of Practical Completion shall have occurred by the Long Stop Date ..." (underlining added).

640. I do not think that Carey dealt with this in its written closings, though the point was articulated by GHU in opening. In oral closings, Carey submitted that the only, or real, point of such a clause is so that, before one reaches the Long Stop Date, the counterparty and the party to each of the building contracts are carrying out their obligations. There was, it was submitted, a clear relationship between this clause, and clause 1.3(c), which placed an obligation on GHU to procure that Urvasco Ltd promptly informed the monitoring surveyors upon becoming aware of any breach or alleged breach under any Development Document. The two provisions, it was submitted, fit together, because there was an obligation, first, to tell Carey what was going on, and then the obligation to procure that the building contracts were being fulfilled by the counterparties. To suggest that this obligation would only arise after the date of practical completion was closing the stable door after the horse had bolted, because the whole point was that Carey wanted to know before things were too late. This provision was needed before the Long Stop Date to protect Carey's position.

641. The difficulty with this argument is that there are other provisions of the contract which provide protection to Carey prior to the Long Stop Date. The language used in these provisions (clause 4.4(b), clause 4.4(c) and clause 4.5(b)) make it clear that a breach may occur before the Long Stop Date has been reached. In contrast, GHU says, it is clear from the language in paragraph 1.1 that a breach of that paragraph may only occur once the Long Stop Date has passed.

642. I have described above the nature of the negotiations in Bilbao between the parties over three days which resulted in these agreements being entered into. Unlike some commercial negotiations, this was a negotiation between principals, who were well aware of what they were doing. It is particularly important, therefore, to have regard to the language which the parties agreed, which reflects the give and take. As a matter of interpretation applying ordinary principles (which are not in dispute), I agree with GHU that a breach of this particular obligation may only occur after the Long Stop Date has passed. This (in my view) follows straightforwardly from the use of the words "shall have occurred". That puts the relevant event in the past, not the future. I further agree with GHU that Carey's interpretation to the contrary is productive of uncertainty. It follows that Carey has not established the first default that it relies upon.

643. As to the second default alleged, I do not think it is in dispute that this is subject to an express materiality threshold. This follows from the words "any material respect" in clause 10(b)(iii) of the Loan Agreement.

644. As to the third default, paragraph 1.3(a) of Schedule 3 of the SPA, as GHU says, this lists in sub-paragraphs (i) to (vi), matters which must be included in the Employer's Agent Reports. There is no express requirement in paragraph 1.3(a) to report non- or late payment of contractors or professionals, nor to report breaches of Development Documents.

645. GHU submits that Carey therefore has to rely on a strained interpretation of paragraph 1.3(a). Carey attaches particular importance to the word "status" in paragraph 1.3(a). It asserts that compliance by Urvasco Ltd with its contractual obligations was an integral part of the status of the Development, and that Urvasco Ltd's failure to include in the Employer's Agent Reports information about breaches of Development Documents (i.e. alleged breaches of the Building Contracts and Professional Appointment through non- or late payment) was a breach by GHU of its obligations under paragraph 1.3(a).

646. That, I think, was Carey's case in this respect. It was not expressed in submissions, save in general terms. Carey says that Schedule 3 provides a detailed set of development controls which GHU was obliged to procure that Urvasco Ltd complied with between the date of the agreement and completion. It also contains the provisions requiring GHU to procure Urvasco Ltd to complete the Development by the Long Stop Date and provides the detailed mechanism by which Carey, as lender, was to be provided with extensive information about the status and progress of the Development in order that it could monitor the Development. Without this information Carey would potentially be lending money into a black hole.

647. That may be correct, in general terms. But I agree with GHU that it does not follow that paragraph 1.3(a) requires it to include information about breaches of the Development Documents. I see no reason to read such a requirement in because of the reference to "the status of the Development" and the words "at least". I find therefore that Carey has not established the third default which it alleges under this head.

648. The fourth default alleged by Carey concerns paragraph 1.3(c)(i) which provides that GHU had to procure that Urvasco Ltd promptly informed the Monitoring Surveyor (G&T) upon becoming aware of any breach or alleged breach under any Development Document. Carey's case is that "any" means "any".

649. The uncommercial nature of this interpretation becomes apparent when one appreciates that there were over a hundred construction packages in the project, each of which could give rise to breaches or alleged breaches, on top of which were the contracts with professionals. I agree with GHU that on its proper interpretation, paragraph 1.3(c)(i) required Urvasco Ltd to identify breaches of Development Documents which were material, alternatively that such a qualification should be implied. As it says, it would be bizarre if the obligation to inform extended to any breach no matter how immaterial, nor would G&T have been interested in such breaches. The purpose of the obligation in paragraph 1(c)(i) was to assist it as Monitoring Surveyor in monitoring the Development and in producing the Project Certificates.

650. GHU has a further contention on the interpretation of the provision. It points out that paragraph 1.3(c)(i) is conditioned on GHU "becoming aware of" a breach of a Development Document. This shows, it submits, that the sub-paragraph is intended to cover breaches or alleged breaches by contractors and professionals, not breaches or alleged breaches by Urvasco Ltd itself. This is another example, it says, of Carey attempting to "shoehorn" its allegations into a contractual framework not intended to address such allegations.

651. In agreement with GHU, this in my view is the right interpretation of the provision. Apart from being consonant with the language used, it fits with the overall structure of paragraph 1.3(c) of Schedule 3 of the SPA. Breaches by Urvasco Ltd itself are covered by the following sub-paragraph 1.3(c)(ii), which deals with the situation in which there is "any claim or demand against the Company…". On the basis that paragraph 1.3(c)(i) applies to breaches by contractors and professionals, I consider that it does not include non-payment of contractors by Urvasco Ltd in breach of contract. This is sufficient to find that Carey has not established the fourth default which it alleges under this heading, which in any case I consider is subject to a materiality threshold.

652. That leaves only the second default. To make it good, Carey has to show that there was a failure by Urvasco Ltd to pay contractors, and that on 6 June 2008 this falsified the representation by GHU and Urvasco Ltd that there was no outstanding breach of any term of any Development Document in any material respect (there being an admitted materiality threshold).

GHU's non-admission as to breach

653. GHU does not deny that it failed to pay contractors, which would obviously be unsustainable on the evidence. It says that the slow payment of builders and professionals was unattractive and unfortunate, but is common in the industry. As to the alleged breaches themselves, it says that Carey accepts that in most cases there were no written agreed terms as to payment. Carey's general approach has been to assume that a failure to pay an invoice on the date stated on the invoice itself evidences a breach of the relevant contract by Urvasco Ltd. However, the payment date unilaterally stated by a contractor in an invoice may or may not represent the agreed date for payment. GHU stands by its pleaded case that failure to pay an invoice in accordance with the time specified in the invoice is not evidence of a breach of contract. Urvasco Ltd does not admit breach of any Building Contracts and/or Professional Appointments.

654. Carey says that this is an unrealistic approach and should be rejected. It refers to the Housing Grants, Construction and Regeneration Act 1996, by which a party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless the duration of the work was to be less than 45 days, or estimated to be less than 45 days. There is a dispute between the parties as to the precise legal effect of the Act, but in general terms it is clear that the Act militates against non-payment of contractors, and was to that extent, a change of culture in the UK construction industry.

655. Further, in cross-examination Mr Fernandez appeared to accept that under the Act, if contractors applied for payment, he had to issue a withholding notice, or certify a sum, otherwise the amount applied for became due.

656. The other evidence in this regard is as follows. Mr Fernandez accepted that there were invoices which were due in May and into June. As he put it, "We had invoices which were due and they were pending for payment". He accepted that there were sums which had been certified and were due which had not been paid. He accepted that there were still "pending invoices" when works recommenced after the March 2008 suspension.

657. To like effect, Mr Valverde said that, "Although I was not directly involved in the contractor payment process, I was aware generally that there were issues with Urvasco paying its contractors".

658. Further, there was a body of evidence relating to the position as at 10 June 2008 (so close to the relevant date) as set out in the email sent by Mr Fernandez on that day. I have referred to this email above. It identified a wide range of long-standing and unpaid invoices. Mr Fernandez said that payments required in June 2008 were up to €8m. He said that in addition to this amount, because they had *forzado* the certification, a further €4m would need to be paid within 3 months.

659. The detail was set out by Carey in its written closing submissions, and I need only refer to part of it. A&T (the mechanical contractor) was owed over £1m which had not been paid within sixty days, as agreed. B&B Italia (the interior fit-out contractor) was owed €2.2m, and although GHU says that it agreed to postpone the date of such payment, in an email of 15 June 2008 Mr Fernandez refers to payment being "a year overdue now". Dolcestone, the stone contractor, was owed substantial amounts on two invoices dated 31 January 2008. Rowen, the steel contractor had been owed £402,504 under an invoice of 28 March 2008, which remained partly unpaid on 6 June 2008.

660. As to professionals, Foster & Partners, Buro Happold, and IDOM itself all had invoices outstanding as at 6 June 2008 which had not been paid in time.

661. By reference to the week immediately prior to 6 June 2008, Carey have shown that numerous complaints about overdue or late payments were made by various contractors and professionals.

662. I accept of course that GHU was entitled to put Carey to proof on this issue, but I am satisfied that Carey has amply proved the allegation that it makes. I agree that evidence that contractors were not paid sums which were "due" to them can only be understood as an acceptance that Urvasco Ltd was obliged to pay sums by a particular time, but failed to do so. There is a good deal of evidence from which I am entitled to, and do infer, that as at 6 June 2008, Urvasco Ltd was in breach of a significant number of Development Documents by failing to make payment under them when due. For reasons already given, I do not accept GHU's suggestion that this can be laid at Carey's door by reason of "its failure to make any advance for the January works". It follows (subject to the materiality threshold) that the representation made in clause 8(e) of the Loan Agreement was falsified on this date.

The materiality threshold: the parties' cases

663. GHU's case is that the materiality threshold in relation to failure to pay contractors and professionals may only be met by a failure to pay which affects the principal obligations owed to Carey, being the obligations to repay the interest and capital and to achieve Practical Completion by the Long Stop Date.

664. It submits that none of the instances of late payment relied on by Carey, even if (as I have found) they constituted breaches of Building Contracts or Professional Appointments, affected GHU/Urvasco Ltd's ability to achieve Practical Completion by the Long Stop Date because:

(1) The mere fact of late payment is not capable, absent other factors, of affecting the timetable for the Development.

(2) A factor which could, in theory, be capable of affecting the timetable for the Development, would be suspension of work by contractors. It is therefore relevant to examine the extent to which late payments resulted in contractors or professionals suspending their works, and the effect that this had on the timetable for the works.

(3) In this respect, the baseline programme for the Development allowed for 19 weeks of spare time, or "float". Mr Saulsbury's 'baseline' analysis (he is GHU's expert witness in programming matters) takes into account all critical delays, including the effect of all suspensions of work, which had occurred as at 6 June 2008. Taking all those matters into account, as at 6 June 2008 critical delay was between 4 and 11.6 weeks (depending on the extent to which resequencing is taken into account). This meant that there remained a period of between 7.5 and 15 weeks of float (i.e. spare time) in the programme for the outstanding works (less 2 weeks if there was to be a Christmas stoppage). The programme for the follow-on activities after 6 June 2008 was therefore able to accommodate further critical delays of between 7.5 and 15 weeks before Practical Completion of the Development would have been delayed beyond the Long Stop Date. (I should add here that in fact Mr Saulsbury did accept that 2 weeks should be allowed for in respect of a Christmas stoppage.)

(4) GHU/Urvasco's ability to achieve completion by the Long Stop Date was therefore unaffected by all matters (including any consequences of late payment) that had occurred as at 6 June 2008. It follows that late of payments of contractors and professionals, even if they constituted breaches of Building Contracts or Professional Appointments, were not material.

665. Carey's case is that this representation was not false in a trivial or minor way. It was, in fact, entirely untrue. At 6 June 2008, Urvasco Ltd was in breach of a very significant number of Development Documents with both contractors and professionals and in very substantial amounts. These breaches were material to its ability to complete the Development by the Long Stop Date not least because, only a few months earlier, a very substantial delay had occurred because of a failure to pay a minor sum (£52,000) to the crane operator. GHU cannot realistically say (Carey submits) that the failure to pay millions of pounds to dozens of professionals and contractors was immaterial to Urvasco Ltd's ability to complete. It was highly relevant to that issue and therefore the falsity of the representation was highly material.

Conclusion on materiality

666. I shall take the materiality test as it is proposed by GHU, namely that the late payment of contractors by by Urvasco Ltd had to affect its ability to achieve Practical Completion by the Long Stop Date. As shown by the summary of its submissions set out above, GHU's case is ultimately dependent on the view of its expert in programming matters, Mr Saulsbury, that as at 6 June 2008 the "float" on the contract was between 5.5 and 13 weeks (allowing for a two week Christmas stoppage). That,

GHU argues, means that there was sufficient time to accommodate any further delays consequent upon non-payment as at 6 June 2008.

667. Though I generally preferred the evidence of Mr Saulsbury to that of Mr Chamberlain (see below), in this regard, I prefer Carey's case. The particular breaches subsisting at 6 June 2008 have to be seen in context. Serious enough in themselves (particularly as regards A&T), they were part of a pattern that had continued since the project began, which had led to Mr Fernandez himself envisaging suspension in October 2007, and contractors walking off the site in March 2008. There was even a suggestion by GHU in its submissions that it could accommodate in part the funding gap which it accepts there was by delaying payments to contractors.

668. Applying GHU's materiality test, Carey must establish on the balance of probabilities that the breaches of the contracts which there were as at 6 June 2008 affected GHU/Urvasco Ltd's ability to achieve practical completion by 30 April 2009. I am satisfied that it has made this point good. Such breaches may not have meant that the Long Stop Date *would* not be met (I will have to consider the evidence in that respect later), but they certainly *affected* the likelihood of it being met. As Carey says, if there were any doubt on the materiality of the breaches, one need only look at the contemporaneous correspondence between the contractors and IDOM, and between IDOM and GHU to see that the issue was a serious problem at this time.

669. Further, I have little doubt that if Mr Fernandez had been asked on 6 June 2008 whether Urvasco Ltd's non-payment of contractors as at that date would affect GHU/Urvasco Ltd's ability to complete by the Long Stop Date, he would have answered in the affirmative. Though it has to be seen in the light of Carey's non-payment of the 6 June tranche, it is the clear message from his email of 10 June 2008 to Mr Esparza and Mr Emilio Iraculis.

670. In the email, Mr Fernandez said (using GHU's translation):

> "I have attached a breakdown of invoices that are necessary to be paid during this month of June. Payments will need to be made of up to 8 million euros in total. Throughout these last few months we have promised all contractors that the financial problems would be solved permanently. If we cannot cope with these volumes of payments, which include the certification retained by Losan as well as late payments we can predict that the continuous progress of work will be seriously jeopardized.
>
> In addition to this amount we have *forzado* the certification and another 4 million euros are pending which need to be remedied within 3 months. The difference between what has been certified and what has been paid has been growing from what you communicated in February of this year, where the difference was 5.5 million euros + tax + invoices Baker Mckenzie."

671. The references to late payments in the first paragraph and to the *forzado* (forced) certification in the second paragraph are particularly relevant because they suggest that payment by Carey pursuant to a proper certification by the UST would still fall considerably short of covering what was then due. The upshot of an inability to cope with these volumes of payments would be, he says, that "… the continuous progress of work will be seriously jeopardized".

672. For the above reasons, I find proved Carey's case in relation to the first development breach which it alleges.

Alleged development breach (2): failure to provide information/provision of inaccurate information

673. This default alleged by Carey includes what was an important issue in the trial, namely the significance (or otherwise) of the emails sent by Mr Fernandez that state that the certification had been *forzado*. The first such email was sent on 10 June 2008, shortly after Carey withheld payment of the April tranche due on 6 June 2008. The others were sent on 15 June 2008 and 23 June 2008. Carey's case is that by reason of this, and what it says are other deficiencies in the reports provided by IDOM, the representation in the Loan Agreement that all information supplied by it or on its behalf was true and accurate in all material respects as at 6 June 2008 was falsified.

674. Though there was some confusion at stages in its argument, in the result the contractual provisions that Carey relies upon were identified in oral closings, and are straightforward. Before coming to them, it is helpful to give them context. As explained by Carey (and I do not think this is in dispute) in broad terms the contractual scheme was as follows. Contractors would apply for payment, IDOM would consider the applications, and certify what it considered was due to the contractors. These amounts would then be certified by IDOM in its "Employer's Agent Report" sent to Carey's Monitoring Surveyor, Gardiner & Theobald, as having been incurred in the calendar month immediately preceding the issue of the report. G&T would then issue its Project Certificate, which Carey was supposed to pay. The contractual provisions that give effect to this scheme are, therefore, important ones, because they condition what Carey was being asked to pay over the lifetime of the loan.

675. On its side, GHU emphasises that the majority of the allegations relating to inaccurate development information relate to information provided to G&T whose role, as Carey's Monitoring Surveyor, included making independent checks on the progress of the works on a regular basis. The question of whether information was "true and accurate" must be seen in, GHU submits, the context of G&T's role and their general state of knowledge.

The contractual provisions

676. The starting point is clauses 1.3(a) and 1.4(a) of Part 2 of Schedule 3 to the SPA.

> "**1.3 Monthly Reports on Development**
>
> (a) The Seller [*GHU*] shall procure that the Company [*Urvasco Ltd*] shall (or shall procure that the Employer's Agent [*IDOM*] shall) supply to the Monitoring Surveyors [*G&T*] within 10 Business Days after the start of each calendar month, a report (each an "Employer's Agent Report") by the Employer's Agent (with such inputs by other members of the Professional Team as may be appropriate) on the status of the Development. The Employer's Agent Report shall include at least:

(i) a summary of the Development Works undertaken to date and a comparison of that to the Development Timetable, identifying any delays;

(ii) reports on extensions of time notified, or applied for, by any Approved Contractor with recommendations as to any extension of time to which the relevant Approved Contractor may be entitled and details showing the impact of such extension of time on the Long Stop Date and the Development Timetable;

(iii) a report on progress of each item set out in the Budgeted Costs;

(iv) a breakdown of the costs and expenses incurred by the Company in connection with the Development to date;

(v) a comparison of actual costs and expenses incurred for the period which the report covers as against the anticipated cost or expense for that period and any resulting Cost Overruns; and

(vi) a forecast of costs and expenses to be incurred during the next month and any Costs Overruns anticipated as a result."

677. Clause 1.4(a) provided as follows:

"**1.4 Issue of Project Certificate**

(a) Each Employer's Agent Report shall include details of such Development Costs which the Company shall have incurred in the calendar month immediately preceding the issue of the relevant Employer's Agent Report and in respect of which the Seller is requesting an advance under the Loan, by way of a Subsequent Tranche (as defined in the Loan). The Seller shall procure that the Company shall (or shall procure that the Employer's Agent shall) produce in support of any request for an advance under the Loan by way of a Subsequent Tranche, copies of all supporting information and receipts reasonably required to verify such Development Costs have been incurred including, without limitation, copies of the interim certificate and Approved Contractors' invoices under the Building Contracts relating to such of the Development as shall have been properly executed down to the date of the certificate together with copies of the Building Contractors' requests for such payment and any other corroboratory information as the Monitoring Surveyors and/or the Purchaser may reasonably require."

678. "Development Costs" are defined in the definitions section of Schedule 3 to the SPA as being, "fees, costs and expenses of any nature which have been or which are from time to time properly incurred by the Company wholly and exclusively in carrying out the Development".

679. GHU and Urvasco Ltd represented to Carey by clause 8(k) of the Loan Agreement (under the heading Development Information) that:

"(i) All information supplied by it or on its behalf pursuant to the terms of the Agreement [*the SPA*] was true and accurate in all material respects as at its date or (if appropriate) as at the date (if any) at which it is stated to be given.

(ii) It has not omitted to supply any information which would make any other information referred to in sub clause (k)(i) above untrue or misleading in any material respect".

GHU/Urvasco Ltd were deemed to repeat these representations on each Subsequent Advance Date by reference to the circumstances existing at that time. Subject to various points not presently relevant, the parties agree that "Subsequent Advance Date" would include 6 June 2008.

680. The other relevant provision is already set out above in respect of the preceding default asserted by Carey. By clause 10(b) of the Loan Agreement, an event of default occurs if "(iii) Any representation … made by the Seller under or pursuant to the Loan Agreement is or proves to have been untrue when made in any material respect …".

681. Clause 10(b) contains an express materiality requirement. I have set out GHU's case above as to its case in this respect. In oral closings, as an aid to interpretation in relation to materiality, Carey made reference to clause 1.3(c)(ii) of Part 2 of Schedule 3 to the SPA, which refers to any claim "that is reasonably likely to impact either the Budgeted Costs, the Long Stop Date or the Development Timetable". Otherwise, I do not think that the parties are in disagreement as to these provisions.

The issues summarised

682. Carey places great weight on the word "incurred" in clauses 1.3(a) and 1.4(a) of Schedule 3 to the SPA. Its case ultimately focused on the proposition that IDOM was obliged to, but did not, provide certificates that reflected actual costs incurred or the invoices or certificates it had issued. Instead estimates were used in some cases. IDOM says the estimates were reasonable. Carey says they were not, as evidenced by the fact that a number of the contractors had to be valued at £0 in the following month or months when G&T asked searching questions. I have taken this from Carey's "Guide to the Construction Aspects of the Case", and shorn of exaggeration, this is what the *forzado* issue comes to.

683. There are numerous other complaints that Carey makes in its written submissions on the April Employer's Agent Report, which is the crucial one for present purposes since it was the one which resulted in the G&T Project Certificate which was payable on 6 June 2008. These go to issues such as the estimated completion date, the budget, extensions of time and the March 2008 suspensions. GHU says that these complaints misrepresent the particular circumstances of the development, and the role of G&T, which could have asked for further information had they wanted it.

The facts as to the forzado issue

684. Mr Fernandez agreed in cross-examination that he was trying to direct payments because the project was in "a very difficult state" and he wanted get things moving. He said that "I tried to prioritise the payments so that the things could keep moving forwards".

685. These exchanges related to the position in April 2008, but in fact the problems Mr Fernandez was experiencing in the payment of contractors given the shortfall in

funding went back months. As I have already explained, the problem was exacerbated at the beginning of 2008 by the fact that the January costs of the development were not paid by either BBVA or Carey.

686. On 18 February 2008, Mr Fernandez had sent a lengthy email to Mr Couto entitled "Urgency of payments". I set out a substantial part of this email in the narrative section of this judgment, noting that Mr Fernandez raised the possibility of a temporary suspension of work on the development, rather than risk closure of Urvasco Ltd. He warned that given the situation, the first to stop work would be the cranes and the rest would stop soon after. That, in fact, is exactly what happened within a few weeks.

687. In this email of 18 February 2008, Mr Fernandez also referred to the position as regarded certifications in the following terms:

> "At the moment the last January certification is still pending, which was issued on 4 February and relates to a part of the work done in January and also carries over some works done in December of last year. As we discussed last Saturday we would need that certification + 1 million euros plus the previous obligations to be able to solve the crisis at this moment, i.e. 3.5 million Euros. One must bear in mind that within this sum we have the payment we owe Cantillon after the resolution of the court case and that we would have to pay urgently during the course of this week. If we don't they will go back to court and start to take what there is in the offices or whatever.
>
> The following certification that we issue will include certain works carried over from the month of January and if Losan [*Carey*] does not deal with this, the situation will become worse. In any case we will try to transfer the certification already issued during the months before February and at least not aggravate the situation. The Spanish contractors would say that we have certified an invoiced amount which is higher than what was really done, so we can now reduce this to get back to a situation more in accordance with the reality.
>
> […]
>
> In addition to all this and as we've stated on previous occasions, we continue to have a gap of approximately another 5.5 million euros (without VAT) of work certified and not paid.
>
> Also pending are the invoices of Baker [& McKenzie] for the Losan contract and some other invoice for Mayer Brown translations. All this adds up to a little more than another half million pounds."

688. This email shows that Mr Fernandez anticipated that the certification that IDOM would issue for the February works, which (as I have explained) was the first month in respect of which Carey was obliged to pay, would include certain works "carried over" from the month of January. The February certificate was paid at the beginning of April, but, says Carey, sums relating to January did not qualify for certification because they had not been "incurred" in February.

689. As I explained in the narrative section, on 7 March 2008 Mr Fernandez sent a lengthy email to Mr Couto regarding due payments and notifications of suspension of works. He stated that €5m was now urgently needed in order to pay contractors, not including sums due to Baker & McKenzie, B&B Italia (the interior fit-out contractor), and "Delayed payments to the Spanish contractors already certified before November and unpaid".

690. Mr Fernandez said in the email:

> "With regard to the Losan [*i.e. Carey*] certification, we'll issue this on Monday with reference to the February work. The same Monday we've a meeting with the Project Manager of Losan to check the certification and how to issue it. We're going to move some of the previous payments with the Spaniards to February with the aim of these already going on account of Losan and trying to reduce the shortfall we have. I hope there's no opposition to this small adjustment. I estimate that the certification will be for a sum of some 3 million pounds."

691. The reference to the "Spaniards" in the translation may be a reference to an earlier passage in the email referring to delayed payments to Spanish contractors which had been certified before November 2007 but were still unpaid. In cross examination, Mr Fernandez said that in fact these had not been moved into the February certificate.

692. I do not think that his evidence in this respect was challenged, but Carey says that there is other evidence that suggests that something similar was happening with respect to Richardson, the roofing contractor. It says that the IDOM certificates to Richardson show that IDOM certified that it had done work valued at:

£7500 gross as at 30/12/07

£20,953.05 as at 31/1/08, due 7 March 2008

£46,301.31 as at 31/4/08, due 1 May 2008

£79,202.38 as at 31/3/08, due 12 May 2008

693. There were no further certificates issued by IDOM to Richardson until 30 December 2008. So, Carey says, no more than £79,202.38 could properly be claimed in respect of Richardson from Carey. The certificate for the January works correctly recorded the sum of £7,500, but, Carey says, this was the only certificate which was correct.

694. Carey says that in March 2008, IDOM claimed that £110,000 was due for Richardson for that month, with a total work to date amounting to £147,307.37. However, Carey says that no such amount was due even by 12 May 2008 according to IDOM's own certificates of Richardson's work. Carey advanced a Subsequent Tranche based on the March certificate, with the result that Urvasco Ltd was paid more in respect of Richardson than IDOM had certified.

695. In the crucial April 2008 certification, the sum of £9,580.31 was claimed in respect of that month's work, bringing the total up to £156,887.68. As with the previous

certificate, this money had not been certified to Richardson, and so (Carey submits) should not have been claimed from it.

696. It is fair to say as GHU points out that this was not part of Carey's pleaded case and therefore (in contrast to the pleaded examples of *forzado*) this particular allegation of *forzado* was not addressed in Mr Fernandez' witness statements nor in the Reply. However, I was not clear whether the facts in this respect were in dispute, and consider that the position can be taken from the documents, as Carey suggests.

The April 2008 certification

697. Mr Fernandez accepted that the certificates did not represent what had been invoiced by contractors or certified as due to them by IDOM, but says that they represented estimates of the value of works based on its view of the work that had been undertaken. Carey responds that the "estimate" was considerably above the value of the work applied for by the client. A number of examples from IDOM's report in respect of the April 2008 works are relied on.

698. As regards AMSA (which was responsible for plasterboard works), works to the value of £395,069.63 were said to have been carried out in April 2008. It is not in dispute that this was in excess of the amounts that IDOM had certified to AMSA. Mr Fernandez explained that he had included material that AMSA had delivered to site. However, that explanation is difficult to accept, since AMSA was not at the time claiming payment for it. I should add that GHU says correctly that in certificates issued after 6 June 2008 there was an adjustment, so that in that sense "Carey was not out of pocket". But by that time, Carey had ceased to lend, and the question of what had been certified was a sensitive one for Mr Fernandez, as I shall describe.

699. Bellapart (responsible for façade cladding) was said to have carried out works to the value of £513,590.39 in April 2008. This took the total said to have been incurred by Bellapart over the total amount for which Bellapart itself had invoiced by the end of April 2008. Mr Fernandez accepts this, but says that by the time of the May Project Certificate, a nil valuation was given in respect of Bellapart's works, so that the figure to date was less than the amounts certified to Bellapart. GHU says that taking a "rolling account" analysis, over time Carey was never out of pocket. Factually, this is correct but the same point I made in regard to AMSA applies.

700. Crown (the lifts contractor) was said to have carried out works to the value of £50,000 in April 2008. Again, this took the total of the works said to have been done by Crown over the total amount for which Crown had itself invoiced by the end of April 2008. Mr Fernandez explained that the figure included an estimated amount for works off-site related to the fabrication process which it was believed at the time that Crown had already begun.

701. A similar point is made by Carey as regards Knight Build which was said to have carried out works to the value of £164,474.60 in April 2008. Again, this took the total of work to date for Knight Build above the amount which Knight Build itself had invoiced. Though the figures cited by Carey support this, I give this item less weight, because the parties were in dispute about a 2.5% discount which Urvasco Ltd was claiming.

702. Pyrotherm (responsible for fire protection on the steel structure) was said to have carried out works to the value of £50,000 in April 2008, whereas in fact on 29 April 2008 it applied for payment of £7,092.20. Mr Fernandez accepted that the Pyrotherm works to date figures in the April and May Project Certificates were in excess of the amounts certified to Pyrotherm at the time, but said that a nil valuation for Pyrotherm was made in the June Project Certificate which evened things up. Again, the point I made in regard to AMSA applies.

703. Finally, A&T (the mechanical contractor) was said to have carried out works to the value of £513,590.29 in April 2008. This again took the total said to have been incurred by A&T over the total amount for which A&T had itself invoiced prior to 30 April 2008. I do not understand this to be in dispute, but Mr Fernandez explains that at May 2008, when A&T submitted another application for payment, the sums claimed were equal to the Project Certificate figures.

704. I should mention that some of these figures were originally invoiced in euros, and converted into sterling for the purposes of certification. It is worth pointing out that Carey has not provided a total figure which it says represents the amount by which the April certification exceeded what had properly been "incurred" by way of development costs during that month. (Neither, for that matter, has GHU.) It would be wrong therefore to draw the inference that this practice was prevalent. However, the details of the figures I have referred to above were not in dispute.

705. In the 18 May 2008 Employer's Agent Report for the April works, IDOM certified a sum of £3,164,543.59. In the Project Certificate, G&T valued the works for April at £2,258,784.70. (The deductions related to contingencies, Dolce Stone materials and a 5% retention on all Subsequent Tranches). The figures set out by Carey under this heading of its defence (which are not in themselves huge) have to be put into the context of the size of the overall sums certified.

706. Nevertheless, I am satisfied that the discrepancies identified by Carey over Development Costs incurred in April 2008 were significant. Unless there is a contrary argument, it follows that IDOM's April 2008 Employer's Agent Report was not "true and accurate in all material respects as at its date", subject to the question of materiality. This was the representation deemed to be made to Carey under clause 8(k) of the Loan Agreement.

GHU's response based on the reasonableness of estimates and a running account

707. The contrary argument advanced by GHU is based on what it says was the reasonableness of using estimates and what was in effect a "running account". It says that this *modus operandi* was known to and accepted by G&T.

708. In more detail, its submissions are as follows. Pursuant to Schedule 3, paragraph 1.4 of the SPA, each Employer's Agent Report ("EAR") was to include details of Development Costs which had been incurred in the month preceding the issue of the EAR. (This is common ground.) The reference to the certifications being *forzado* arose, GHU says, because (as Mr Fernandez says) at the point of preparing the EARs it was not always possible to determine precisely the value of a contractor's work. Applications for payment might not have been received, and accordingly where necessary IDOM would estimate the value of the works based on its view of the work

which had been undertaken. Where there was a range of reasonable estimated costs, GHU says that IDOM tended to use the figures at the higher end of the range. Mr Fernandez used the word *forzado* to reflect the fact that, as a consequence, there would probably be a gap in the sense of the certifications being above the amounts subsequently invoiced. However, the estimates were always within what IDOM considered reasonable for the works that were being carried out.

709. This approach, GHU submits, was not unreasonable or inappropriate given that it was necessary to use estimates, and it would not cause any prejudice to Carey in circumstances where the total amount of the Subsequent Tranches available under the Loan Agreement (£40 million) was going to be drawn down. Moreover, any over-payments made in respect of a particular contractor would be reversed when a final account was agreed with that contractor. However, one consequence was that when it transpired in a later month that there had been over estimates of the value of work done in earlier months it would then be necessary to include reduced or nil valuations for that contractor's works in that later month.

710. Another assertion emphasised by GHU is that this *modus operandi* was in effect accepted by Carey's Monitoring Surveyors, G&T. The evidence in this respect centred on the cross-examination of Mr Tony Farmiloe, a partner with the firm. He took over this account after the illness of one of his colleagues. He was a good witness, and his evidence, in my view, carries considerable weight.

711. It appears that the relationship of his firm with Carey was not ideal. G&T had asked for an hourly rate, but Carey agreed to pay £9,500 per month, and at the beginning of June 2008 negotiated a reduction to £9,000 per month (£7,500 for June). At that point, G&T was asking for payment of what was already owing to it, not having been paid by Carey at all up to this point.

712. In any case, as GHU says, there was a lot to do for that money, which may explain what GHU describes (fairly in my view) as a disinclination to ask questions and to probe into matters of which they had some, but incomplete, information. GHU makes no criticism of G&T in that regard, but says that the lack of curiosity on its part did not create greater or more onerous obligations on GHU in relation to the provision of information than would otherwise have been the case.

713. The passages in the cross-examination of Mr Farmiloe relied on by GHU are as follows. GHU says that G&T was aware that estimates were being used. This was obvious because the relevant figures presented to G&T were round numbers and could only have been estimates or something other than 'actual' figures. Mr Farmiloe accepted that he knew this at the time the figures were submitted:

> **Q**.... What I want to know is what you must have understood at the time. Plainly there is a degree of estimation or a degree of something which is not actual about those figures; do you agree with that?
>
> **A.** Yes.
>
> **Q.** And you would have known that at the time?
>
> **A.** Yes

714. GHU says that Mr Farmiloe accepted that there was in effect a running account which would be adjusted up or down the following the month. For this reason, G&T did not concern themselves with the minutiae of the amounts and they signed off on figures which they knew and understood included estimates:

> **Q.** So in other words, you have effectively signed off in your project certificate on those round figures which you have accepted in some way plainly involved a degree of estimation; yes?"
>
> **A.** Yes
>
> **Q** .You have not chosen to take objection to that; correct?
>
> **A.** Correct.

715. As Mr Duncan McCall QC, leading counsel for GHU, pointed out, there are parts of Mr Farmiloe's evidence which (taken at face value) might suggest that his understanding was that IDOM was certifying what it had actually paid contractors. I doubt he thought that, but in any case, I am satisfied that a fair reading of his evidence as a whole makes it clear that he was not accepting the legitimacy of a process of certification by which IDOM estimated the value of the contractor's work in the month in question, rather than basing it on what the contractor had invoiced, or IDOM itself had certified.

716. Nor did Mr Farmiloe accept that there was a running account between GHU and Carey, in the sense that it was sufficient if, at the end of the day, Carey was not asked to pay more in respect of a contractor than was due. I do not think he went further than accepting that he understood that there was a degree of estimation taking place, and a degree of adjustment month by month if it turned out that too much, or too little, had been certified.

717. That in my view is entirely compatible with clause 1.4(a) of Schedule 3 to the SPA, which provides that each Employer's Agent Report shall include details of such Development Costs which Urvasco Ltd shall have incurred in the calendar month immediately preceding.

718. GHU submitted that this was what IDOM was doing. However, I am satisfied that it went further than that. The instances of the contractors cited by Carey make this clear.

What happened after 6 June 2008

719. The view I have expressed is supported by what happened after 6 June 2008. The failure to make the 6 June 2008 advance was clearly a drastic step, and those concerned with the transaction would have concluded that Carey wanted out of the deal. I infer that Mr Fernandez must have realised at this point that dealings as regards the development, including the IDOM certifications, were likely to come under scrutiny.

720. I have set out above the text of the email Mr Fernandez sent on 10 June 2008 attaching a breakdown of invoices. In addition to payments due in June, he said "we

have *forzado* the certification and another €4m are pending which need to be remedied within three months".

721. On 15 June 2008, following a meeting with G&T, he emailed his colleague Mr Zadeh saying that G&T was "requesting proof of payments so we need to be very careful with next valuation".

722. Carey described this as "a devastating piece of evidence". It submits that it is clear that Mr Fernandez knew that what was happening was not appropriate, which was why when the proof of payment was ultimately proffered, there was no breakdown of the amounts paid to contractors, but an overall amount certified by banks as having been paid in respect of the development. That, Carey suggests, was to hide the fact that payment was not being made to contractors as per the certificates.

723. GHU says that this comment reflected Mr Fernandez's understanding that G&T was seeking proof that the estimated figures in the Employer's Agent Reports matched the sums subsequently agreed with contractors, which would not necessarily be the case. In fact, G&T was simply seeking proof that the Subsequent Tranches had been used to pay contractors.

724. Also on 15 June 2008, Mr Fernandez sent a further email to Mr Emilio Iraculis and Mr Esparza which says that, "During the last week there has been a big batch of payments made amounting to the value of 4.2 million euros which has helped to prevent people stopping even after Losan's rudeness …". This is a reference to the fact that Carey withheld the payment due on 6 June 2008 without notice. As I have said, a sum of €4.456m was paid by GHU to Urvasco Ltd in June 2008 which the group found out of its own resources.

725. There is then a potentially important passage which refers to the further €4m would need to be paid within 3 months which Mr Fernandez had explained in his email of 10 June 2008. In the parties' respective translations the passage is as follows:

> "Apart from this there is a gap of another 4 million euros (taxes included) between the certificate with Losan and the payments, part of it is because some of the payments are of 90 days and we have *forzado* the certification more than we should have during recent months." [*GHU's translation*]
>
> "Apart from this, there is another imbalance of a further 4 million EUR (VAT included) between what was certified with Losan and what was paid, part of which is due to the fact that some payments are 90-day, having distorted the certification too much in the last months." [*Carey's translation*]

726. Carey uses the term "distorted", but has accepted that *forzado* as used by Mr Fernandez means "forced", as I have held it does. On this basis, even GHU's translation is that IDOM has forced the certification "more than it should have during recent months". This is clearly important because it is a contemporary statement by the person responsible for the certification.

727. On 23 June 2008 Mr Fernandez sent another email to Mr Emilio Iraculis and Mr Couto. Again, it is necessary to set out the parties' respective translations. He said:

> “I've checked over the figures for the certification of May. The reality is that the certification for April is already a bit "*forzada*"' and there are contractors where I'm going to find it difficult to complete a certification above that of the previous month, so that I'm going to opt to certify zero in some chapters. Under these conditions I'II end up with a certification of around 1.5 million pounds. I'll try to finalise this tomorrow. To justify this reduction over the previous month, one should argue that given the low level of certainty of the payment by Losan we've already negotiated with some contractors to postpone the certification one more month, also bearing in mind that we'd let them certify materials off-site It would be important they don't make us present the contractor certifications of May backwards and that the focus from June is on the payment guarantee scheme that you agree with and that you talked about yesterday.” [*GHU's translation*]

> “I've checked over the figures for the certification of May. The reality is that the certification for April is already a bit forced and there are contractors where I'm going to find it difficult to complete a certification above that of the previous month, so that I'm going to opt to certify zero in some chapters. Under these conditions I'll end up with a certification of around 1.5 million pounds. I'll try to finalise this tomorrow. To justify this reduction over the previous month, one should argue that given the low level of certainty of the payment by Losan we've already negotiated with some contractors to postpone the certification one more month, also bearing in mind that we'd let them certify stocks. It would be important they don't make us present the contractor certifications of May backwards and that the focus from June is on the payment guarantee scheme that you agree with and that you talked about yesterday.” [*Carey's translation*]

728. GHU says that Mr Fernandez's concern was that certifying nil for a number of contractors in the May Employer's Agent Report might be interpreted by G&T to mean that those contractors had not undertaken any work in May when this was not in fact the case. That may have been the effect of Mr Fernandez's evidence, but I do not accept it. It is plain from this email that because the certification for April was forced, for the next month he was going to certify zero in respect of some of the contractors. This is what he did in respect of the May certification.

729. Further he is suggesting to GHU that this course should be justified by saying that since Carey's continued payment was uncertain, it had been agreed with some contractors to postpone the certification for one more month. This, as Carey says, was not true. (It goes some way to explain however the much lower certification in respect of May despite the fact that according to Mr Fernandez, it had been a particularly good month in terms of work on site.)

Conclusions on the forzado issue

730. In the circumstances, I need make no findings as to whether the format of the bank letters as to payment of contractors provided on the 7 August 2008 were, as Carey suggests, intended to obfuscate the position. The question I have to decide is whether the April 2008 certification was “true and accurate in all material respects as at its

date". This was the representation deemed to be made to Carey under clause 8(k) of the Loan Agreement as at 6 June 2008.

731. On the evidence, there can only be one answer to that question. Mr Fernandez recognised it in his emails. The April 2008 certification was forced to the extent that a nil certification was required in respect of some contractors the following month.

732. Although Carey suggested to the contrary, I do not consider that Mr Fernandez was dishonest in this respect (nor was such an allegation pleaded, or clearly put to him as is required in the case of such an allegation). I am satisfied that he had no intention of extracting more from Carey than was due from it, in terms of the certification process as a whole.

733. However, there can be no question in my view of conducting the certification procedure in a way that allowed for, as Carey put it, everything coming out in the wash. It had to be done by reference to the month in question. The SPA provided in clauses 1.3(a) and 1.4(a) (set out above) that the Employer's Agent Report which IDOM had to prepare had to include details of such Development Costs which Urvasco Ltd had incurred in the month in question. In some respects at least, the April certification did not comply with this requirement. I infer that this was a consequence of Mr Fernandez's need to prioritise payments to contractors in view of the endemic shortage of funding with which he was faced.

734. There can be no doubt that the express requirement of materiality in clause 8(k) of the Loan Agreement was satisfied. The April certification was materially inaccurate to such an extent that it had to be remedied by an artificially low certification the following month. I am satisfied that Carey has proved the default alleged under this heading. Of the defaults proved by Carey, this in my view was the most central, because it goes directly to the advance due on 6 June 2008, which is at the heart of the case.

Carey's other complaints

735. In those circumstances, I can deal briefly with Carey's other complaints about the April Employer's Agent Report, which go to issues such as the estimated completion date, the budget, extensions of time and the March 2008 suspensions. For reasons given by GHU in its closing submissions, I do not think that Carey's case was particularly persuasive in these respects. The Employer's Agent Report made it clear that the completion date was under review. Had G&T (as monitoring surveyors) been dissatisfied as to the budgetary information or LTPs, this could have been raised at the time. No extensions of time had in fact been granted to contractors, so that issue did not arise either.

736. The March suspension falls into a different class in my view. This was plainly something which had to be made known to G&T. However, G&T paid its monthly site visit on 14 April 2008, and it is clear that the effects of the March suspension were obvious. G&T reported appropriately to Carey. Their Monitoring Report No. 2 said that "the last site walkabout revealed lack of discernible progress on the 9th and 10th Floors, from both the concrete and steel structure point of view". The Report said, "Progress on concrete and structural steel has slowed and impacts the rest of the job as shown by a net movement of 3% from the previous month to the current

month". The Report said, "The overall progress on concrete on the 9th and 10th floors on both the hotel and apartments side is very slow and almost stagnant ...". Given what he reported, it would be surprising if the G&T surveyor had not asked about the cause when he was on site.

737. As to Carey's complaint that GHU failed to provide information to G&T pursuant to paragraph 1.4, Schedule 3, Part 2 of the SPA, the only substantive points (in my view) relate to information requested as to the payment of contractors. I have dealt with this above. Any breach on the part of GHU relates to the period following 6 June 2008, and requires no further consideration in light of my above conclusion.

Alleged development breach (3): failure to notify claims

738. By the SPA, Schedule 3, part 2, paragraph 1.3(c)(ii) GHU was obliged to procure that Urvasco promptly informed G&T upon becoming aware of:

> "(ii) any claim or demand made against the Company by any person in connection with the Development, including any claim that is reasonably likely to impact either the Budgeted Costs, the Long Stop Date or the Development Timetable."

739. Carey alleges that GHU failed to notify four claims which, together with my findings on each, are as follows:

(1) A summons for non-payment of rates served by Westminster City Council on 14 January 2008. I am satisfied that this had been paid by Urvasco Ltd in November 2007.

(2) A statutory demand served by Cantillon on 20 March 2008. I am satisfied that the outstanding sum was paid a couple of days later.

(3) A claim by New Haden Pumps Ltd for £5,904. The claim made by solicitor's letter on 7 May 2008 was paid on 19 May 2008.

(4) An adjudication commenced by Cantillon on 17 June 2008. I am satisfied that G&T was told about this during a site visit, which is supported by the fact that the Employer's Agent Reports for June and July 2008 included fees for legal services incurred in relation to this claim.

740. I am satisfied that there were no breaches in this respect, alternatively that a requirement of materiality is to be implied, and that any breach was immaterial, or taken in context, de minimis. I do not consider that Carey's further reference to clause 8(w) Loan Agreement adds anything, given that payment pursuant to the statutory demand was made so soon after its service. All this, it seems to me, is part of the picture as regards non-payment of contractors, which I considered in detail above.

Alleged development breach (4): inability to reach the Long Stop Date

741. Carey's case is that, as at 6 June 2008, the Development would not be completed by the contractual Long Stop Date (LSD), which was 30 April 2009. It says that "this fact engages two obligations on the part of GHU", which I shall take in reverse order.

The contractual provisions relied on by Carey

742. The first is paragraph 1.1 of Part 2 of Schedule 3 to the SPA, by which GHU was obliged to procure that Urvasco Ltd used its reasonable endeavours to procure that the Development was carried out by the LSD by, amongst other things, complying with its obligations under each Building Contract and Professional Appointment. The fact that completion was unlikely to take place by the LSD reflected the fact that Urvasco had failed to comply with its obligations under the Building Contracts and Professional Appointments to pay the contractors and professionals. In oral submissions, Carey confirmed that failure to pay contractors was the only issue under this obligation. This clause was relied on by Carey in respect of that default, and I set out there my reasons for accepting GHU's submissions that a breach of this obligation could only occur after the Long Stop Date had passed. This clause cannot support Carey's case therefore.

743. The second is clause 4.4 of the SPA. This provides as follows:

> 4.4 **Notification of the Purchaser**
>
> Upon either the Seller [*GHU*] or the Purchaser [*Carey*] becoming aware that any of the conditions in Schedule 2 (*Conditions*):
>
> …
>
> (b) will or is likely to be delayed in satisfaction beyond the Long Stop Date; or
>
> (c) has become incapable of satisfaction by the Long Stop Date,
>
> that party shall immediately notify the other party of that fact and shall supply to the that other party written evidence (if available) of the satisfaction of that condition or (as the case may be) a written explanation for the delay in satisfaction or for that condition having become incapable of satisfaction.

744. For these purposes, the issue of the Certificate of Practical Completion is the relevant Condition set out in Schedule 2. The following were defined terms under the SPA:

> "Certificate of Practical Completion" means the written statement issued by the Architect under each of the Building Contracts (as defined in Schedule 3 {Development Control and Other Conduct before Completion)) indicating that the Development, as a whole, has reached Practical Completion;
>
> "Long Stop Date" means 30 April 2009 as it may be extended in accordance with Schedule 3, Part 2, Paragraph 1.5 {Development control and other conduct before Completion), but notwithstanding the provisions of Schedule 3, Part 2, Paragraph 1.5, subject to an overall longstop date of 31 December 2009;
>
> "Practical Completion" means the stage at which the Development as a whole is complete except for omissions and minor defects: (a) which in the opinion of the Architect the Approved Contractors have reasonable grounds for not promptly correcting; (b) which do not contravene any Necessary Consents; (c) which do not prevent the Development or any part of the Development from being used for its intended purpose; (d) which do not prevent or disrupt other

works within the Development from being progressed; and (e) rectification of which will not prejudice the convenient use of the Development.

745. Carey's case is that Practical Completion was, or was likely to be, delayed beyond the Long Stop Date, that is 30 April 2009, and that by 6 June 2008 GHU had become aware of that fact.

746. GHU's case is that it never became aware (if it was the case which it denies) that Practical Completion was likely to be delayed beyond the Long Stop Date.

Was there an extension?

747. It is also GHU's case that though the date of 30 April 2009 was never extended by agreement it was extended automatically in accordance with clause 6.17 of the SPA. The relevant part of clause 6.17 provided that, "In the event of delay on the part of the Purchaser in advancing any Tranche, the Long Stop Date shall be extended by an equivalent period". There were delays, GHU says, and the effect was to extend the Long Stop Date to 14 May 2009.

748. As I understand it, GHU's case is based on the definition of "Subsequent Advance Dates", which is defined to mean the dates which fall no earlier than three Business Days after the delivery each month (commencing on 28 February 2008) of the Relevant Project Certificate.

749. As to the facts, the February tranche was due on 27 March 2008 but was not advanced by Carey until 2 April 2008. I am satisfied that there was no agreement to the contrary. In response, Carey takes a point that notice of drawdown was given by email rather than by fax or post. The fact that such a point should be taken at all (given that only a few days are involved) goes to show that its Long Stop Date case is tight on the facts. That aside, the parties in this case clearly communicated by email, and I do not think that this point is a good one.

750. GHU says that the March tranche was due from Losan on 25 April 2008, but was not advanced until 5 May 2008. This is on the basis of an EAR provided on 15 April 2008. However, Carey relies on the fact that a revised EAR was provided on 21 April 2008, and I agree that this has the effect of extending time. Taking into account public holidays over this period, I am satisfied that this payment was not made late.

751. Overall, taking into account non-business days, I am satisfied that the Long Stop Date was extended by three or four days in respect of the February tranche. This makes no difference on the facts, and I shall continue to treat 30 April 2009 as the relevant date, as is done in all the material before the court.

By 6 June 2008, had GHU become aware that Practical Completion was likely to be delayed beyond the Long Stop Date?

752. In oral submissions, Carey accepted that this was the harder ground to make good on the facts, since the test of awareness was a subjective one, a point with which I agree.

753. In oral submissions, it sought to make the case good as follows. The position, it says, speaks for itself. IDOM was doing the programming. To take the example of the

vaults, these do not appear on the programme at any point in time until after April 2008. At the same time, there was a problem with the mansard roof. One cannot have been carrying out the programming analysis without becoming aware of the position.

754. In my view, there are two distinct questions in this regard. The first, which I think was the one addressed by Carey in oral submissions, is whether Practical Completion would have been, or would be likely to have been, delayed beyond the Long Stop Date as at 6 June 2008. At trial, this factual question has been addressed by reference to the evidence, and the expert evidence of the programming experts in response to the series of questions that were put to them (this was the first and main question).

755. However, the question arising under clause 4.4 of the SPA is a different one. To make good its case as to default, Carey must prove that GHU had become aware by 6 June 2008 that Practical Completion would, or would be likely to be, delayed beyond the Long Stop Date. The duty to notify Carey can only apply if GHU had that awareness as at 6 June 2008. I do not think that this analysis is in dispute.

756. Furthermore, I am inclined to agree in the present context with a point that GHU makes in relation to the other contractual provision relied on by Carey. Such a breach could only be established if the evidence was clear, given the enormous commercial significance of GHU being obliged to make such a notification.

757. Further, given Carey's (correct) concession that the test of awareness is a subjective one, it does not follow that awareness on the part of IDOM should be ascribed to GHU, although I do not think in this case that it makes much difference.

758. With those points in mind, I come to consider the evidence. There is no evidence in the contemporary documents that Mr Fernandez or Mr Utrilla (IDOM's programmer) thought that completion by the Long Stop Date would not be achieved at this time. The projected timescale for its completion was monitored by IDOM using short-term plans ("STPs") which were six week programmes produced every fortnight.

759. I have explained the position as regards the long-term plans ("LTPs") above. On 23 April 2008 LTP revision 17 was produced in draft (with a target date for the completion of the works of January 2009). On 30 April 2008, LTP revision 18 was produced in draft showing a target date for the completion of the works of 20 March 2009. As I have explained in the narrative section of this judgment, G&T knew that the target date had changed, and had reported it to Carey. The upshot was, as Carey says, that while IDOM's programming up until March 2008 suggested that the works would be completed by Christmas of that year leaving a "buffer" or "float" of some four months before the LSD, by the start of May of 2008 three of the four months had gone.

760. Carey placed much reliance on the fact that at the meetings between Carey and GHU in Bilbao between 19 and 21 December 2007 when the agreements were entered into, Mr Fernandez's view was that a realistic date for completion allowing some scope for contingencies would be May or June 2009. However, as he explained, this was his conservative view, and under pressure from both Mr Couto and Mr Losada, he proposed that the earliest date that should be agreed for practical completion was

April 2009. That was in fact the date agreed. This was months before the time at which the issue has to be decided, and I consider it to be of limited assistance.

761. So far as Mr Utrilla is concerned, Carey describes him as a "rather junior member of the team". It is true that like many of the IDOM team, Mr Utrilla was young at the time he was engaged on the project. However, having seen him give evidence, I am satisfied that he was a competent programmer.

762. Carey based its criticism of him on a programme produced for an adjudication that took place between Urvasco Ltd and Knight Build later in the year. Attached to a response document on behalf of Urvasco Ltd dated 12 December 2008, there was a programme that showed a 10 month period to carry out the works on the west core and complete the follow-on works for the Development. This would have taken completion well beyond the Long Stop Date.

763. In fact (as found by the adjudicator) the adjudication programme had no analytic use or evidential value. I agree with GHU that it is unfair of Carey to criticise Mr Utrilla in this respect. In cross-examination, he explained that after he had left the development and returned to work in Spain, Mr Zadeh (who did not have the necessary Microsoft Project software) asked him to transcribe information provided by Mr Zadeh. Mr Utrilla disagreed with the suggestion that he "produced" the adjudication programmes—his point was that he was merely acting as a Microsoft Project transcriber for Mr Zadeh. I accept his evidence in this regard. In any case, I am satisfied that this programme does not reflect Mr Utrilla's thinking as at 6 June 2008.

764. Furthermore, the evidence of Mr Farmiloe of G&T, Carey's Monitoring Surveyors, was unambiguous. Cross-examined as to the position in May, June, and indeed July 2008, he accepted that a fair way of summarising G&T's view was that though delays were a trend which had to be kept an eye on, the Long Stop Date was not impacted by the known delay at that stage. G&T had visited the site on 16 June 2008, at which time Carey had withheld its 6 June 2008 advance. He accepted as at that time that G&T had no evidence to say that the Long Stop Date would not be met.

765. Carey's expert Mr Chamberlain fairly accepted in cross-examination that G&T was in a better position than he was to assess the state of the development. It was put to him:

> **Q.** A hard copy of a short-term programme shows the progress that has been made in the last two weeks, doesn't it?
>
> **A.** It does.
>
> **Q.** Armed with that hard copy programme, they would know what work had been done in the last two weeks, wouldn't they?
>
> **A.** They would.
>
> **Q.** Armed with that and with a site visit, their eyes and their expertise, they could see what work had been done at a given date, couldn't they?

A. They could equate the work done or shown in the short-term programme to their observations, I agree.

Q. I think that's a very long way of saying yes, is it?

A. Yes.

Q. So they know at a given date what work has been done, you have agreed with me that they knew the scope of works or, to put it another way, all the work that had to be done to finish the job; yes? You have agreed with that.

A. Yes.

Q. Subtracting one from the other, absent any other information, they would know at any given date what work still had to be done and the time available to do it, wouldn't they?

A. With regard to the information, yes.

Q. We are going to assume a level of programming expertise on the part of G&T. Do you have any reason to doubt that?

A. No, I don't. I believe their observations show that. I agree.

Q. Absent any other information, at any given date when they make a site visit, G&T were able to form a view, were they not, about whether the long stop date was realistically achievable or not?

A. Yes, they could.

766. He also fairly accepted that the question of whether the Long Stop Date could have been achieved as at 6 June 2008 was at least open to a range of reasonable viewpoints:

Q. Admittedly based on different information for each of them, but with those three opinions ranged against yours, and also given that G&T and Mr Utrilla had access to the works, site visits and so forth, can I ask whether you at least agree with these propositions. The first is this: the question of whether the long stop date could have been achieved as at 6 June 2008 is at least open to a range of reasonable viewpoints?

A. I agree.

767. There is also significant evidence from Carey’s contemporary documents. As the narrative section of this judgment shows, for some time Carey had itself been attempting to raise finance in connection with its obligations under the Loan Agreement. There are a number of communications between Carey and various banks in which the suggestion is given that the project’s timing is on track.

768. On 24 July 2008 Mr Borja del Riego (Carey’s Financing Manager) answered a query from Deutsche Bank regarding the commencement date of the Lease by saying: “REGARDING THE LONG STOP DATE, ALL THE INFO WE HAVE FROM

URVASCO AS WELL AS FROM GARDINER AND THEOBALD (PROJECT MONITOR) TELLS THAT THE WORK ADVANCE IS AS FORECASTED".

769. Carey is itself made up largely of savings banks, and given what it was telling other banks at the time, the case advanced in this litigation that Practical Completion would not take place by the Long Stop Date has, as Mr McCall QC said, a considerable credibility threshold to surmount. That aside, I am satisfied that by June 2008 neither IDOM nor G&T was aware that Practical Completion was likely to be delayed beyond the Long Stop Date (if it was). I am satisfied that GHU was in the same position, and that, consequently, Carey has not proved the default it alleges under this heading.

Would Practical Completion have been, or would be likely to have been, delayed beyond the Long Stop Date as at 6 June 2008?

770. Since I have decided this default against Carey, the factual question of whether Practical Completion would have been, or would be likely to have been, delayed beyond the Long Stop Date as at 6 June 2008 does not arise. The issue is also academic, because I have found other defaults proved (so that GHU cannot succeed on its damages claim which is the other issue to which the LSD is most relevant). Also, as I shall explain, I am satisfied that GHU could not have funded the development to completion. However, since the issue was argued, I will express my views, focusing on the points that featured most prominently.

771. The question whether Practical Completion would have been, or would be likely to have been, delayed beyond the Long Stop Date as at 6 June 2008, was the main question put to the programming experts, Mr Chamberlain for Carey, and Mr Saulsbury for GHU.

772. They were also asked about the later dates on which GHU claims further Subsequent Tranches were due and payable. As regards later dates, if *GHU* was in default as at 6 June 2008, the position as at later dates adds little. If *Carey* was in default on 6 June 2008, the subsequent picture becomes complicated by the fact that (on this hypothesis in breach of contract) Carey was withholding funding for the project. Like the parties at trial therefore, I shall concentrate on 6 June 2008, which it is common ground is the crucial date.

773. Permission to introduce these experts into the proceedings was given on Carey's application on 23 February 2012. It was common ground that this was a late application, and it was opposed by GHU. The application was made on the basis that GHU's disclosure had been given late.

774. To deal with the late timing of the evidence, Eder J required Carey to serve a list of the specific questions to be considered by the experts. The purpose of the Programming Questions was to encourage the experts to address the same issues as each other and to narrow their scope of enquiry. The issue was broken down in Part 1 of the Programming Questions, by reference to the effect of delays or problems affecting specific packages or parts of packages on the Development.

775. Although the original order required the Joint Memorandum to be produced by 19 July 2012 and it was not in the event produced until 25 October 2012 (so just before

the trial started), it was a well structured document, properly identifying the issues, and summarising their respective positions on each. The parties were able to agree a reading list closely based on the Joint Memorandum.

776. Both experts agreed on the significance of a baseline programme, but disagreed on which programme should be used. I am satisfied that Mr Saulsbury was right to treat IDOM's LTP Revision 15 of September 2006 as the correct baseline programme. The one selected by Mr Chamberlain (see above) was an incomplete draft.

777. More generally, Mr Saulsbury adopted a conventional (Carey called it a "pure") critical path analysis. Carey says that this was overly simplistic, because by 6 June 2008, a large range of the packages across the development were suffering delay and disruption. The idea that there could be re-sequencing and parallel working to resolve this was, it says, completely unrealistic.

778. However, so far as referable to a programming analysis, this was a matter for the experts. Overall, I preferred the evidence as well as the approach of Mr Saulsbury. He also produced a notional programme as at 6 June 2008, which did not involve making any assumptions about the validity of the baseline programme (or indeed of any of the LTPs).

779. In any case, GHU submits that Mr Chamberlain's analysis actually supports its case. It says that as at 6 June 2008, on his analysis, the comparable delay to Mr Saulsbury's upper range of 11.6 weeks was the figure of 14.1 weeks. In cross-examination, Mr Chamberlain accepted that Mr Saulsbury's 11.6 weeks and his 14.1 weeks included the effect of the suspension in March 2008. Even on the basis of Mr Chamberlain's higher figure of 14.1 weeks, therefore, there was a remaining period of float of 6 weeks as at 2 June 2008 (i.e. his float of 20 weeks less his maximum figure for delay of 14.1 weeks). This was accepted as correct by Mr Chamberlain in cross-examination.

780. In fact in closing, Carey primarily based its case on factual matters. To quote its "Guide to the Construction Aspects of the Case", amongst other things, the factual matters relied on included (a) the extensions of time requested by contractors; (b) the delays in the works referred to by contractors; (c) the payment problems on the Development; and (d) the increase in the budget which Carey says that GHU and Urvasco Ltd could not pay for.

781. These are points which I have dealt with elsewhere in this judgment. As regards GHU's ability to pay for the development, I have held later in this judgment that it could not have bridged the funding gap. It follows that Practical Completion would not have been reached for that reason alone. However, when non-payment was put to him in cross examination, Mr Saulsbury said that he had assumed for the purposes of his report that contractors would be paid as and when moneys were due, otherwise, as he put it, the work would not go on. He was clearly right to make that assumption in giving his evidence, and for the purposes of discussing this issue, I have to assume the same.

782. Finally, it may be noted that although Carey's expert was of the opinion that Practical Completion would not be reached by the Long Stop Date, even he did not suggest that there would be a long overrun. This is not a case where massive delays are alleged.

(*i) The mansard roof*

783. The experts disagree as to whether delays to the construction of the mansard roof (on the apartment side) would have delayed completion past the Long Stop Date. Richardson, the roofing contractor, left site at the end of May 2008 after a dispute about payment and contract terms, and no replacement contractor was formally appointed, although in early August 2008 the UST (that is, the Urvasco Site Team of mainly IDOM employees) intended to appoint Fenland Flat Roofing to carry out some of the works. The experts do not agree (a) how long it would have taken to complete prefabrication, (b) when construction would have started on site, (c) how long that construction would have taken, or (d) the effect that delays to the mansard roof would have had on other works.

784. The problem with Richardson had been non-payment. Although a contract was not signed with Fenland, I accept the evidence of Mr Llamosas, who was the relevant package manager with IDOM, to the effect that Fenland was willing to carry out the work. There would, I find, have been sufficient time to manufacture the dormer windows. I accept that Carey is right to say that for GHU to be correct on the mansard roof issue, all assumptions must be made in its favour and there had to be no other problems which delayed the works. I also accept that the package would need to be properly managed, but do not accept Carey's submission that IDOM were unable properly to manage the works. On these assumptions, including timely payment (which as I have said is the premise upon which this part of the analysis must proceed) I accept Mr Saulsbury's evidence that it could have been done by the LSD (though with little time to spare).

(ii) Knight Build

785. The superstructure works were chiefly performed by Knight Build (concrete) and Rowen (steel and precast concrete planks). So far as presently relevant, the problems relate to Knight Build. As Carey put it, the "big ticket" issues are the west core and the vault works (though it says that the remedial works necessary are relevant in a more general sense).

(ii) West core

786. The West tower of the building was designed as an internal concrete core covered in stone cladding. There was to be a cavity between the outer face of the concrete and the inner face of the cladding, into which insulating material was to be fitted. It is common ground that the west core tower was constructed out of tolerance by Knight Build and required remedial work. The experts disagree as to whether this would have delayed completion past the Long Stop Date and the effect it would have had on other works.

787. Carey says that the position is perhaps most simply put thus. As at the start of June 2008 Urvasco Ltd had no idea about how long this problem would take to resolve itself. Knight Build had done nothing about it for six months. Urvasco Ltd did not even know if there was a solution which did not require rebuilding. In spite of this nothing was done to get that solution. It was therefore an issue threatening the LSD.

788. Carey also places reliance on the adjudication between Urvasco Ltd and Knight Build later in the year. I repeat what I said about this above. The facts of that dispute (and the respective positions taken by the parties) do not assist in determining the position as at 6 June 2008.

789. In fact, a straightforward solution to the problem was adopted when the development recommenced under new developers. As Mr Giles Robinson, the project architect with Foster & Partners said, "The issue has now been solved by agreeing a thinner insulation, which achieves the same thermal value as the insulation previously specified. No remedial work has been required to be undertaken to the structure of the West Core itself. No changes have been required to the cladding either."

790. It is correct, as Carey says, that this solution had not been identified at the beginning of June 2008. But I accept Mr Utrilla's evidence that this was because IDOM wanted Knight Build to supply the solution, since they had caused the problem in the first place. He considered that the work could have been done by the Long Stop Date. Mr Saulsbury's evidence was that at all relevant dates, there was time available to find and implement a solution to the west core and to complete the follow on works by the Long Stop Date. I accept his evidence in this regard.

(iii) Electrical work and vaults

791. The experts disagree as to whether delays to the design and installation of the electrical works would have delayed completion of the development past the Long Stop Date. In particular, the experts disagree as to the significance of a number of documents sent by EI-WHS (the electrical contractor) predicting completion dates for its works; the connection between the electrical works and delays to the mansard roof and vault works; and the effect of delays to the design and co-ordination of the mechanical and electrical services.

792. In relation to the vaults, the disagreement concerns whether plant rooms and a substation would have been completed in sufficient time to enable mechanical and electrical services to be installed and commissioned by the Long Stop Date. It is common ground that as at 6 June 2008 the concrete demolition and building work necessary in the vaults had not begun (having been excluded from Knight Build's scope of work by Supplemental Agreement 3 of 23 April 2008). A particular point of disagreement is whether time could have been saved by overlapping the concrete demolition and building work with installation of equipment in the plant rooms.

793. I shall start with the last point which was whether the vaults had to be completed before the generators could be installed, or whether such work could be overlapped. If so, there would be a substantial saving of time. The vaults ran round the side of the apartment section of the development, starting at the Aldwych, and ending in the Strand. Mr Utrilla, Mr Inigo Aguirre (IDOM's mechanical engineer) and Ms Maria Azpiroz (IDOM's project designer) were familiar with the site, and I accept their evidence that overlap could have taken place. On that basis, I accept Mr Saulsbury's evidence that a six week overlap is reasonable.

794. On that basis, construction of the vaults would have had to start by 12 September 2008 in order for the vaults and plant rooms to be completed by the Long Stop Date. Even if Carey is correct, and twenty weeks should be allowed for the vault works,

taking account of overlap, construction of the vaults would have had to start by 8 August 2008. I am satisfied on the basis of Mr Saulsbury's evidence that the EDF substation could also have been completed in conjunction with this work, and if necessary, commissioned on a rolling basis.

795. The other main issue concerns delays reported by the electrical contractors. I accept Carey's point that this is consistent with other evidence as to delay. On the other hand, I do not think that too much weight can be put upon these reports. Whilst on 18 June 2008 EI-WHS was reporting a nineteen week delay which would put completion of their works at 11 May 2009, on 22 May 2008 they reported a sixteen week delay. Further, as regards electrical works, Mr Chamberlain agreed that the "main issue on this topic" was the extent to which time could have been saved by overlapping.

796. Obviously, work could not have commenced by the substitute contractor for the vaults (Coffey) without funding but, on the basis that there was funding, the evidence of Ms Azpiroz was that work could have started by August 2008. I am not satisfied that either the vaults or the electrical works would have delayed Practical Completion of the development beyond the Long Stop Date.

(iv) Mechanical works

797. The experts disagree as to whether delays to the design and installation of the mechanical works (the responsibility of A&T, which was a joint venture Spanish contractor) would have delayed completion of the development past the Long Stop Date. In particular, the experts disagree as to the significance of a letter from A&T dated 8 May 2008 predicting completion of its works in June 2009; the connection between the mechanical works and delays to the mansard roof and the vault works; and the effect of delays to the design and co-ordination of the mechanical and electrical services.

798. Although Carey say that Mr Chamberlain did not take A&T's letter at face value, I think that GHU is right to say that he effectively adopted it (see for example appendix 4 to his first report). However, in cross-examination he accepted that, "It's the start point of a negotiation. It's an extension of time claim, and it's an assumption". He agreed that the letter hinted that, "We can do a bit better than this if you do the right deal with us".

799. In its oral closing, Carey placed emphasis on an adjudication later in the year between A&T and Urvasco Ltd, which Mr Chamberlain dealt with in his supplemental report, but as GHU says, it is only briefly treated in its written closing. For present purposes, I would not place much weight on the parties' submissions in the adjudication documents Carey specifically refers to.

800. There was also evidence that when Sol Melia took over the site in 2010, all of the M&E works were stripped out. This could have been due to the fact that by then the site had been idle for some time, but Mr Robinson did not agree that this was the sole cause, and said that there was genuine concern about compliance with specifications. It is difficult to form a firm view on this on the evidence, which (rightly) Carey did not expand on in its extensive written closing submissions. On balance and preferring the evidence of Mr Saulsbury to that of Mr Chamberlain on this point, I do not find

that it proved that the issues raised by Carey relating to the mechanical works would have delayed Practical Completion beyond the Long Stop Date.

(v) The lifts

801. The evidence suggested that delay in relation to the delivery period of the lifts concerned the leather finishes. I am satisfied that this would not have caused significant delay.

(vi) Other issues

802. The experts disagreed as to whether delays to other packages are relevant in assessing whether the development would be completed by the Long Stop date. (These were blockwork (Amsa), remedial concrete works (including the basement structure and sprinkler room not being watertight, the lift shafts and snagging works – Knight Build), stoneworks (Astec), façade cladding and glazed elements (Bellapart), external windows to the Marconi building (Carpinteria Couto), fire proofing (Pyrotherm), plasterboard setting out and the interior fit out (B&B, DMP), scaffolding (H&B), and cranes (Select)). Whilst this was referred to briefly in Carey's written closings, the court being invited to "peruse" the Chamberlain reports, I think that GHU was right to say that raising these miscellaneous issues does not amount to an analysed case on delay.

Conclusion

803. Carey seeks a finding that the development would not have been completed by the Long Stop Date. In essence, its submission is that when viewed against the history of the site, whilst no specific issue in itself may be decisive, taken as a whole the court can be confident on this point.

804. The force of this submission rests on the fact that the evidence makes it clear that numerous problems arose during the course of this development. An important example concerns the March suspensions. In cross-examination, Mr Saulsbury was asked whether he had ever come across a project where there was a suspension and where the work finished on time. He said that he was not aware of one.

805. As against that, his programming analysis showed that completion was achievable by the Long Stop Date. For reasons set out above, I prefer his analysis to that of Mr Chamberlain.

806. As at 6 June 2008, I am satisfied that after allowing for the effect of the March suspension, there was about a month of "float" left before the 30 April 2009 deadline. Carey's case is that IDOM was incompetent and incapable of managing the development, and would have been incapable of re-sequencing or accelerating the works. Having seen numerous IDOM employees cross-examined, I reject that assertion. In my view, IDOM was perfectly capable of managing this development *provided* it was properly funded. For reasons I have already explained, this aspect of the case has to assume that the development could have been funded to completion.

807. Further, Carey's submissions tended not to differentiate between events before, and after, 6 June 2008. I do not consider that events afterwards are a safe basis upon

which to reach conclusions on this aspect of the case. Apart from the funding implications, Carey's sudden refusal to make further advances must have seriously undermined the morale of the IDOM employees responsible for managing the development. It is difficult to say, for example, whether this slowed the engagement of Coffey to replace Knight Build in respect of work on the vaults.

808. In any case, I am satisfied that as at 6 June 2008 Practical Completion *could* have been achieved by the Long Stop Date.

809. Carey does not seek an explicit finding that in the alternative, though possible, this was *not likely*. For the Long Stop Date to have been achieved, I am satisfied that there was little or no room for anything further going wrong. On the other hand, Mr Farmiloe, who was Carey's own monitoring surveyor, accepted in his evidence that the Long Stop Date was not impacted by the known delay as at June 2008. Carey itself was telling the banks at this time that its information was that the work would be finished by the Long Stop Date. I have set out the facts above.

810. My conclusion on all the evidence I have heard is as follows. As at 6 June 2008, and assuming funding to completion, a failure to meet the Long Stop Date was a distinct possibility. But Carey has not satisfied me that Practical Completion would be *likely* to have been delayed beyond the Long Stop Date. That is an on balance conclusion.

Alleged development breach (5): use of Subsequent Tranches

811. One of the package of agreements entered into on 21 December 2007 was an Intercreditor Agreement between GU, GHU, Urvasco Ltd, Carey and BBVA. This regulated the position as between the two lenders, BBVA and Carey. Broadly, BBVA's lending took priority, and amongst other things, Carey was restricted from accelerating its debt and from taking enforcement action without BBVA's prior consent.

812. One aspect of the agreement gives rise to a defence raised by Carey in these proceedings. Paragraph 8 dealt with "intermediate payments" under the Carey Loan Agreement. These consisted of the "Subsequent Tranches", and there is no dispute that they include the First Subsequent Tranche of €4,106,798.62 advanced by Carey to GHU on 2 April 2008, and the Second Subsequent Tranche of €3,441,880.59 advanced on 5 May 2008 (the latter being the last advance which Carey made).

813. Paragraph 8 of the Intercreditor Agreement provided that:

> "8.2 The Shareholder [*GHU*] undertakes to the Secured Parties to advance an amount equal to the Subsequent Tranches to the Borrower [*Urvasco Ltd*] (whether by way of share capital subscription or loan) to enable the Borrower to apply such amounts in carrying out the Development (as defined in the BBVA Facility Agreement).
>
> 8.3 The Borrower [*Urvasco Ltd*] undertakes to the Secured Parties to apply the amounts received by it in respect of the Subsequent Tranches as provided for in paragraph 8.2."

The term "Secured Parties" as used in this paragraph is a reference to BBVA and Carey.

814. Carey says that on the proper construction of the clause and/or as an implied term (1) GHU was required immediately on receipt of a Subsequent Tranche from Carey to advance a sum equal to that Subsequent Tranche to Urvasco Ltd, and (2) to procure that Urvasco Ltd used the monies received from GHU to pay the specific contractors and specific amounts to which the Subsequent Tranche related.

815. GHU says that Carey's alleged construction fails because it involves reading substantial wording into the language used, and leads to a result which is uncommercial.

816. Carey's factual case is as follows.

(1) Of the €4,106,798.62 advanced by Carey to GHU on 2 April 2008, GHU transferred a total of €2,311,625 to Urvasco Ltd between 3 and 8 April 2008. GHU retained for its own benefit and use some €1,795,173 of the First Subsequent Tranche.

(2) Of the €3,441,880.59 advanced by Carey to GHU on 5 May 2008, GHU transferred a total of €3,008,000 to Urvasco Ltd on 6 and 7 May 2008. GHU retained for its own benefit and use some €433,880 of the Second Subsequent Tranche.

817. I have set the facts out in relation to the 2 April 2008 payment above. On 28 March 2008, GU obtained two short term €10m loans from Banco Vasconia secured against the offer made by RWE for Urvasco Energia and against personal guarantees from among others Mr Couto. €1.9m of these funds was transferred to Urvasco Ltd so that it could make outstanding payments due to its contractors and suppliers. Along with the €2.3m transferred by GHU a few days later, the full amount of the €4.1m was transferred to Urvasco Ltd either before or shortly after its advance by Carey. When one bears in mind my finding that the advance was due on 27 March 2008 but was paid late by Carey on 2 April 2008, it is apparent that this point is hopeless.

818. The position as to the €3,441,880.59 advanced by Carey to GHU on 5 May 2008 is different. GHU transferred a total of €3,008,000 to Urvasco Ltd, and as the figures in paragraph 17 of Mr Esparza's first witness statement show, these were the only transfers to Urvasco Ltd in May 2008. Further, the only transfers made in *April* were the €2.3m I referred to in the last paragraph. It is correct, therefore, that some €433,880 of the Second Subsequent Tranche was not transferred by GHU to Urvasco Ltd, certainly at the time.

819. In this regard, GHU says (in effect) that when one looks at the totals it transferred to Urvasco Ltd after 31 December 2007, by 5 May 2008 transfers equal to (and indeed in excess of) the amount of the First and Second Subsequent Tranches had already been made by GHU to Urvasco Ltd.

820. GHU submits that paragraph 8 of the Intercreditor Agreement does not specify *when* sums equal to the Subsequent Tranches received from Carey have to be advanced and in the absence of any such express restriction none should be implied. Such a

restriction would also be uncommercial, because if before payment of a Subsequent Tranche fell due from Carey, there was an urgent need for payments to be made on the development and GHU advanced monies to Urvasco Ltd to enable it to make those payments, it would be absurd if when GHU received the Subsequent Tranche it was immediately obliged to hand over the entire sum to Urvasco Ltd and could not make a deduction from the amount which it had already advanced.

821. Carey submits that the purpose of clause 8.2 of the Intercreditor Agreement is to ensure that an amount equal to the monies Carey advanced to GHU was then transferred on to Urvasco Ltd. That way Urvasco Ltd would receive (and Carey would know that it had received) sufficient funds to pay the amounts certified as having been carried out on the development and which made up the relevant Subsequent Tranche. If GHU was entitled to rely on earlier or later transfers, Carey would not have the security that Urvasco Ltd had received the funds necessary to pay the costs certified on a timely basis. Instead, Urvasco Ltd would be likely to be left short of funds to pay the relevant certification as the historic transfers would be likely to have been used to pay other, earlier, costs and future transfers may not even have yet been made.

822. In my view, as a matter of construction, paragraph 8.2 is referring to "Subsequent Tranches" individually, rather than as a whole. The obligation placed on GHU to advance an amount equal to a Subsequent Tranche to Urvasco Ltd has (in my view) to be fulfilled at the time. On the other hand, the word "immediately" is not used in the sub-paragraph, and I see no need to imply it. The facts relating to the advance made on 2 April 2008 show that that would lead to an inflexible result that the parties cannot have intended. Equally, the parties cannot have intended (for example) to allow GHU to use advances for non-development purposes, so long as by the time of the last advance, a sum equal to the totality had been paid over. As Carey says, this would leave it exposed (among other things) to the risk of intervening insolvency. I find therefore, either as a matter of interpretation, or as a matter of implication, that each Subsequent Tranche advanced by Carey to GHU had to be transferred by GHU to Urvasco Ltd at the time, but with a degree of flexibility to allow for circumstances.

823. Whatever the final tally may have been in terms of amounts advanced to Urvasco Ltd, in my view this requirement was broken in respect of the Second Subsequent Tranche, in respect of which the transfer was €433,880 short (taking into account the months of April and May).

824. Earlier in the proceedings there was a further construction point taken by GHU on the applicability of this term. This was not pursued, and I am satisfied that Carey has proved a default to the above extent.

825. I can deal shortly with Carey's other alleged breach. There is nothing in these provisions that require Urvasco Ltd to use the monies for the purpose of paying only the contractors identified in the Project Certificate to which the Subsequent Tranche related. Nor is there any reason to imply such a requirement. I agree with GHU that Carey's interests were sufficiently protected by the requirement which is stated in paragraph 8.3, namely, that the monies be applied in carrying out the development.

GHU'S RELIEF FROM LIABILITY TO REPAY IN CASE OF CAREY'S BREACH

826. Clause 6.17 of the SPA provides in material part as follows:

> "If the Purchaser fails to advance any Tranche due to be advanced under and in accordance with the Loan and fails to remedy such breach within a period of 30 days of notice from the Seller requiring such remedy, the Seller shall be entitled to rescind this Agreement by written [sic] to the Purchaser without liability of any kind on the Seller's part under this Agreement. Upon such rescission the Seller shall not be obliged to repay the Loan."

827. The effect of this provision is that in the event that Carey failed to advance a Tranche due to be advanced under the Loan Agreement, GHU was entitled to rescind the SPA by written notice to Carey. Upon such rescission, GHU was not obliged to repay the loan.

828. GHU's case is that Carey failed to advance the April Tranche which was due under the terms of the Loan Agreement, that it exercised its right to rescind the SPA by notice given in its letter of 29 December 2009, and that in these circumstances, by the terms of clause 6.17, GHU is under no continuing liability to Carey in respect of the loan. (I do not think that any point is taken on the terms of the letter of 29 December 2009, though as Carey points out, it was sent after the litigation had started.)

829. Carey's response is that clause 6.17 only applies if it "fails to advance any Tranche due to be advanced under and in accordance with the Loan …". No further Subsequent Tranche was due, because of the defaults under the Loan Agreement (clause 3(c)(i)). Carey was not in breach of the Loan Agreement and therefore clause 6.17 never became operative.

830. It is not in dispute that if (as I have held) GHU was in default under the Loan Agreement as at 6 June 2008, clause 6.17 has no application. In those circumstances, I need not decide whether Carey was correct in submitting that the clause constituted a penalty (or its point on affirmation).

<u>CAREY'S CLAIM: QUANTUM</u>

831. It follows from the above that Carey has established that GHU was in default under the loan agreement as at 6 June 2008, and that Carey is therefore entitled to recover the advances that it made. There is no dispute that GU as guarantor is also liable. As at 18 January 2013, Carey says the total of principal and interest was €65,410,700.85. The parties should be able to agree the current amounts.

832. The only issue as to quantum concerns an on demand bond issued by Houston Casualty Company Europe, Seguros y Reaseguros, S.A. ("HCC") in favour of Carey dated 19 December 2007 as part of the package of agreements around that date. The bond was for €21,013,650, or the euro equivalent of £15 million, and it has since been called by Carey.

833. The facts are set out by GHU in its closing submissions, and are not disputed. In short, proceedings were brought by Carey under the bond against HCC in Madrid. Carey obtained judgment on 19 July 2011 for €21,013,650 and interest being a total of €23,310,758.41, and this amount was paid into court by HCC. At least the principal amount of €21,013,650 has been transferred by the court to Carey.

834. In October 2011, HCC appealed the judgment, and on 29 February 2012 the Court of Appeal of Madrid reduced the principal amount that HCC was ordered to pay Carey to £15 million.

835. In May 2012, HCC filed an enforcement claim seeking reimbursement from Carey of €4,473,530.45 said to be the difference between what had been ordered by the Court of Appeal to be paid and ordered by the Court of First Instance to be paid, with an adjustment for interest and costs of the enforcement proceedings. HCC's claim was however not admitted by the court (GHU says on technical grounds) and there is an appeal on that decision to the Court of Appeal. At the time of oral closings, this was an extant appeal.

836. On 22 September 2012, Carey filed a writ with the Court of First Instance stating that it had deposited €255,433.14 with the court said to be the amount owing following the judgment of the Court of Appeal. The principal reason for the difference between the amounts as calculated by HCC and Carey is because HCC used the sterling/euro exchange rate as at the date of payment (17 August 2012) to calculate the difference in principal whereas Carey has used the exchange rate contained in the SPA in these proceedings. HCC says that this is incorrect, and it does not accept the payment of €255,433.14.

837. In addition to the enforcement proceedings, HCC has also appealed the judgment of the Court of Appeal of 29 February 2012. I am told that this appeal has not yet been admitted by the Supreme Court, and at the time of oral closings was extant.

838. GHU says that Carey is required to give credit for the sum it has received of €21,013,650 (less €255,433.14) against the amount for which it is liable under the Loan Agreement. In the event that Carey is required to repay some or all of those monies, then it would be at liberty to apply to the court to increase the amount of any judgment which it obtained in the present proceedings.

839. Carey says that the proper course is for the court to give judgment for the full amount of the loan plus accrued interest subject, if necessary, to an undertaking from Carey that it will not seek enforcement of the judgment in any jurisdiction for an amount greater than the total amount of the judgment, less any amount paid to Carey by HCC under the HCC Bond and retained for the time being by Carey.

840. There is no dispute that Carey must give credit for what it has received under the HCC Bond. The matter is only in doubt because of the extant appeals. By the time this judgment is handed down, matters may have moved on. I shall hear the parties as to the appropriate form of order then.

GHU'S DAMAGES CLAIM

841. It may seem odd to deal with GHU's damages claim at the end of this judgment since GHU is the claimant, at least in the proceedings first brought. However, this was how GHU itself dealt with its damages claim in its written opening (it said very little about it in oral opening). The reason, as I have explained elsewhere in this judgment, is that the principal issue at trial has been whether Carey could prove that GHU was in default under the Loan Agreement as at 6 June 2008. Most of the evidence went to that issue. Since I have found in Carey's favour on that issue, it follows that GHU's

claim fails. Since it was argued, I set out my views below in relation to the decisive issues which would have arisen for decision had I been in GHU's favour on the default question.

842. In summary, GHU's case is that but for Carey's breaches of the Loan Agreement, the development would have proceeded to completion. There are two elements to its claim for loss and damage. The first is the loss of the profit which it says would otherwise have arisen from the operation of the hotel. The second is the loss which it says arises from the early termination of the construction of the development caused, it says, by Carey's breach in failing to make the advances due.

843. Even had I been in favour of GHU on liability, it is to be noted that there were a number of significant difficulties in the way of its damages claim. These stem from the fact that, given the economics of the situation, and the terms of the deal with Carey, had Carey continued to fund the project GHU would nevertheless have ended at completion facing a large loss.

844. The hotel itself would not have operated profitably in the initial years. This has nothing to do with the concept. I am satisfied that the hotel has the potential to be successful, even iconic. It is solely the result of the size of the rental payments due to Carey under the December 2007 agreements. The loss of profits claim was effectively a notional capitalisation of income after the initial period of seven years' operation, and the development loss was the loss GHU said it incurred over and above the loss which it accepts which it would have suffered anyway.

845. A further obstacle in the way of the claim is that GHU admits a default under the Loan Agreement. This is the default which happened when GU began negotiations for the rescheduling of its indebtedness, which it admits doing at the end of September 2008 (in fact I have found that negotiations with individual creditors began much earlier). GHU has to show, therefore, that Carey would not have pulled out at that stage anyway, which for reasons I give below, it has not succeeded in doing.

846. Even if it had been made in full, Carey's funding was insufficient to complete the project, and so GHU would have had to find substantial sums from its own resources. A key issue therefore is whether GHU had the money required to finish the building works and thereafter to repay BBVA, which was a condition precedent to Completion. This raises issues as to costs to completion, and GHU's ability to find the money needed.

The factual steps on which GHU's claim is based

847. There are a number of steps in the chain of facts that forms the basis for the damages claim, which is predicated on the assumption that, but for Carey's breaches of the terms of the Loan Agreement, the development would have proceeded to Completion under the SPA. The Long Stop Date (it will be recalled) was 30 April 2009.

848. What would have happened, GHU submits, is that:

(1) Completion would have taken place under the Agreement for Lease with LPS (this was for 999 years at an agreed premium—see above in the factual narrative);

(2) Completion would have taken place under the SPA with Carey under which GHU would have sold the entire share capital of Urvasco Ltd (owner of the hotel) to LVA, which was Carey's nominee;

(3) GHU and Carey would have entered into the lease under which GHU would have leased the hotel from Urvasco Ltd for a period of 10 years (with an option to renew for a further 10 years).

(4) GHU and Carey would also have entered into the Call Option Agreement, under which GHU would have the right to reacquire Urvasco Ltd (or the hotel) after seven years.

849. GHU would then have entered into an agreement for the provision of hotel management services by its majority-owned hotel management subsidiary, Hoteles Silken SA, which manages the group of hotels owned by GHU and in which as I have explained GHU has a 55.55% direct and indirect shareholding. Mr Couto's evidence is that the terms of the management contract would have provided for:

(1) The agreement to commence from on or about 1 June 2009.

(2) Management fees of 1.5% of total revenue and 3% of gross operating profit for the hotel to be payable by GHU to Silken.

(3) Silken to be responsible for the salary of the General Manager of the hotel and for providing management, administrative and marketing services.

850. At the end of the period of seven years, Mr Couto says that GHU would have exercised its option under the Call Option Agreement to acquire the shares in LVA which in turn held the shares in Urvasco Ltd (which owned the hotel).

851. As to this, there is a dispute as to whether or not the option would in fact have been exercised by GHU. However:

(1) GHU says that Mr Smith (Carey's expert on the hotel issues) accepted that the disagreement between the parties reflected the differing views of Mr Smith and Mr Bailey and Mr MacGregor (GHU's experts on these issues) as to the value of the net cashflows which would have been generated.

(2) Mr Couto's evidence was that it was always GHU's intention to repurchase the hotel at the first available opportunity.

(3) He said that the repurchase price under the call option would have been funded by a combination of equity from the Urvasco group (and, if necessary, its shareholders) and debt funding from financial institutions.

(4) GHU says that the views of Mr Bailey and Mr MacGregor on the value of the cashflows are to be preferred over those of Mr Smith, and on this basis, the court is invited to conclude that the option would have been exercised by GHU.

852. Having exercised the option, GHU would thereafter, it says, through Urvasco Ltd, have retained the hotel and continued to operate it, engaging Silken to provide hotel management services. In this way, GHU says that it would have directly received the

future cashflows arising from the operation of the hotel or their benefit into perpetuity.

853. However, GHU says, the actual position which resulted from Carey's breaches of the Loan Agreement was that the work on the development had to cease in September 2008. BBVA appointed receivers over the development in July 2009 and the partially completed development was sold by the receivers in December 2009 for proceeds of €125,030,594. Accordingly, GHU has been deprived of the benefit of the cashflows which it would otherwise have earned from the operation of the hotel.

854. In addition, the loss suffered by GHU on the construction phase of the development (excluding earnings from operation) was increased (which is the second element of the claim).

855. GHU's case is that construction of the development would have been completed by the Long Stop Date of 30 April 2009 and the hotel would have opened for business on or about 1 June 2009. Carey does not agree that the hotel would have opened on this date and argues that the opening date would have been 1 January 2010. As to this:

(1) Mr Bailey's evidence is that it would have been possible for GHU to recruit and plan off-site for the opening and, accordingly, an opening date of 1 June 2009 following Practical Completion on 30 March 2009 would have been possible.

(2) Mr Smith's position in his report was that the hotel would not have opened until 1 January 2010. However, this was based on what GHU says was the unrealistic assessment that GHU would have taken six months to prepare the hotel for opening and then would have waited a further two months before opening the hotel.

(3) GHU says that an opening date of 1 June 2009 would have been possible, and would have happened as GHU would have wished to open the hotel as quickly as possible in order to begin generating revenue.

856. As to the costs which would have been incurred between 30 April 2009 and 1 June 2009, GHU accepts that a deduction falls to be made for the pre-opening expenses which would have been incurred in that month. Mr Smith says that such costs would have been a minimum of £250,000 on the basis of a start-up period of three to six months. Mr Bailey has agreed Mr Smith's figure (although GHU says that the necessary start-up period would have been only one month).

The funding issue

857. There is an important issue which arises in respect of GHU's damages claim, and which (in general terms) is relevant to the whole case, and I must deal with it in some detail.

858. Under clause 4.1 of the SPA, Completion was conditional on the satisfaction or waiver of each of the Conditions in Schedule 2 as follows:

(1) The issue of the Certificate of Practical Completion.

(2) All existing security be discharged by Urvasco Ltd and the BBVA loan repaid.

(3) The provision of evidence satisfactory to Carey that Urvasco Ltd had net assets at Completion. (This was because Carey was acquiring the company, and was a reason why inter-company loans would likely be capitalised or otherwise written down at completion.)

859. The question of whether Practical Completion of the development would have occurred by the Long Stop Date has been addressed above. In addition, Carey denies that the funding available to GHU was adequate for it to complete the development. This raises issues as to the costs to completion, and GHU's sources of funding them.

Costs and funding

860. I mentioned above the position as regards budgets for the construction of the development. The preparation of budgets for a development is an important aspect of its management, and the evidence was (from Mr Robinson of Foster & Partners) that in the case of a development of this size, one might expect monthly budgets to be produced and updated as the development progressed. IDOM did produce budgets from time to time, and I have identified these above. Monthly budgets were not however produced.

861. The parties' positions as regards the figures which should be taken for the cost to complete the development varied from time to time during the trial. Among the complications is comparing like with like. As Carey puts it, in order to ensure that the figures are comparable, there are three main elements which make up the complete costs of the development: (a) the costs of construction (split between contractors and consultants); (b) the costs of purchasing the land and other fees associated with it (such as amounts due to Westminster Council pursuant to the s.106 agreement); and (c) financing costs, essentially interest due under the loans taken out for the development. It was the first and last of these three elements which went up over time. Some of the budgets omit one or more of these items. However, during the trial the focus was firmly on the first. A further complication was mentioned earlier in this judgment, namely that some of the costs were incurred (or were anticipated to be incurred) in pounds, and some in euros, and there is the perennial problem of identifying an exchange rate.

862. As Carey says, there are two main sources of information from which the determination of the costs of the development can be made. These are the contemporaneous materials (as explained or modified by the evidence), and the expert evidence from quantity surveyors. Each party adduced expert evidence from quantity surveyors, Mr Brooker on behalf of GHU, and Mr Boultwood on behalf of Carey.

863. In the result however, it is common ground that the decision for the court is as between four outcomes, two from budgets prepared by IDOM (which can conveniently be referred to as the "April 2008 Budget" and the "June 2008 Budget", the latter being contained in a draft Cost Report sent on 4 September 2008 by Mr Fernandez to Mr Emilio Iraculis), and two from the conclusions of Mr Brooker and Mr Boultwood respectively.

864. As set out in GHU's closing submissions (and not disputed), in round terms, and expressed in pounds sterling:

(1) The April 2008 Budget shows a total figure (representing the total budgeted figure in sterling both for work already done up to this date and work to be done) of £112.45m.

(2) The figure in the June 2008 Budget is £118.67m.

(3) Mr Brooker's (GHU's expert) overall sterling total is £114.43m.

(4) Mr Boultwood's (Carey's expert) equivalent is £126.65m.

865. These sterling figures depend to some extent on the date of conversion of the amounts of euro contracts. The four outcomes are summarised in an agreed table showing the sterling and euro amounts making up the budgets. This was handed in during oral closings to explain differences in the figures in documents of 4 and 8 September 2008. In modified form, the table is as follows:

	April 2008 Budget	June 2008 Budget	Mr Brooker (GHU's expert)	Mr Boultwood (Carey's expert)
Sterling contracts	£60,548,617	£65,355,855.97	£60,912,531.01	£64,142,703.07
euro contracts	€66,497,504	€71,300,968.45	€68,930,283.70	€76,377,047.44

The parties' contentions

866. As would be expected, GHU seeks to argue for the lower figures, and Carey for the higher figures. GHU's primary position is that the April 2008 Budget is an adequate and reasonable basis for assessing both GHU's ability to fund the development works to completion and for assessing the quantum of GHU's claim for damages. It invites the court to accept the April 2008 Budget as reflecting the total costs of the development from which the costs to complete can be calculated. Alternatively, GHU invites the court to adopt Mr Brooker's figures in relation to the total estimated out-turn cost of the development. Although Mr Brooker addresses the question of whether the April 2008 Budget was reasonable, for comparative purposes, he does this by producing his own estimates of the various construction and consultant work packages which make up the April 2008 Budget, and, in that way, carries out an exercise equivalent to that carried out by Mr Boultwood.

867. Carey submits that neither of these options represents the correct approach. It invites the court to reject the use of the April 2008 Budget and of Mr Brooker's figures. Instead it should accept Mr Boultwood's figures, failing which it should accept the figures in the June 2008 Budget.

868. I shall first set out the factual position as regards the two budgets prepared by IDOM. Despite the name it was given at trial, the first in time is the June 2008 Budget, not the April 2008 one.

The June 2008 Budget

869. This budget was prepared by Mr Fernandez, he said in cross-examination, based on information up to June 2008. He provided it to Mr Emilio Iraculis on 4 September 2008 in a document called "Cost Report (June 2008)". It is true, as GHU points out, that the document is a draft, but the covering email says that it is the "budget updated to June 2008", and the evidence suggests that IDOM treated budgets as draft until approval by GHU. There is on the face of it no reason not to treat it as IDOM's budget at this time.

870. Mr Fernandez says in his witness statement, however, that as he knew that the budget was being provided to BBVA for the purposes of obtaining additional funding to complete the project, he thought that it was sensible to produce figures on a "worst case" basis (as opposed to seeking to minimise costs as he had been doing since April 2008) so that "it covered the cost of the highest quality materials that might be required by Foster & Partners and the highest costs that Urvsaco might incur".

871. GHU submits that because it was deliberately prepared on a "worst case" basis for the purpose of raising additional funding, the June 2008 Cost Report, and the derived figure of £118,673,816, is not a suitable basis on which to assess the outstanding costs to complete the development.

872. As Carey points out, the contemporaneous documents do not support the proposition that the budget was prepared on a "worst case" basis. On the contrary, it was sent to BBVA as "correct". Moreover, there is no explanation of which entries were altered to reflect the "worst case" element in the June 2008 Budget. The budget contains a wide range of different columns dealing with different aspects of the work. The court can, Carey submits, legitimately ask which of the columns was altered to include a figure which was a "worst case" and what was the nature of the alteration.

The April 2008 Budget

873. In January 2010, Mr Fernandez produced a budget for the development as at April 2008. In the opinion of GHU's quantity surveying expert, Mr Brooker, this was a reasonable budget, and the assessments of IDOM contained in it are reasonable, an opinion which he says is unaffected by the adjustments he has made in his own figures, which add some £2m (see the summary above). GHU says that although that document was produced in January 2010, it was produced from information that Mr Fernandez had collated in April 2008 from the UST's electronic records relating to the estimates of the construction costs of the project as at April 2008. The April 2008 Budget shows a total construction budget, expressed in sterling, of £91,213,733. Although that was nearly £11 million higher than the September 2007 target budget, GHU says that a significant proportion of that increase related to exchange rate fluctuation.

874. Carey submits that no proper explanation has been given as to how or why this budget was done. If it was for the purposes of this litigation (as it says seems likely) it cannot be treated as being akin to a contemporaneous document. Further, the April 2008 Budget is too low, and ignores the higher budget that was produced by IDOM for June 2008. It also ignores the evidence of Mr Boultwood, who says that the budget would, in fact, have been even higher than IDOM stated in June 2008.

Conclusion as between the April and June 2008 Budgets

875. GHU itself takes as a premise the fact that an IDOM budget is appropriate for these purposes, and I accept that as a premise. Despite Carey's criticisms, IDOM plainly had the necessary skills to prepare a budget. However, I see no reason to take as accurate the April 2008 Budget, which is not a contemporaneous document, but one prepared after the litigation began, and presumably with the litigation in mind. The best contemporaneous evidence is in the form of the June 2008 Budget, which as I have explained, was prepared by Mr Fernandez as the "budget updated to June 2008".

876. I reject the evidence of Mr Fernandez that it was prepared on a "worst case" basis, and that of Mr Iraculis so far as he supports that position. There is no support for this in the contemporary documents, and it was provided to BBVA as correct. Furthermore, even if Mr Iraculis was right to say that the figures were at the top end of the range of what the potential costs might be to complete the project, there is no reason, in my view, not to accept them as realistic. In this regard, it is relevant to take into account GHU's previous disinclination to accept realistic budgets, and the consequent production of budgets that were too low. I have set out the evidence in this respect above.

877. Furthermore, since it is a contemporary budget prepared by IDOM which had been managing the development since the start of the works, I consider that it is the right budget to take for the purposes of deciding this issue. It is to be taken, in my view, in preference to the figures put forward by the parties' respective expert witnesses.

The evidence of the expert quantity surveyors

878. Given the above conclusion, I can, therefore, deal with the evidence of the expert quantity surveyors relatively briefly. In any event, the difference between them (as is common ground) largely came down to the allowance made by each for contingencies. In those circumstances, it is unnecessary to deal with the evidence on a package by package basis, and it would be disproportionate to do so. I shall, however, express my findings on the decisive contingency issue.

879. Mr Brooker and Mr Boultwood did reach varying conclusions as to individual packages, but the greatest point of difference between them is that, in the absence of agreed prices, Mr Boultwood has generally applied a contingency of 20%, whereas Mr Brooker has generally applied 5%, though sometimes 3%. The disagreement particularly affects the packages where there was no contract price agreed between Urvasco Ltd and a contractor for the package. However, GHU says, and I do not understand this to be in dispute, that for the most part, both experts use the same pre-contingency base cost information.

880. Mr Brooker's most common approach, where there is no agreed contract price in relation to a specific package, is to take the notional contract price from a document produced by IDOM called the March 2008 Procurement Commentary and add a contingency of 5%. Mr Boultwood's most common approach in these circumstances is to take the figure from IDOM's June 2008 Cost Report (see above) and add a contingency of 20%. However, the base cost information in both the March 2008 Procurement Commentary and the June 2008 Cost Report, GHU says, is largely the same.

881. Mr Brooker's evidence is that he has never come across a contingency of 20% being applied prospectively. In his view, as a project progresses, the contingency allowance should reduce because more information should be available and therefore budget estimates should be more accurate. I am satisfied that this is normally the case, and indeed Carey does not seriously dispute it.

882. Carey's answer is that such reduction depends on the continual letting of packages so that the risk associated with buying the packages falls. If the packages are not being let, then the risk remains. It also assumes that the ongoing packages are being carried out in line with the budgeted costs. If they are not, then the contingency does not fall. In this instance, it says, risks were becoming realities, as occurs on badly run projects.

883. Carey maintains that Mr Boultwood's application of a higher contingency reflects the lack of certainty in the base contract cost for those packages where procurement of the contractor to carry out the work was underway (described by the experts as category 2), and those in respect of which a contractor had not been procured (described by the experts as category 3), along with the other substantial body of evidence that the development was in disarray, and that the packages actually in progress were experiencing very substantial delay and disruption, variations and additions. Mr Brooker did not, Carey says, consider the actual conditions on site because he was not provided with the relevant documentation.

884. GHU's response is that although it is true that in some instances Mr Brooker and Mr Boultwood had access to only limited costs information for the purposes of their reports, particularly in relation to packages in respect of which a contractor had not been procured, it would not follow that the base cost information is unreliable. IDOM was in the best position to estimate and monitor the base cost information and there is no reason to suggest that these figures should be treated as inaccurate or that they justify such a high additional contingency figure.

885. In any event, GHU points out that Mr Brooker's view on contingency is consistent with the views of other professionals associated with the development. This includes the December 2007 Due Diligence Report which G&T produced for Carey on the development. G&T concluded that, based on their benchmarking exercise, the development budget fell within an "acceptable range", and that a level of contingency at 5.5% would be "sufficient for a project of this size". I should add that G&T's approach to budgeting and contingency was criticised by Mr Boultwood (not very convincingly in my view).

886. Carey's answer on this point is that G&T and other consultants were commenting at the stage of the development when the works being carried out were effectively those of Knight Build and Rowen. They did not know of the actual and nascent problems on the site. Further, Carey says, the track record on the site so far as increase in the budget was concerned, even in the period September 2007 - April 2008, was that the contingency applied in late 2007 proved to be insufficient.

887. My conclusion on this point is as follows. I accept Mr Brooker's general point that the application by Mr Boultwood of a prospective 20% contingency is an unconventional and unusual approach for a quantity surveyor. On the other hand, this contingency particularly affects the packages in respect of which a contractor had not been procured. This is what the experts described as category 3. Given the problems

which the site was experiencing in 2008 (and indeed earlier), I think it is reasonable to apply a contingency higher than 5% to category 3.

888. Understandably, neither party attempted calculations which would reflect an uplift in Mr Brooker's contingency for category 3, though not to the extent contemplated by Mr Boultwood. On the whole, Mr Boultwood's numbers appear to me to be out of step with the rest of the evidence, and too high by a considerable margin. The conclusion that I draw from the expert evidence is that it supports the factual finding I have made, because an uplift in the contingency would push Mr Brooker's figures towards those in IDOM's June 2008 Budget.

The funding gap

889. It is important to note that, whichever of the above figures are adopted, it is common ground between the parties that GHU had a funding gap, in other words, a gap between the funds available from Carey and BBVA under their respective facilities, and what it was going to cost to complete the development. This existed even on the premise that Carey fulfilled its obligations under the contract.

890. Somehow that gap had to be filled. GHU says that it could readily have been filled. Carey says that it could not be filled, given the state of the group in 2008 onwards.

891. As I have said, GHU bases its case on the April 2008 Budget prepared by Mr Fernandez in January 2010. It is instructive to see how its case developed in that regard, because it shows that even the claimant did not find it easy to reach conclusions on the numbers. In its written opening submissions, it set out the amount which remained to be funded as at April 2008 and the sources of funding which left, it said, a gap of €19,303,319.96. This would have been met, it says, by delaying payments to contractors, and by further funding provided by BBVA. The latter point largely depends on GHU's version of what happened at the meeting of 24 September 2008 being accepted by the court (which it has not been).

892. However in the course of its oral opening, it was accepted on behalf of GHU that the figure of €19.3m was wrong, because it did not take account of sums certified as at 30 April 2008 but not paid, which were about €12m, or €10.2m excluding VAT. This produced a gap of about €29.5m. In its closing submissions, the gap which it acknowledges is €28,961,112.25.

GHU's calculation

893. In its written closings, GHU's calculation based on the April 2008 Budget is as follows. The estimated total cost to completion contained in the April Budget was €147,968,833.30 or £112,450,593.78. This represented the budgeted costs of the entire construction works, both already incurred and to be incurred.

894. As at April 2008, the budget for the works which remained to be funded was €86,259,856. It is necessary to make certain adjustments to this figure:

(1) To add in a figure of €774,571.25 in respect of package 4015;

(2) To adjust for exchange rate movements resulting in a deduction of €2,411,327;

(3) To add certain additional costs not included in the April 2008 Budget;

(4) To add the costs which as at 30 April 2008 had been certified but not paid (these were the ones accepted in opening). These costs are €12,034,443 including VAT, and €10,242,079 excluding VAT.

The effect of this, as GHU put it in oral closing, is to produce a budget of €105,925,810 for the cost of construction and fees for completing the development as at 6 June 2008. I am unclear whether based on the April 2008 Budget these numbers are in dispute as numbers, but in any event see no reason not to accept them.

How would the development been funded?

(i) The position prior to completion

895. The question, again as GHU put it in oral closing, is how that sum of €105.9m would have been funded. The answer it gives is based on taking the remaining amounts available for drawdown under the Loan Agreement, and the amount available under the BBVA Credit Agreement, which BBVA certified as at 23 June 2008 as being €25,631,496.

896. On this basis, it submits that as against the remaining amount to be funded of €105,925,810, GHU had total funding available of €76,964,698. This leaves a gap of €28,961,112.25. Carey had some points on the calculation, but again I see no reason not to accept it.

897. However, the gap is calculated on the basis of the April 2008 budget. When one looks at the differences in the underlying currencies of the contracts, the June 2008 Budget (which I have found to be the correct basis for the calculation) is £3.95m higher on the sterling contracts and €4.5m higher on the euro contracts. This appears from the agreed figures in the table above. Carey did not produce its own worked through calculations, but made this point in its closing submissions.

898. Based on the June 2008 Budget, which I have found to be the correct basis, I take the gap as being about €34.4m (that is, adding the €4.5m into €28.9m which GHU acknowledges) plus £3.95m. In fact, this is not far off the number given in Carey's closing submissions, which state that "while the Court will not be able to put a precise figure on the gap because there is insufficient evidence from GHU to quantify certain costs, it is clear that the gap was in excess of €40 million". It goes on to say that, "There is no evidence that, at 6 June 2008, GHU or Urvasco had any means to fill this funding gap. The Court should find that it did not".

899. To the contrary, GHU's case is that that necessary funding would have been provided. In particular, it submits, the evidence shows that BBVA would have provided the necessary funding to progress the development to completion. As it was put, the bank would not have allowed it to fail. Reliance is placed in particular on GHU's case as to what was said at the meeting on 24 September 2008 between GHU, Carey and BBVA. I have dealt with this in the factual narrative. Mr Couto's evidence was that at this meeting BBVA said words to the effect that it would fund the gap between the amount to be paid by Carey under the Loan Agreement, and the final sum to be paid by Carey on completion of the SPA.

900. However, for reasons I have explained, I do not accept GHU's account of the meeting. It is inherently unlikely that BBVA would have been prepared to put any more money into the project. Unlike Carey, it had a first charge over the property. Although of course this would not necessarily have been apparent at the time of the 24 September 2008 meeting, when the property was finally sold, all of BBVA's lending on the project was paid out of the proceeds, though without much to spare.

901. In the run up to trial, GHU produced further evidence to the effect that even if funding had been refused by Carey from the end of September 2008, which GHU accepts it could have been, funding would have been provided by shareholders in the group, or by way of GU's art collection, or other means. In his sixth witness statement of 18 October 2012, Mr Couto said that it was only following conferences with his legal team between 28 September and 1 October 2012 that he appreciated more fully the potential importance of the issue, which was why the evidence was so late.

902. The evidence is to the effect that the shareholders in Urvasco Energia received substantial sums following the sale of that company to RWE, which is undoubtedly correct. (Their initial stakes in the company achieved a spectacular return on the sale.) If necessary, GHU says, one or more of these shareholders would have advanced any funds required to complete the development. Specifically:

(1) Mr Esparza (who was the head of accounting and of the finance department at GU) says that he would have invested €2m and that these funds were available from June 2008 until July 2011.

(2) Mr Rodolfo Di-Pietro Elizaran, who had been General Manager Urvasco Energia said that he would have been prepared to invest a further €15m.

903. It was a considerable gesture on the part of Mr Di-Pietro to come to court to give evidence to this effect, and it shows the close nature of the relations between the principals of the Urvasco group's business. However, evidence of this kind produced at the last minute carried little or no weight. As Carey put it, he was a cautious man who would have taken legal and financial advice before advancing any money. He would also have been looking for security. The same in my view applies to Mr Esparza. Meaningful security could not have been given by GU or GHU because of their financial problems.

904. Furthermore, the sale of Urvasco Energia completed in June 2008. This evidence is subject to the obvious response that had any of the shareholders been prepared to put money into the development, they could have done so then. They would not in my view have done so, because it was so obviously a bad risk. In my view, this evidence lacked credibility.

905. I would add that although I have had considerable sympathy with GHU's complaint that during the course of this litigation it has had to deal with an ever increasing number of allegations raised by Carey in relation to the building development, in this instance there is no cause for complaint. GHU is the claimant, and unless it can show that the development could have been funded but for Carey's breach of contract, its damages claim lacks a factual foundation.

906. As regards other sources of funding identified by GHU, whilst it may be correct that Urvasco Ltd would have had outstanding trade creditors at completion, deferring payments to contractors was plainly not available as a method of funding the development.

907. GHU refers to GU having €96m of cash on its consolidated balance sheet as at 31 December 2008 (i.e. cash held in the group companies whose positions were consolidated). As Carey says however, this amount was more than matched by the overdue amounts of principal (€86,640,295) and interest (€11,529,025) across the group which are recorded in note 21 to the accounts. Thus, the existence of cash does not mean that it was actually available to be used on the development, particularly when, in addition to whatever liabilities the group had to pay in the first few months of 2009, it already had more overdue liabilities than cash to meet them.

908. GHU says that the reality is that if necessary GU would have been able to rearrange its liabilities as it had done in the past in order to free sufficient cash to complete under the SPA. But by now, times had changed, and the financial position of the group was very different. I accept Carey's submission that any cash balances available in the group were more than outweighed by amounts which were already overdue from group companies to its banks, and not available for use on this development.

909. In his sixth witness statement, Mr Couto also says that GU owns a valuable art collection valued by an art dealer in January 2009 at approximately €33.5m (though recorded in GU's 2008 consolidated accounts as having a value of €13.3m, because under accounting rules it was valued at cost). This was unencumbered and could, he says, and would have been used to raise finance. GU also as at April 2009 owned various property assets which were either unencumbered or had free equity. The net value of these assets, he says, was in excess of €30m.

910. A sum of €17.5m held in escrow which was part of the proceeds of sale of Urvasco Energia could, Mr Couto says, have been used to raise funding of between €10m and €12m. However, the money in the escrow account was held against contingencies on the sale, and I am not satisfied that it was available as a source of funding for the London development.

911. As to the other assets, Carey's case is that the assertion by GHU that these were available to provide funding for the development cannot be accepted given that it relates to a time when the accounts of GU and GHU were subject to a qualification about their ability to continue as going concerns, and the group was undergoing a distressed restructuring because it could not afford to pay its existing debts.

912. Carey says that the references to the art collection and the various property assets as representing viable security are mere assertion. There is no evidence that any bank would have accepted these as security for a loan to complete the development, particularly as security could not be given over the hotel itself and, even on GHU's case, very substantial losses would have been made in the operation of the hotel in its early years.

913. GHU accepts that there was a funding gap, and the onus must be on it to show how it could have been met. Whilst acknowledging the force of its submissions, I have no

hesitation in accepting Carey's case in this regard. I find that as at 6 June 2008, and as at the end of September 2008 so far as that time is relevant, neither GHU nor Urvasco had the means to fill the funding gap, which I find was not far short of €40m.

(ii) The default related to the restructuring

914. As I have mentioned, there is another hurdle which GHU has to get over if it is to have a case. GHU accepts that in September 2008, a default occurred under the BBVA Credit Agreement on the basis that GU had entered into negotiations with its creditors for the rescheduling of its indebtedness by reason of its actual or anticipated financial difficulties. A BBVA default was a default under the Loan Agreement between GHU and Carey. GHU's case is that as a matter of fact, Carey would have continued to lend. Nonetheless, it is common ground that from that time, it was not obliged to do so. (I have found that the breach happened earlier because negotiations with individual banks began earlier.)

915. Looked at as at September 2008, GHU's case is that since (by this time) the May, June, July and potentially August tranches would have been due by the end of September 2008, Carey would have invested at least £44m in the project by that time. The unpaid tranches up to September were those for April £2,258,784.78, for May £1,390,737.35, for June £879,876.20, for July £2,924,522.90, in each case as per the G&T Project Certificate, and potentially for August £1,483,735.38, in respect of which G&T did not certify, but as per the IDOM report.

916. GHU submits that had Carey continued to fund up to September, the investment would actually have been more, because the fact that it did not make any advances from June onwards slowed down the work at a time when it would otherwise have been proceeding rapidly. Moreover, by September, completion of the development would only have been seven months away.

917. As GHU pointed out, Carey did not adduce evidence from any witness who said that Carey would have relied on such a default in September in order to withhold funding. Further, it points out that since advances went to satisfy the sum payable by Carey on completion, the effect of not advancing subsequent tranches would only have been to give rise to a need for GHU to bridge the gap prior to completion. Carey would have been a long way down the road, it submits, to completion both in money and time terms, and GHU invites the court to find that in these circumstances, it would in fact have continued to fund GHU.

918. I have set out elsewhere my findings as to the timing of the admitted breach in relation to rescheduling negotiations, which Carey says (and I have found) took place much earlier than the end of September 2008. Accepting for present purposes GHU's submissions as to timing, I accept the force of the point that the more that Carey invested in the project, the less likely it was to withdraw. As GHU says, by September 2008 completion was only months away, assuming that it could be achieved by the Long Stop Date at the end of April 2009.

919. It is not easy to make a factual finding on a matter that is hypothetical. As well as advancing the tranches under the Loan Agreement, it must be kept in mind that on completion, Carey was obliged to pay the euro equivalent of a further £35m at the fixed rate in the SPA. By June 2008, I am satisfied that Carey had determined to get

out of the deal. As I have explained in the factual narrative, all the evidence points in this direction, and indeed GHU makes much the same point, criticising Carey for duplicitously continuing to press for the second charge.

920. Over the next few months, the group's financial condition continued to deteriorate. The fact of calling in IREA itself spoke to the seriousness of the position. On any view, the London development was not in particularly good shape. Had there been an opportunity lawfully to get out at the end of September 2008, which GHU accepts there was, I am satisfied that Carey would have seized that opportunity. It follows from this that GHU cannot show that a breach by Carey caused it any loss.

(iii) The position at completion

921. It follows from the above conclusions that the position at completion is not strictly relevant, because in my view the development was not going to reach completion. Nevertheless, I should deal with GHU's case in this regard which raises much the same issues as already discussed. Its calculations assume that Carey would have fulfilled its obligations.

922. At that point, Urvasco Ltd would have had liabilities to BBVA to repay the sums advanced under the BBVA Credit Agreement. These liabilities were secured by a first ranking security in favour of BBVA including security over the property.

923. In fact, substantial funds would have been available to GHU on completion. GHU puts its case as follows:

(1) As described under the factual narrative, Urvasco Ltd had entered into the Agreement for Lease with LPS. Under this agreement, LPS agreed to pay £70m (subsequently increased to £71m) to acquire a 999 year lease for the 79 apartments included in the development. LPS was required to, and did, pay a deposit of £7m to Urvasco. Accordingly, on completion a further £64m would have been received from LPS.

(2) In addition, on completion the euro equivalent of a further £35m would have been received from Carey under the SPA, representing the difference between the purchase price due under the SPA (£105 million) and the amount of the loan advanced to GHU (£70 million) (see clause 3 of the SPA). At the fixed exchange rate, this would have amounted to €48,510,000.

924. As to the liabilities which were required to be discharged, GHU says:

(1) The maximum amount available for drawdown under the BBVA Credit Agreement was the euro equivalent of £87,670,000. On the assumption that this had been fully drawn down, then this amount would have required repayment.

(2) Under clause 30.8(a) of the BBVA Credit Agreement any repayment was to be in euros. The exact sum in euros which would have required repayment depended on the exchange rates which under the terms of the agreement were to be fixed shortly after each loan was drawn down: see the definitions of "Euro Equivalent" and "Rate Fixing Date". In fact, GHU drew down the funds in euros and to the extent it was necessary to convert the monies to

sterling it did so under hedging arrangements entered into with BBVA. The average exchange rate applied by BBVA according to Ms Santamaria was £0.70: €1. Assuming that exchange rate, GHU says that the sum of €125,242,857 would have required repayment.

(3) In addition, it would have been necessary to discharge the gap of €28,961,112 on the funding of the works either by discharging any further loan from BBVA in this amount or by making the deferred payments to the contractors. I refer to my findings above in this respect. On the basis of the June 2008 Budget, this figure is considerably higher, and near €40m.

(4) It is a hypothetical question, GHU says, as to whether such sum would have been required to be repaid in sterling or in euros or in a combination of both. This would have depended on the currency of any further loan from BBVA and on the currency of the relevant contractor payments which were deferred. In practice, GHU says, Urvasco Ltd would not have had to convert the sterling received from LPS into euros in order to repay BBVA, because GHU and Urvasco would have allocated sterling receipts to meet sterling liabilities and euro receipts to meet euro liabilities.

925. GHU's case is that even assuming that all of the €28,961,112 (in other words, its estimate of the gap on funding the construction works) was to be settled in euros then the position would have been as follows:

(1) The €48,510,000 received from Carey would have discharged the €28,961,112 gap on funding and €19,548,888 of the loan to BBVA leaving €105,693,969 due to BBVA.

(2) Conversion of the £64 million from LPS into euros at the applicable exchange rate (the euro-sterling exchange rate at 30 April 2009 was approximately €1.12 to £1), would have amounted to €71,680,000.

(3) Accordingly, there would have been a remaining amount of about €34,013,969 due to BBVA.

926. GHU accepts therefore that there would be a shortfall at completion of €34,013,969. (In opening, it quantified the shortfall as €23,867,729.96.) As to this, GHU's case is similar to that in relation to the funding gap prior to completion, namely that any shortfall would have been met by funding from one or more of the sources I have set out above. Taking a step back, GHU submits that it is inherently unlikely that, having achieved completion of the construction works, GU (or, for that matter, BBVA) would have allowed a situation to arise where completion under the SPA did not take place. The reality is that the necessary funding would have been found. Overall, GHU submits, the funds received from Carey, from LPS and from other sources would have been sufficient to repay the sums due to BBVA. Accordingly, Urvasco Ltd would have been able to discharge all existing security at completion and to repay the loan due to BBVA.

927. Carey case is that the amount of the gap accepted by GH is still understated, which for reasons explained above I have found that it is. Otherwise, its submissions are as above.

(iv) Conclusion on the funding issue

928. I accept GHU's point that by completion, there would have been, at least on the face of it, a strong commercial imperative on the group to find the funds that were required to repay BBVA. It had been well capable in the past of juggling its finances to keep particular parts of the enterprise afloat, and these are points which support its case.

929. On the other hand, its estimate of the shortfall at completion of €34m is too small, for the reasons explained above in relation to the differences between the April 2008 and June 2008 Budgets. Applying the same reasoning, the shortfall would, in my view, have been more like €44m. As regards BBVA, it was in the strongest position, because it had a first charge.

930. Further, it is worth standing back to consider the financial effect of the transaction which GHU entered into with Carey. Even on GHU's basis of calculation, it accepts that had all gone according to plan, and Carey met its obligations in full, GHU would have incurred a deficit at completion of about €34m. In my view, the root cause of the gap was that (as I have explained above) a substantial proportion of the total facility available under the Loan Agreement was advanced up front in December/January 2007, but only a small part of it went into the development, the remainder being applied to other indebtedness of the group.

931. That brings into relief the question of the profitability of the hotel. It was not in dispute at trial that because of the rent under the leaseback arrangement, the hotel would have operated at a loss. Accordingly, had this transaction gone to completion, GHU would have incurred a large loss on the development, whilst being committed under the leaseback arrangements to a loss-making hotel. Effectively, and with the qualifications as to the figures which are dealt with above, this is common ground.

932. Since finance could not be raised on the hotel at that point, the group would have had to find the sums required from its general resources. This would have been very difficult at a time when it was being forced to reduce its massive debt overhang. I accept that GHU has made strong arguments in favour of its position, but I prefer Carey's case on this aspect of the matter, and conclude that GHU would not have been in a position to fund the gap, and was not in a position to complete, even if the project had got there.

933. However, as indicated above, this is academic. For the reasons I have given, my finding is that the project would not have got to completion. For this reason, GHU's damages claim would have failed even if Carey had not proved its case on default.

Quantum

934. In the light of the above, I can deal with the main points on quantum succinctly. The experts on quantum were Mr MacGregor and Mr Bailey for GHU and Mr Smith and Mr Clements for Carey. Their points were contained in a considerable number of reports, which were narrowed down helpfully in the agreed reading list.

(1) Loss of profit on hotel operations

935. The first question is whether the hotel would have made a profit at all. It was not disputed in the course of the experts' evidence that because of the rent under the leaseback arrangement, the hotel would have operated at a loss. This applied to the first seven years after completion. At the end of the period of seven years, Mr Couto says that GHU would have exercised its option under the Call Option Agreement to acquire the shares in LVA which in turn held the shares in Urvasco Ltd (which owned the hotel).

936. When asked on the first day of oral closings to confirm that the hotel would have been loss making, GHU did so. The following day, it said that in fact the true position was that hotel would have been loss making for the first two years, but for the following five years there would have been "a small excess of cash flow from operations over and above the rent payments". Carey responded (again in oral closing) saying that this depended on converting the euro rental to sterling at the exchange rate in the Loan Agreement, whereas sterling had weakened substantially since then. Carey's calculation was to the effect that at current rates, none of the seven years would have been profitable. That I accept is the effect of the evidence.

937. For the period that extends beyond seven years, the position is clearly hard to forecast. Nevertheless, I accept that the hotel would have become profitable once the rental obligation owed to Carey ceased. The hotel has in fact (as explained above) now opened under different owners, albeit, I infer, after very considerable extra expenditure. There was also an increase in the number of suites, which was presumably deemed appropriate for a hotel of this class. This suggests that the hotel, as conceived by GHU, was potentially a money-making proposition.

938. The experts agree that the valuation of the loss of profits from the operation of the hotel involves determining the future net cashflows which the operation of the hotel would have generated and discounting these back to present value using an appropriate discount rate. Leaving aside the first seven loss-making years, GHU's claim in this regard comprises the future cashflows earned directly by GHU from its operation of the hotel and by Urvasco Ltd after the exercise by GHU of its option to purchase the shares in LVA after seven years of operating the hotel.

939. As Carey points out, this would result in GHU owning a company which owned the company which owned the hotel. It is by no means evident that discounting the cash flow represents recoverable loss as regards GHU, since its loss may properly be referable to the diminution in the value of its shareholding in the structure. I shall assume this point in GHU's favour. However, I would have rejected the claim based on Silken cash flows, because GHU held only 55.55 per cent of the shares in Silken.

940. On the point of substance, I prefer Mr Bailey's evidence. He has selected (in my view) a more appropriate comparator set of hotels. Further, Mr Smith's evidence that the hotel would have been a high-end four star property (in cross-examination he said four to five star) does not fit with the facts. The hotel was clearly positioned as a five star property, and the Norman Foster connection gives it extra cachet. One only has to look at Carey's own press release issued in January 2008 to see that a four star rating was completely unrealistic.

941. As to projected growth, however, I would accept Mr Smith's more cautious approach, not least because Mr Bailey placed too much emphasis on the boost to business which

he thought events in London in 2012 would give. He initially placed these in the third year of operation, but since he assumed that the hotel would open on 1 June 2009, the events (the Olympics among others) would fall in the fourth year of operation.

942. As to the opening date, Mr Bailey was suggesting that there would be a hard (not soft) opening on 1 June 2009. Even if the building works had been practically completed by that date, I think this is very unlikely. There would have been little chance to get staff in place in the run up to 30 April 2009. Given GHU's ambitions for the hotel, I have no doubt that the opening would have been closer to the date proposed by Mr Smith, namely the beginning of 2010. But this does not make much difference to the figures.

943. In calculating and valuing the cashflows, the items in dispute which have the most material effect on the claim are the projected average room rates, the growth rates applied to those room rates and the discount rate. Much was agreed (or substantially agreed). The main point of disagreement was as to room revenues: Mr Bailey determined an average room rate for the hotel in its first year of operation of £225, whereas Mr Smith said that it would be £195.93. For the reasons I have given, I prefer the evidence of Mr Bailey in this respect.

944. As to valuation of the cashflows, Mr MacGregor has adopted Mr Bailey's opinion on the profits from GHU's operation of the hotel, adjusted those amounts by agreement with Mr Smith for a general manager's salary and has then taken into account deduction of the amounts payable under the sale and purchase agreement with Carey (namely rent for a seven year period at an above market level and a premium payable at the end of that period to acquire LVA, owner of Urvasco Ltd). Mr Smith has applied the same adjustments to his operating cash flows (albeit for the shorter period of seven years and without the premium payment, as he says GHU would not have exercised its option to acquire LVA, owner of Urvasco Ltd, because the value of the cashflows he calculates is lower than the premium payable).

945. As to rent, Mr MacGregor and Mr Smith agree on and have used the same basis of calculation but a difference arises in the annual rental charge calculated by each of them because of differences in the assumed date of opening of the hotel.

946. Mr MacGregor and Mr Smith have then each calculated the pre-tax present value of GHU's future cashflows from hotel operation by discounting for the time value of money.

947. Timing of cashflows is no longer in dispute. The main matter in dispute was the discount rate and capitalisation rate applied to future cash flows. These rates have three main inputs—the cost of debt, the cost of equity and the debt/equity ratio.

948. GHU's expert Mr MacGregor uses a discount rate of 6.19% and a capitalisation rate of 3.19%. This is said to be, in effect, the actual rate for GHU in June 2009. Carey does not accept this, saying that it is based on historic data which was no longer relevant mixed with estimates from Mr MacGregor which take no proper account of the state of GHU or the market.

949. Carey's expert applies a discount rate of 8.34% and a capitalisation rate of 5.34%. These are derived from the rates available in the market for hotel transactions. Carey

says that the position of GHU (and the group generally) was such that it would not have been able to achieve very much better returns than the market more generally being in the middle of a huge restructuring. There is no credible basis, it says, on which GHU could have outperformed the market rates which reflect the base that GHU could have hoped for.

950. GHU says that Carey has simply applied the wrong approach, since the question is the loss which has been caused to GHU, not to some notional investor in the hotel. It says that Carey's exercise seeks to address the different question of the value of the hotel on sale to a third party.

951. On the facts, I much preferred Carey's case in this respect. Given the shifting fortunes of the group, in my opinion the best indicator of prospective loss was derived from the rates available in the market for hotel transactions generally.

952. However, the reality is that once one accepts that the first seven years of operation would have been loss making, a claim for future loss of profits becomes tenuous. It further depends on the premise that GHU would have exercised the option after seven years. I accept that Mr Couto would have wished to do so, not least because of his personal investment in time and money in the project. However, I am not satisfied that such a decision would have been justified on business grounds, and I am sure that he would have strictly based it on business grounds. Overall, I regard GHU's loss of profit claim as speculative.

(2) Development loss

953. In relation to development loss, GHU's claim is for the difference between (a) the position on completion of construction which would have transpired but for Carey's breaches of contract (including the agreed sale and leaseback transaction) and (b) the actual position on the sale of the partially completed development by the receivers.

954. It seeks to compare (1) the loss that would have been incurred on construction of the development but for Carey's breaches of contract, including the sale of Urvasco Ltd to LVA ("the But For Position"), and (2) the loss actually incurred being the costs of construction less the proceeds of sale of the development in its partially completed state ("the Actual Position").

955. GHU's case is that although a loss would have been incurred upon the construction of the development, the effect of Carey's breaches of contract was to increase the amount of that loss and GHU's claim in respect of development loss is for that increase.

956. GHU's calculations are based on the April budget, whereas for reasons stated in detail above I have held that the costs are appropriately calculated by reference to the higher June budget. I have further stated in detail my reasons for holding that GHU would not have been able to fund the project to completion even had Carey performed under its agreements. I need not repeat this reasoning here. This head of claim does not arise on the facts as I have found them.

<u>OVERALL CONCLUSION</u>

957. A significant number of the points raised by Carey at trial have been decided in GHU's favour. However, my overall finding is that GHU was in default under the Loan Agreement as at 6 June 2008, and that Carey was not obliged to make the advance otherwise due on that date, and that its subsequent cancellation of the agreement was lawful. I find therefore that Carey is entitled to succeed on its counterclaim for the sums it has advanced to GHU, and on its claim against GU as guarantor. I am grateful to both parties for their assistance, and will hear them as to the form of order consequent on this judgment.

ANNEX

Translation of letter agreements of 21 October 2008 and 26 November 2008

GRUPO HOTELERO URVASCO

October 21, 2008

Mr César Losada Santamaria
Losan Hotels World Value Added 1, S.L.
Serrano, 26, 4°
28001 Madrid

Dear Mr. Losada:

I refer to you letter dated October 6, 2008, whereby you informed us of the termination of the loan agreement entered into on December 2007, by and between Grupo Hotelero Urvasco, S.A. ("GHU") and Losan Hotels World Value Added I, Ltd ("Losan"), pursuant to clause 10(a)ii thereof and the reservation of rights in your favour as regards said loan agreement and the sale and purchase agreement of the same date by and between GHU, Losan and London Value Added I Limited (hereinafter jointly, the "Agreements").

Further to our conversations with you, Losan would be prepared to accept, on the terms and subject to the conditions below, the surrender of its position under the Agreements in exchange for a payment by GHU to include (i) THIRTY FIVE MILLION FOUR HUNDRED AND FORTY SIX THOUSAND, THREE HUNDRED AND SEVENTY SEVEN POUNDS STERLING AND FORTY NINE PENCE (£35,446,377.49) by way of return of amounts handed over by Losan to GHU under the Agreements; (ii) EIGHT HUNDRED THOUSAND POUNDS STERLING (£800,000.00) by way of compensation for the opportunity cost incurred by Losan; (iii) interest accrued and pending payment (including late payment interest, where applicable) up to the date on which the above payment is made pursuant to the loan agreement; and (iv) any and all expenses actually incurred by Losan within the framework of the sale and purchase and leaseback transaction, to include, *inter alia*, legal fees, technical due diligence costs, financial advisors fees, technical advisors fees, travel expenses, management fees paid by Losan, etc., all of which shall be duly documented, and shall not in aggregate exceed the amount of ONE AND A HALF MILLION POUNDS STERLING (£1,500,000.00). The amounts under paragraphs (1) and (iii) above mentioned shall be payable by GHU in Euros on the terms provided under the Agreements, whereas the amounts under (ii) and (iv) shall be payable in pounds sterling. All the above amounts shall be paid within a maximum of two (2) months as from the moment when GHU is duly notified of Losan's acceptance of this letter, on the terms and conditions hereunder, by receiving a duly signed copy of this letter.

During the first month of said period, Losan undertakes to refrain from taking any legal action to which it may be entitled under the Agreements. After said one month period, Losan shall be entitled to avail itself of any and all rights it may have under the Agreements.

Following the end of the two (2) month period above-mentioned, Losan may either request compliance by GHU with its obligations hereunder, or leave without effect the agreements arising hereunder, or extend the contents of this letter for the period it deems fit.

By agreeing to this notice, Losan expressly authorises GHU to undertake such contacts and negotiations with third parties as may be necessary to carry out their substitution in Losan's stead under the Agreements, as well as the execution with such third parties of any documents, whether binding or otherwise, as may be necessary for such purposes, with the only limitation that said documents shall in no event entail that payment to Losan of any of the amounts referred to under paragraph Second of this letter is not made within the above mentioned two-month period. GHU represents and warrants that it is aware that said two-month deadline for the payments is of the
essence, and an essential condition for Losan's acceptance of the terms of this letter.

Upon receipt of the amounts above mentioned, Losan and GHU shall execute any such documents, whether of a private or public character, as may be necessary to effectively terminate the Agreements, together with any outstanding contractual relationships between Losan and GHU arising from or in relation to the Agreements Said documents shall include the relevant representations and warranties by Losan and GHU in the sense that payment of the above mentioned amounts is in full and final settlement of any and all amounts howsoever due under or in relation to the Agreements, and fully extinguishes any outstanding contractual relationship between Losan and GHU thereunder arising, and that both GHU and Losan expressly waive any right or action to claim against each other, whether in court or out of court, on any facts or circumstances howsoever, whether past, present or future, arising from their
contractual relationships.

Acceptance by Losan of this letter is only for the purposes of confirming (i) the amount for which it is prepared to surrender its position under the Agreements, provided always that payment is made within the agreed deadline, whereby GHU acknowledges that the above mentioned amounts and deadline for payment are of the essence for Losan, and that Losan would, in the absence thereof, not have entered into this letter agreement; (ii) GHU's authorisation to proceed on the terms indicated under paragraph fifth hereof, (at) Losan's commitment to refrain from taking any legal action against GHU for a period of one (1) month as from acceptance of this letter agreement, and (iv) Losan's willingness to execute the documents mentioned under paragraph six above immediately upon receipt of the amounts above mentioned.

Acceptance by Losan of this letter agreement shall in no event entail, during any period, any waiver of rights assisting Losan (other than purely judicial rights) under the Agreements, including the right to terminate the sale and purchase agreement and the loan agreement, and to claim reimbursement of any amounts lent to GHU under the loan agreement, as and when it may deem fit.

For the event that Losan actually brings legal action, which shall in no event occur prior to expiry of one (1) month as from receipt of acceptance by GHU of this letter agreement, GHU may pay the above mentioned amounts within the established deadline, and Losan undertakes to immediately thereafter withdraw from any such action, provided that payment by GHU is final and irrevocable. For a period of one (1) month as from acceptance of this letter agreement, GHU undertakes not to bring any legal action under the Agreements.

I look forward to your reply at your earliest convenience.

Yours faithfully,

Antonio Iraculis Miguel

In witness of acceptance and agreement

César Losada Santarnaria
Losan Hotels World Value Added 1, S.L..

GRUPO HOTELERO URVASCO

26 November 2008

Mr César Losada Santamaria
Losan Hotels World Value Added I, S.L.
Serrando, 26, 4
28001 Madrid

Dear Mr. Losada:

I refer to your letter of 6 October 2007, by virtue of which you informed us of termination of the loan agreement entered into on 21 December 2007, between Grupo Hotelero Urvasco, S.A. ("GHU") and Losan Hotels World Value Added I, Ltd ("Losan") pursuant to the provisions set down under clause 10(a)ii of said agreement and the reservation of rights related to loan agreement per se and the purchase agreement entered into on the same date between GHU, Losan and London Value Added I. Limited (hereinafter referred to jointly as the Agreements).

According to the conversation held with you, Losan is able, under the terms and subject to the following, to accept abandoning its position in the Agreements in exchange for a payment on the part of GHU to include (i) THIRTY FIVE MILLION FOUR HUNDRED AND FORTY SIX THOUSAND THREE HUNDRED AND SEVENTY SEVEN POUNDS STERLING AND FORTY NINE PENCE (£35,446,377.49) as return of sums provided by Losan to GHU by virtue of the aforementioned Agreements, (ii) EIGHT HUNDRED THOUSAND POUNDS STERLING (£800,000.00) as compensation for loss of profit by Losan, (iii) interest accrued and payable (including default interest, if appropriate) up until 21 December 2008, as set down in the loan agreement and (iv) all costs effectively incurred by Losan under the scope of the purchase operation and subsequent lease and to include, among others, costs for legal advice, including any which may be incurred up until 30 April 2009, technical due diligence, financial advisers, technical advisers, travel costs, management commissions paid by Losan, etc. and for which proper receipts must be provided and limited to a maximum of ONE MILLION FIVE HUNDRED THOUSAND POUNDS STERLING (£1,500,000.00).

GHU must furthermore pay interest at a rate of 7.5 annual interest, settled on a monthly basis, calculated on the overall total amount of sums payable by GNU by virtue of paragraphs (i), (ii), and (iv) above, calculated as from 21 December 2008 up to the date of payment. Thus, neither interest amounts agreed in the loan agreement nor any default payments are deemed payable from 21 December 2008 up until the payment date.

The amounts referred to under paragraphs (i) and (iii) above must be paid over by GHU in Euros and under the conditions provided for in the Agreements, whereas the amount set out under paragraphs (ii) and (iv) are to be paid in pounds sterling. All said amounts must be paid prior to 30 April 2009, under the terms and conditions set out herein.

Losan undertakes not to instigate any legal actions it may be entitled to bring by virtue of the Agreements up until 31 March 2009. From 1 April 2009 onwards, Losan may, without any limitation, exercise any of the rights to which they are entitled to according to the provisions set down in said Agreements.

From 30 April 2009 onwards, Losan may either require compliance with the obligation taken on by GHU by virtue of this letter, or render the agreements arising out of this communication without effect or extend the content of this letter by whatever time period it deems appropriate.

By accepting this communication, Losan expressly authorises GHU to enter into as many contacts, relationships or negotiations with third parties as necessary in order to achieve a replacement for the Losan position in the Agreements and also to sign as many documents, whether binding or not, with said third parties as necessary to that end, with the following limitations:

- That the aforesaid documents may not imply that payment shall not be made to Losan of the amounts referred to under paragraph two of this letter as a whole prior to 30 April 2009. GHU states in this sense that it is aware of the importance Losan of the payment being carried out within the time period set down, i.e. prior to 30 April 2009 and that this is deemed to be a basic condition for the purposes of acceptance of this letter on the part of Losan.
- That in the event that, as at 31 March 2009, GHU has not confirmed an agreement with any third party to take the position of Losan in the Agreements, then it must accept any offer it has received prior to 30 April 2009 as long as the offer concerned at least covers the debt GHU owned to Losan by virtue of the aforesaid agreement dated 21 December 2007 as well as the debt owed by Urvasco Limited, company wholly owned by GHU, to the financial institution BBVA, pursuant to the loan agreement originally entered into between the two companies as at 22 December 2004 and amended on 20 November and 21 December 2007.

Upon paying the aforesaid amounts, Losan and GHU will sign as many public or private documents as legally necessary for the purpose of rendering the Agreements duly terminated, as well as all other contractual relationships in force between Losan and GHU arising therefrom. Those documents must include the corresponding statements on the part of Losan and GHU to confirm, upon payment of the total sum of the aforementioned amounts, that any amounts which may be owed with regard to any item or legal relation having to do with said Agreements and all the remaining contractual relationships in force between Losan and GHU arising therefrom have been fully met, settled and finally paid off and that GHU and Losan reciprocally waive any right to legal action or claim either in or out of court due to any events or circumstances that may occur, either in the present or the future, arising out of their contractual relationships.

Acceptance on the part of Losan of this letter is deemed to refer exclusively for the purposes of confirming: (i) the amount in exchange for which the former is willing to give up its position in the Agreement for as long as said payment is paid over within the agreed time period, and GHU acknowledges to that end, that the aforesaid amount and payment periods are deemed to comprise basic factors for Losan, without which it would not have signed this documents, (ii) the authorisation on the part of GHU to proceed in the terms set out under paragraph seven herein, (iii) it Losan waives its right to take legal action against GHU up until 1 April 2009 and (iv) Losan willingness to sign the documents referred to under paragraph eight herein at one and the same time as paying over the aforesaid amount.

Acceptance by Losan of this letter shall not in any event be deemed to imply for any period of time whatsoever that it waives any rights to which Losan may be entitled (other than strictly judicial rights) as provided under the Agreements, including the right to terminate the purchase agreement or the loan agreement and to request return of the amounts provided to GHU by virtue of the loan agreement whenever it deems it
appropriate to do so.

In the event that Losan effectively does instigate judicial proceedings, which cannot in any event occur prior to 1 April 2009, GHU may hand over the aforesaid amount within the period provided, i.e. prior to 30 April 2009, and Losan undertakes to withdraw from any legal action it may have instigated provided that such payment on the part of GHU is final and irrevocable. GHU undertakes not to exercise any judicial actions which it may be entitled to by virtue of the Agreements up until 1 April 2009.

With nothing further to add, I await your prompt response and remain,
Yours faithfully

SIGNATURE

Antonio lraculis Miguel

As evidence of acceptance and in agreement

SIGNATURE

César Losada Santamaria
Losan Hotels World Value Added I, S.L.

ADDENDUM TO AGREEMENT DATED 26/11/08
BETWEEN GRUPO HOTELERO URVASCO, S.A. AND LOSAN HOTELS WORLD VALUE ADDED 1, S.L.

For the purposes of guaranteeing compliance with the obligation of Grupo Hotelero Urvasco, S.A. (GHU) to accept any offer made by a third party to take over the position of Losan Hotels World Added I, S.L. (LHWVAI) in the loan agreements and purchase agreements entered into by the two parties (the Agreements), GHU undertakes to keep LHWVAI

informed of any third party offers it receives. GHU particularly undertakes to forward to LHWVAI any final offer received to replace LHWVAI in the Agreements within a time period of three days from the date on which GHU receives such an offer.
Equally, GHU undertakes to forward a fortnightly report to LHWVAI listing all contacts made with third parties with a view to replacing LHWVAI in the Agreements and all non-binding offers received to the same end.

And for the record for appropriate purposes, this document is signed on 26 November 2008:

For Grupo Hotelero Urvasco, S.A.
Mr. Emilio Iraculis

For Losan Hotels World Value Added I. S.L.
Mr. César Losada