A permit was invalid (and the payment of £2,000 by the entrant may have strengthened that impression). But in the present case it cannot be said that the work permits were invalid: they were what they appeared to be; they contained no misstatement; and they were not forgeries.

I agree that these appeals should be allowed and the decision of the immigration officers that the applicants are illegal entrants should be quashed.

B

Appeals allowed with costs.
Leave to appeal refused.

Solicitors: E. Edwards Son & Noice; Treasury Solicitor.

C D. E. C. P.

D

[COURT OF APPEAL]

BANQUE BRUXELLES LAMBERT S.A. v. EAGLE STAR INSURANCE CO. LTD.

E

UNITED BANK OF KUWAIT PLC. v. PRUDENTIAL PROPERTY SERVICES LTD.

NYKREDIT MORTGAGE BANK PLC. v. EDWARD ERDMAN GROUP LTD. (FORMERLY EDWARD ERDMAN (AN UNLIMITED COMPANY))

F

B.N.P. MORTGAGES LTD. v. KEY SURVEYORS NATIONWIDE LTD.

B.N.P. MORTGAGES LTD. v. GOADSBY & HARDING LTD.

G

MORTGAGE EXPRESS LTD. v. BOWERMAN AND PARTNERS (A FIRM)

1995 Jan. 25, 26, 27, 30, 31; Feb. 20

Sir Thomas Bingham M.R., Rose and Morritt L.JJ.

Damages—Measure of damages—Surveyor's report—Plaintiffs lending money on basis of surveyor's negligent valuation—Subsequent general fall in property market and default by borrowers in repayment of loans—Plaintiffs obtaining possession and selling properties at price below valuation—Whether loss attributable to market fall recoverable

H

In six actions for negligence and breach of contract the plaintiff mortgagees claimed damages against defendants who, in the first five actions, had acted as valuers and, in the sixth action, as solicitors, in relation to property on the security of which the plaintiffs had made advances. In each action the plaintiff alleged that the property had been negligently over-valued and that but for that valuation it would not have entered into the transaction with the borrower. Following a general fall in the property market the borrowers defaulted so that on possession and sale the plaintiffs obtained substantially less than the figure at which the property had been valued. The plaintiffs sought to include in their claims for damages amounts in respect of the loss attributable to market fall between the date of valuation and that of realisation. During trial of the first action the plaintiff, having relied on the fifth defendants' valuation of the relevant property, compromised its claim with its insurers, the first defendant, which had provided mortgage indemnity cover in respect of the loan. Thereafter the first defendant, having itself relied on the fifth defendants' valuation for the purposes of its insurance agreement with the plaintiff, sought to recover its loss, including that attributable to market fall, from the fifth defendant. The judge awarded damages to the first defendant but disallowed any sum representing its loss attributable to market fall. His decision was followed in the fourth, fifth and sixth actions, but in the second and third actions such loss was held to be recoverable.

On appeals by the first defendant in the first action, the defendants in the second and third actions and by the plaintiffs in the fourth, fifth and sixth actions on the question whether loss attributable to market fall was recoverable by way of damages:–

Held, allowing the appeals in the first, fourth, fifth and sixth actions and dismissing the appeals in the second and third actions, that where a mortgage lender would not, but for the negligent valuation, have entered into the transaction with the borrower he could recover the net loss he had sustained as a result of having done so; that a fall in the market was foreseeable, and since, in such a case, the lender would not have entered into the transaction but for the valuer's negligence and could not escape from it unless and until the borrower defaulted, that negligence was the effective cause of his loss, and a fall in the market was not to be treated as a new intervening cause breaking the link between the valuer's negligence and the damage sustained; and, that, accordingly, on the assumed facts, the first defendant in the first action and the plaintiff mortgagees were entitled to recover damages in respect of the loss they had sustained which was attributable to market fall (post, pp. 419C–E, 420C–D, E–421B, F, 423H–424A, 425A, G, 427B–D, 428F, 431A–B).

Baxter v. F.W. Gapp & Co. Ltd. [1939] 2 K.B. 271, C.A. and *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223, H.L.(E.) applied.

Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd. [1991] 2 A.C. 249, H.L.(E.) distinguished.

Decisions of Phillips J. in *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.*, Judge Fox-Andrews Q.C. sitting on official referee's business in *B.N.P. Mortgages Ltd. v. Key Surveyors Nationwide Ltd.* and *B.N.P. Mortgages Ltd. v. Goadsby & Harding Ltd.* and Arden J. in *Mortgage Express Ltd. v. Bowerman and Partners* reversed.

A Decisions of Gage J. in *United Bank of Kuwait Plc. v. Prudential Property Services Ltd.* and Judge Byrt Q.C. sitting as a judge of the Queen's Bench Division in *Nykredit Mortgage Bank Plc. v. Edward Erdman Group Ltd.* upheld.

The following cases are referred to in the judgment of the court:

B *Alexander v. Cambridge Credit Corporation Ltd.* (1987) 9 N.S.W.L.R. 310
Avco Financial Services v. Holstein (1980) 109 D.L.R. (3d) 128
Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd. [1991] 2 A.C. 249; [1990] 3 W.L.R. 364; [1990] 2 All E.R. 947, H.L.(E.)
Baxter v. F.W. Gapp & Co. Ltd. [1938] 4 All E.R. 457; [1939] 2 K.B. 271; [1939] 2 All E.R. 752, C.A.
British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd. [1912] A.C. 673, H.L.(E.)
C *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568, H.L.(E.)
Corisand Investments Ltd. v. Druce & Co. [1978] E.G.D. 769
County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co. [1987] 1 W.L.R. 916; [1987] 1 All E.R. 289, C.A.
Duncan & Weller Pty. Ltd. v. Mendelson [1989] V.R. 386
Eagle Star Insurance Co. Ltd. v. Gale & Power (1955) 166 E.G. 37
D *First National Commercial Bank Plc. v. Humberts* [1995] 2 All E.R. 673, C.A.
Ford v. White & Co. [1964] 1 W.L.R. 885; [1964] 2 All E.R. 755
Galoo Ltd. v. Bright Grahame Murray [1994] 1 W.L.R. 1360; [1995] 1 All E.R. 16, C.A.
Hayes v. James & Charles Dodd [1990] 2 All E.R. 815, C.A.
Iron and Steel Holding and Realisation Agency v. Compensation Appeal Tribunal [1966] 1 W.L.R. 480; [1966] 1 All E.R. 769, D.C.
E *Livingstone v. Rawyards Coal Co.* (1880) 5 App.Cas. 25, H.L.(Sc.)
London and South of England Building Society v. Stone [1983] 1 W.L.R. 1242; [1983] 3 All E.R. 105, C.A.
Lowenburg, Harris & Co. v. Wolley (1894) 3 B.C.R. 416; (1895) 25 S.C.R. 51
McElroy Milne v. Commercial Electronics Ltd. [1993] 1 N.Z.L.R. 39
March v. E. & M.H. Stramare Pty. Ltd. (1991) 171 C.L.R. 506
Perry v. Sidney Phillips & Son [1982] 1 W.L.R. 1297; [1982] 3 All E.R. 705, C.A.
F *Philips v. Ward* [1956] 1 W.L.R. 471; [1956] 1 All E.R. 874, C.A.
Pilkington v. Wood [1953] Ch. 770; [1953] 3 W.L.R. 522; [1953] 2 All E.R. 810
Quinn v. Burch Bros. (Builders) Ltd. [1966] 2 Q.B. 370; [1966] 2 W.L.R. 1017; [1966] 2 All E.R. 283, C.A.
Raylon Investment Ltd. v. Bear Realty Ltd. (1981) 20 R.P.R. 288
Robinson v. Harman (1848) 1 Exch. 850
G *Royscot Trust Ltd. v. Rogerson* [1991] 2 Q.B. 297; [1991] 3 W.L.R. 57; [1991] 3 All E.R. 294, C.A.
Rumsey v. Owen White & Catlin [1978] E.G.D. 730, C.A.
Scholes v. Brook (1891) 64 L.T. 674, C.A.
Seeway Mortgage Investment Corporation v. First Citizens Financial Corporation (1983) 45 B.C.L.R. 87
Singer & Friedlander Ltd. v. John D. Wood & Co. (1977) 243 E.G. 212
H *Swingcastle Ltd. v. Alastair Gibson* [1990] 1 W.L.R. 1223; [1990] 3 All E.R. 463, C.A.; [1991] 2 A.C. 223; [1991] 2 W.L.R. 1091; [1991] 2 All E.R. 353, H.L.(E.)
Trade Credits Ltd. v. Baillieu Knight Frank (N.S.W.) Pty. Ltd. (1985) 12 N.S.W.L.R. 670

Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport [1942] A.C. 691; [1942] 2 All E.R. 6, H.L.(E.) A

Watts v. Morrow [1991] 1 W.L.R. 1421; [1991] 4 All E.R. 937, C.A.

The following additional cases were cited in argument:

Alliance and Leicester Building Society v. Edgestop Ltd. [1993] 1 W.L.R. 1462; [1994] 2 All E.R. 38

Associated Portland Cement Manufacturers (1900) Ltd. v. Houlder Brothers & Co. Ltd. (1917) 86 L.J.K.B. 1495 B

Banco de Portugal v. Waterlow & Sons Ltd. [1932] A.C. 452, H.L.(E.)

Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd. [1992] 1 A.C. 233; [1991] 2 W.L.R. 1279; [1991] 3 All E.R. 1, H.L.(E.)

Berg Sons & Co. Ltd. v. Adams (unreported), 10 July 1992, Hobhouse J.

Bristol & West Building Society v. Kramer (unreported), 16 December 1994, Blackburne J. C

Czarnikow (C.) Ltd. v. Koufos [1969] 1 A.C. 350; [1967] 3 W.L.R. 1491; [1967] 3 All E.R. 686, H.L.(E.)

Dodd Properties (Kent) Ltd. v. Canterbury City Council [1980] 1 W.L.R. 433; [1980] 1 All E.R. 928, C.A.

Doyle v. Olby (Ironmongers) Ltd. [1969] 2 Q.B. 158; [1969] 2 W.L.R. 673; [1969] 2 All E.R. 119, C.A. D

Evans (J.) & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd. [1976] 1 W.L.R. 1078; [1976] 2 All E.R. 930, C.A.

First National Commercial Bank Plc. v. Humberts (unreported), 30 July 1993, Judge David Smith Q.C.

HIT Finance Ltd. v. Lewis & Tucker Ltd. [1993] 2 E.G.L.R. 231

Inder Lynch Devoy & Co. v. Subritzky [1979] 1 N.Z.L.R. 87

Industria Azucarera Nacional S.A. (IANSA) v. Expresa Exportadora de Azucar (Cubazucar) [1982] Com.L.R. 171 E

International Shipping Co. (Pty.) Ltd. v. Bentley, 1990 (1) S.A. 680

Jamal v. Moolla Dawood Sons & Co. [1916] 1 A.C. 175, P.C.

Jobling v. Associated Dairies Ltd. [1982] A.C. 794; [1981] 3 W.L.R. 155; [1981] 2 All E.R. 752, H.L.(E.)

Johnson v. Agnew [1980] A.C. 367; [1979] 2 W.L.R. 487; [1979] 1 All E.R. 883, H.L.(E.)

Kingsway, The [1918] P. 344, C.A. F

Koch Marine Inc. v. D'Amica Societa di Navigazione A.R.L. [1980] 1 Lloyd's Rep. 75

McKew v. Holland & Hannen & Cubitts (Scotland) Ltd. [1969] 3 All E.R. 1621, H.L.(Sc.)

Malhotra v. Choudhury [1980] Ch. 52; [1978] 3 W.L.R. 825; [1979] 1 All E.R. 186, C.A.

Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B) [1949] A.C. 196; [1949] 1 All E.R. 1, H.L.(Sc.) G

Murphy v. Brentwood District Council [1991] 1 A.C. 398; [1990] 3 W.L.R. 414; [1990] 2 All E.R. 908, H.L.(E.)

Naughton v. O'Callaghan (Rogers, Third Party) [1990] 3 All E.R. 191

Nyckeln Finance Co. Ltd. v. Stumpbrook Continuation Ltd. [1994] 2 E.G.L.R. 143

Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd. (The Wagon Mound) [1961] A.C. 388; [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404, P.C. H

Roe v. Minister of Health [1954] 2 Q.B. 66; [1954] 2 W.L.R. 915; [1954] 2 All E.R. 131, C.A.

A *Sachs v. Miklos* [1948] 2 K.B. 23; [1948] 1 All E.R. 67, C.A.
Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd. [1994] 1 W.L.R. 1271; [1994] 4 All E.R. 225, C.A.
Stinnes Interoil G.m.b.H. v. A. Halcoussis & Co. (No. 2) [1984] 1 Lloyd's Rep. 676
Twycross v. Grant (1877) 2 C.P.D. 469, C.A.
Waddell v. Blockey (1879) 4 Q.B.D. 678, C.A.
B *Wilhelm, The* (1866) 14 L.T. 636
William Sindall Plc. v. Cambridgeshire County Council [1994] 1 W.L.R. 1016; [1994] 3 All E.R. 932, C.A.
Wroth v. Tyler [1974] Ch. 30; [1973] 2 W.L.R. 405; [1973] 1 All E.R. 897

The following additional cases, although not cited, were referred to in the skeleton arguments:

C *Anglia Hastings & Thanet Building Society v. House & Son (Wetheralls, Third Party)* (1981) 260 E.G. 1128
Axa Equity & Law Home Loans Ltd. v. Goldsach & Freeman (unreported), 18 February 1994, Judge Marr-Johnson
Bain v. Fothergill (1874) L.R. 7 H.L. 158, H.L.(E.)
Beoco Ltd. v. Alfa Laval Co. Ltd. [1995] Q.B. 137; [1994] 3 W.L.R. 1179; [1994] 4 All E.R. 464, C.A.
D *Campbell Mostyn (Provisions) Ltd. v. Barnett Trading Co.* [1954] 1 Lloyd's Rep. 65, C.A.
Carradine Properties Ltd. v. D. J. Freeman & Co., The Times, 19 February 1982; Court of Appeal (Civil Division) Transcript No. 60 of 1982, C.A.
Clark Boyce v. Mouat [1994] 1 A.C. 428; [1993] 3 W.L.R. 1021; [1993] 4 All E.R. 268, P.C.
Crabb v. Brinsley (1888) 5 T.L.R. 14
E *Esso Petroleum Co. Ltd. v. Mardon* [1976] Q.B. 801; [1976] 2 W.L.R. 583; [1976] 2 All E.R. 5, C.A.
Goody v. Baring [1956] 1 W.L.R. 448; [1956] 2 All E.R. 11
Gran Gelato Ltd. v. Richcliff (Group) Ltd. [1992] Ch. 560; [1992] 2 W.L.R. 867; [1992] 1 All E.R. 865
Great Lakes Steamship Co. v. Maple Leaf Milling Co. Ltd. (1924) 41 T.L.R. 21, P.C.
F *Groom v. Crocker* [1939] 1 K.B. 194; [1938] 2 All E.R. 394, C.A.
Hadley v. Baxendale (1854) 9 Exch. 341
Henderson v. Merrett Syndicates Ltd. [1995] 2 A.C. 145; [1994] 3 W.L.R. 761; [1994] 3 All E.R. 506, H.L.(E.)
Hughes v. Lord Advocate [1963] A.C. 837; [1963] 2 W.L.R. 779; [1963] 1 All E.R. 705, H.L.(Sc.)
Hussey v. Eels [1990] 2 Q.B. 227; [1990] 2 W.L.R. 234; [1990] 1 All E.R. 449, C.A.
G *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1979] Ch. 384; [1978] 3 W.L.R. 167; [1978] 3 All E.R. 571
Miliangos v. George Frank (Textiles) Ltd. [1976] A.C. 443; [1975] 3 W.L.R. 758; [1975] 3 All E.R. 801, H.L.(E.)
Moody v. Cox and Hatt [1917] 2 Ch. 71, C.A.
Parsons (H.) (Livestock) Ltd. v. Uttley Ingham & Co. Ltd. [1978] Q.B. 791; [1977] 3 W.L.R. 990; [1978] 1 All E.R. 525, C.A.
H *Radford v. De Froberville* [1977] 1 W.L.R. 1262; [1978] 1 All E.R. 33
Smith v. Baker & Sons [1891] A.C. 325, H.L.(E.)
Smith v. Leech Brain & Co. Ltd. [1962] 2 Q.B. 405; [1962] 2 W.L.R. 148; [1961] 3 All E.R. 1159

T. & S. Contractors Ltd. v. Architectural Design Associates (unreported), A
16 October 1992, Judge Rich

Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd. [1971] 1 Q.B. 88; [1969] 3 W.L.R. 927; [1969] 3 All E.R. 1681

Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 K.B. 528; [1949] 1 All E.R. 997, C.A.

Weld-Blundell v. Stephens [1920] A.C. 956, H.L.(E.)

Wills v. Wood (1984) 128 S.J. 222, C.A. B

Wooldridge v. Sumner [1963] 2 Q.B. 43; [1962] 3 W.L.R. 616; [1962] 2 All E.R. 978, C.A.

BANQUE BRUXELLES LAMBERT S.A. v. EAGLE STAR INSURANCE CO. LTD. AND OTHERS

APPEAL from Phillips J.

The plaintiff, Banque Bruxelles Lambert S.A., by a writ issued on C
22 February 1991 and an amended statement of claim, claimed damages against Eagle Star Insurance Co. Ltd, Maurice Markovits, Allied Dunbar Assurance Plc., Lewis & Tucker Ltd. and John D. Wood Commercial Ltd., in respect of property alleged to have been negligently valued in 1989 in the sum of £44·35m. by the fifth defendant, such property being security for a loan of £39·915m. advanced to the borrower who D
subsequently defaulted in repayment. The plaintiff claimed against the first defendant the sum of £23,490,091 representing the loss recoverable under a contract of insurance whereby the first defendant provided mortgage indemnity cover in respect of the plaintiff's loan to the borrower. During trial of the action the first defendant compromised the claim against it by paying the plaintiff the sum of £7,437,220 and, by an amended notice served on 28 January 1993 pursuant to R.S.C., Ord. 16, r. 8, sought to E
recover that sum from the fifth defendant. The judge found that at the date of valuation the value of the property was £27·5m. and that, as at 31 March 1993, being the relevant date for the assessment of damages, the value was £20m. He held that the fifth defendant owed and was in breach of a duty of care to the first defendant in valuing the property and by his order, dated 21 December 1993, entered judgment for the first defendant F
in the sum of £5,371,320, such sum excluding an amount in respect of the first defendant's loss attributable to the fall in the market.

By a notice of appeal dated 16 March 1994 the first defendant appealed on the grounds, inter alia, that (1) the judge, having correctly found that the relevant transaction would not have taken place if the fifth defendant's valuation had been competent and that the first defendant had relied on the valuation in agreeing to issue the indemnity insurance policies to the G
plaintiff, should have held that the appropriate measure of damages was the sum which would place the first defendant in the same position as it would have been if it had not issued the policies and paid the plaintiff the sum of £7,437,220 in reasonable settlement of its claim; (2) the judge erred in holding that he was not bound by *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 K.B. 271 and *Swingcastle Ltd. v. Alastair Gibson* [1991] H
2 A.C. 223 to hold that the fifth defendant was liable for the full amount of the losses suffered by the first defendant; alternatively, he gave insufficient weight to the approach adopted in those cases of restoring the plaintiff to the position he would have been in if the transaction had not

A taken place; (3) the judge erred in holding, by implication, that the first defendant accepted two separate risks, namely (a) that of negligent overvaluation and (b) that of fall in market value; alternatively, he erred in holding that the first defendant relied on the fifth defendant in relation to the first but not the second risk; and he gave insufficient weight to the evidence before him on those issues; (4) the judge erred in treating as relevant to his assessment of damages the fact that the first defendant
B would have insured a loan of 90 per cent. of a competent valuation: that was irrelevant in the light of the judge's finding that the transaction would not have taken place if the fifth defendant had provided a competent valuation; (5) alternatively, if it were relevant whether the first defendant would have been willing to provide cover if the transaction had been structured on a competent valuation, the judge ought to have held,
C on the facts, that the first defendant would have refused to provide such cover.

UNITED BANK OF KUWAIT PLC. v. PRUDENTIAL PROPERTY SERVICES LTD.

APPEAL from Gage J.

D By a writ and statement of claim dated 7 August 1992 the plaintiff, the United Bank of Kuwait Plc., claimed damages against the defendant, Prudential Property Services Ltd., for breach of contract and in tort in respect of the sum of £1·75m. advanced to the borrower against the security of property valued in 1990 by the defendant at £2·5m. Following the borrower's default the property was sold in 1992 for £950,000. The judge found that the proper valuation at the valuation date would have
E been £1·8m. to £1·85m. or £1·85m., and dismissed the defendant's claim that the plaintiff had caused or contributed to its loss. By his order dated 10 December 1993 the judge entered judgment for the plaintiff for damages to be assessed, on the basis that the plaintiff was entitled to recover all losses, including that attributable to market fall, sustained by reason of having made the advance to the borrower on the security of the
F property valued by the defendant.

By an amended notice of appeal, dated 31 January 1994, the defendant appealed on the grounds that (1) the judge erred in determining the "correct" value of the property, since there was no correct value, but only a bracket within which a reasonably competent valuation could properly have fallen; the judge ought therefore to have decided the amount of the highest valuation that the defendant could properly have advised; (2) the
G judge ought to have held that on an assessment of the damages on a no-transaction basis, the defendant's liability should have been limited to the difference between the valuation advised (£2·5m.) and either (a) the highest non-negligent valuation or (b) the "correct" valuation; (3) alternatively, the judge ought to have held that for the purpose of assessing the plaintiff's damages there ought to be deducted from the plaintiff's actual loss such amount as was attributable to a fall in the value
H of the property between the date of the defendant's valuation and the date of sale; (4) the judge was not justified in finding that the plaintiff had discharged the burden of proving that, had the defendant not been negligent, there would have been no transaction; and (5) the judge ought

to have found that there had been contributory negligence on the part of the plaintiff.

NYKREDIT MORTGAGE BANK PLC. v. EDWARD ERDMAN GROUP LTD.

APPEAL from Judge Byrt Q.C. sitting as a judge of the Queen's Bench Division.

By a writ, dated 8 August 1991, and a statement of claim, amended on 10 December 1992, the plaintiff, Nykredit Mortgage Bank Plc., claimed damages against the defendant, Edward Erdman Group Ltd. (formerly Edward Erdman, an unlimited company), for breach of contract and in tort in respect of its valuation of property in the sum of £3·5m. against the security of which the plaintiff advanced a loan of £2·45m. to the borrower. Following the borrower's default the property was sold for the sum of £345,000. By its re-amended defence, dated 4 February 1993, the defendant denied the claim and asserted that the plaintiff's loss was caused or contributed to by its negligence. The judge found that as at the date of valuation no figure over £2m. could be justified so that the defendant had been negligent. He dismissed the defendant's assertion of contributory negligence and by his order dated 1 October 1993 entered judgment for the plaintiff in the sum of £2,105,000, together with interest, such sum to include damages in respect of the plaintiff's loss attributable to market fall.

By a notice of appeal dated 11 November 1993 and a supplemental notice of appeal dated 14 February 1994 the defendant appealed on the grounds, inter alia, that (1) the judge should not have concluded that the element of loss attributable to the collapse on the value of the security property between the date of its valuation and the date of its sale was recoverable by the plaintiff from the defendant because (a) the collapse in the property market was not foreseeable, (b) the defendant owed the plaintiff no duty to protect the plaintiff against such a loss, (c) the defendant's negligence did not cause that loss and (d) such loss was too remote to be recoverable; and (2) the judge should have deducted a sum representing market fall from the loss which might be recovered by the plaintiff.

By a respondent's notice dated 24 March 1994 the plaintiff sought that the judge's decision be affirmed on the additional grounds that the defendant was obliged to advise on and should have appreciated the general weakening of the market and that since a decline in the market was a foreseeable consequence of the defendant's breach of duty the whole sum awarded by the judge was properly recoverable.

B.N.P. MORTGAGES LTD. v. KEY SURVEYORS NATIONWIDE LTD.

APPEAL from Judge Fox-Andrews Q.C. sitting on official referee's business.

By a writ dated 23 February 1993 and a statement of claim the plaintiff, B.N.P. Mortgages Ltd., claimed damages for breach of contract and in tort against the defendant, Key Surveyors Nationwide Ltd., in respect of the alleged negligent valuation of property in the sum of £90,000 which was to be held as security against an advance of £72,000 made by the plaintiff to the borrower. The property was sold on the borrower's default for £60,000. The judge held that the open market value of the property as at the date of valuation was £72,500, that the defendant was accordingly negligent but that the plaintiff had failed to mitigate its loss and was guilty of 25 per cent. contributory negligence. He further held that the plaintiff was not entitled to recover its loss attributable to market fall and, by his order made on 19 July 1994, awarded the plaintiff damages in the sum of £23,101.

By a notice of appeal, dated 2 August 1994, the plaintiff appealed on the grounds that the judge erred in (1) distinguishing *Baxter v. F. W. Gapp & Co. Ltd.* [1939] 2 K.B. 271 when he should have followed that decision; (2) concluding that the relevant fall in the market had been significant; (3) following the decision of Phillips J. in *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.* (unreported), 21 December 1993 and failing to follow that of Gage J. in *United Bank of Kuwait v. Prudential Property Services Ltd.* (unreported), 10 December 1993; and, in the alternative, (4) loss represented by the general market fall, whether insignificant or catastrophic, and its consequences, were not too remote or otherwise irrecoverable by a lender who relied on a negligent overvaluation in a no-transaction case; and (5) the judge should have found on the facts that the plaintiff's loss attributable to market fall was foreseeable by the defendant.

By a respondent's notice, dated 5 September 1994, the defendant sought to rely on the judge's finding that it was not responsible for loss resulting from market fall on the additional grounds that (1) the defendant owed no duty to protect the plaintiff against such a loss, whether or not significant; (2) the plaintiff did not rely on the valuation advice of the defendant to protect it from such a loss; (3) the defendant's breach of duty did not cause that part of the plaintiff's loss; (4) that such loss was too remote to be recoverable from the defendant; and (5) *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 K.B. 271 did not govern the principles applicable to such a case.

B.N.P. Mortgages Ltd. v. Goadsby & Harding Ltd.

Appeal from Judge Fox-Andrews Q.C. sitting on official referee's business.

By a writ and an amended statement of claim, dated 2 December 1992, the plaintiff, B.N.P., claimed damages against the defendant, Goadsby & Harding Ltd., for breach of contract and in tort in respect of the defendant's valuation in 1990 of property in the sum of £245,000 which was to be held as security against a loan of £196,215 advanced by the plaintiff to the borrower. After the borrower's default the plaintiff sold the property in 1992 for the sum of £100,000. On determination of preliminary issues the judge held on 17 June 1994 that the defendant's valuation had been negligent, that the true value as at the date of valuation was £180,000, that it was a no-transaction case and that the plaintiff could not recover that part of its loss which was attributable to market fall. He accordingly answered preliminary issue 6, namely, whether the plaintiff could recover that part of its loss which was represented by the reduction in the value of the property between the date of the valuation and that of sale, in the negative. A

By a notice of appeal dated 15 July 1994 and leave granted by the judge the plaintiff appealed on the grounds that (1) the judge was bound to follow *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 K.B. 271 and should not have followed Phillips J. in *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.*, 21 December 1993; and (2) the judge should have concluded on the facts that the plaintiff did look to the defendant for advice on market movements following valuation. B

By leave granted by Saville L.J. and a notice of appeal, dated 25 November 1994, the plaintiff also appealed on the ground that the judge had been wrong to find that no element in the 20 per cent. discount in the advance made to the borrower covered the plaintiff against the risk of a fall in the value of the property between the date of valuation and the date of advance. C

MORTGAGE EXPRESS LTD. v. BOWERMAN AND PARTNERS

APPEAL from Arden J.

By a writ dated 15 April 1993 and a re-amended statement of claim the plaintiff, Mortgage Express Ltd., claimed damages against the defendant solicitors, Bowerman and Partners, for negligence and breach of contract in respect of its alleged failure in 1992 to inform the plaintiff prior to exchange of contracts or completion that the property in respect of which the plaintiff agreed to advance the sum of £180,150 by way of mortgage to the borrower on a valuation of £199,000 had been the subject of two recent sales, and that the vendor was selling at a profit, having himself purchased the property for £150,000. After the borrower's default the plaintiff repossessed and, in 1992, sold the property for the sum of £96,000. The plaintiff claimed, inter alia, the loss suffered in selling the property after the general fall in property market prices, namely the difference between £120,000, the true open market valuation at the date of the transaction, and the sum of £96,000 for which the property was sold. On 11 May 1994 the judge determined that the damages recoverable by the plaintiff did not include such loss. D E F

By a notice of appeal dated 10 June 1994 the plaintiff appealed on the grounds, inter alia, that the judge was wrong in law (1) in following the reasoning and decision of Phillips J. in *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.*, 21 December 1993 and in failing to follow Gage J. in *United Bank of Kuwait Plc. v. Prudential Property Services Ltd.*, 10 December 1993; (2) in holding that *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 K.B. 271, *Scholes v. Brook* (1891) 64 L.T. 674; *London and South of England Building Society v. Stone* [1983] 1 W.L.R. 1242 and *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223 did not bind the court from concluding that the defendant was not liable in a no-transaction case for loss attributable to a fall in the market value; (3) in rejecting the plaintiff's submission that, since the plaintiff would not have entered into the transaction but for the defendant's negligence, the defendant was liable for the whole loss suffered by the plaintiff; (4) in holding that there was no causal link between the over-valuation and the loss resulting from the fall in the market value; and (5) in rejecting the submission that the G H

Banque Bruxelles case was distinguishable on the ground that it concerned valuers rather than solicitors.

By a respondent's notice dated 28 June 1994 the defendant cross-appealed on issues of liability to be the subject of separate appeal.

The six appeals were heard together. The facts are stated in the judgment of the court.

Michael Lyndon-Stanford Q.C., Mark Hapgood Q.C. and *Richard Morgan* for the first defendant in the first action. Where negligent advice induced a plaintiff to enter into a transaction, the purpose of awarding damages to the plaintiff is to put him in the position in which he would have been if the negligence had not occurred. Where the transaction was a loan by the plaintiff to a third party and the plaintiff, if properly advised, would have made a lower loan (a "transaction case") the measure of damages is prima facie the difference between the amount lent and the lower amount: see *Robinson v. Harman* (1843) 1 Exch. 850, 855; *Livingstone v. Rawyards Coal Co.* (1880) 5 App.Cas. 25, 39; *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223, 238 and *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673. Where the transaction was a loan and the plaintiff, competently advised on value, would not have entered into the transaction (a "no-transaction case") the measure of damages is the amount of his loss in the transaction: see *Scholes v. Brook* (1891) 64 L.T. 674; *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 K.B. 271; *Corisand Investments Ltd. v. Druce & Co.* [1978] E.G.D. 769; *London and South of England Building Society v. Stone* [1983] 1 W.L.R. 1242 and the *Swingcastle* case [1991] 2 A.C. 223. Any lesser sum fails to put the plaintiff in the position he would have been in if the negligence had not occurred. The same principles apply where the plaintiff is an insurer of the loan rather than the lender. The authority of *Baxter v. F.W. Gapp & Co.* on the point in issue in the present case has not been weakened by subsequent cases: see the *Swingcastle* case [1991] 2 A.C. 223. *Lowenburg, Harris & Co. v. Wolley* (1895) 25 S.C.R. 51 is not to be followed: see *Stone's* case [1983] 1 W.L.R. 1242.

The causal link between the defendant's negligence and the plaintiff's loss may be broken by the intervention of a new cause for which the defendant is not liable. However, the fall in market value was reasonably foreseeable and did not constitute a new intervening cause: see *Iron and Steel Holding and Realisation Agency v. Compensation Appeal Tribunal* [1966] 1 W.L.R. 480 and *Royscot Trust Ltd. v. Rogerson* [1991] 2 Q.B. 297.

The judge was wrong to treat the risk of negligent valuation and the risk of market fall as separate risks. That was not the case. The first defendant accepted what was both commercially and contractually a single risk and the valuer's negligence vastly increased the overall degree of risk in the transaction to an extent which far exceeded the degree of risk which the first defendant was willing to accept. The judge's view that negligent valuation and market fall were separate causes of separate losses was equally wrong. His reasoning, founded on *Philips v. Ward* [1956] 1 W.L.R. 471, was flawed and his reliance on *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1991] 2 A.C. 249 was misplaced.

The valuer is not to be considered as if he were an underwriter, whether in respect of separate risks or of the whole venture: see *Watts v. Morrow* [1991] 1 W.L.R. 1421 and the *Swingcastle* case [1991] 2 A.C. 223. The claim against the fifth defendant is therefore for damages to compensate the first defendant for the actual loss (not a notional loss of profit) caused by the valuer's breach of duty. If the type of loss was reasonably foreseeable it does not matter that the extent or quantum of that loss was not foreseeable: see *Wroth v. Tyler* [1974] Ch. 30; *Malhotra v. Choudhury* [1980] Ch. 52; *Johnson v. Agnew* [1980] A.C. 367 and *Sachs v. Miklos* [1948] 2 K.B. 23.

The disallowance for market fall deprives the plaintiff in a no-transaction case of the benefit of the protective cushion created by the difference between the amount of the valuation and the lower amount of the loan or insurance cover. In a transaction case the plaintiff will not lose the cushion on a conventional assessment of damages, so the judge should not have adopted an approach which would place the plaintiff in a no-transaction case in a worse position. The judge's treatment of market movement (as a separate speculation which was irrelevant for the valuers) produces the anomalous result that a lender or insurer who speculates in the market not only suffers loss when the market falls but is entitled to benefit if the market rises. That anomaly should not arise otherwise the law would not be even-handed, and there would be no reciprocity or "symmetry of risk:" see *Benjamin's Sale of Goods*, 3rd ed. (1987), p. 793, para. 1303 and *Jamal v. Moolla Dawood Sons & Co.* [1916] 1 A.C. 175. [Reference was also made to *Rumsey v. Owen White & Catlin* [1978] E.G.D. 730 and *Banco de Portugal v. Waterlow & Sons Ltd.* [1932] A.C. 452.]

The fifth defendant did not appear and was not represented.

Roger Toulson Q.C. and *Daniel Pearce-Higgins* for the plaintiff in the second action, adopting the argument of Lyndon-Stanford Q.C. The judge was correct, on the general principles applicable to the assessment of damages, not to deduct damages for loss attributable to market fall. [Reference was made to *Robinson v. Harman,* 1 Exch. 850; *Livingstone v. Rawyards Coal Co.,* 5 App.Cas. 25; *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223; *C. Czarnikow Ltd. v. Koufos* [1969] 1 A.C. 350 and *Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388.]

Where a person enters into a transaction in reliance on negligent advice by a valuer, surveyor or solicitor and incurs loss, damages are sometimes assessed as at the date of entering into the transaction and sometimes as at a later date: see *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916. Thus, the method of assessment is either "the successful transaction method," by measuring the difference between the value of that which was bargained for and the value of that which was acquired at the date of entering into the transaction (see *Philips v. Ward* [1956] 1 W.L.R. 471); or "the no-transaction method" (see *Hayes v. James & Charles Dodd* [1990] 2 All E.R. 815) whereby the plaintiff's actual financial state is compared with that which he would have been in if he had not entered into the transaction at all, and to award him the difference by taking into account expenses incurred in the transaction, the cost of extricating himself from it and any profit he would have made by putting his money to alternative use.

Where a person buys property in reliance on a negligent survey or over-valuation and retains the property with knowledge of the facts, the normal measure of damages is the difference between the value as represented and the true value as at the date of the purchase: see *Philips v. Ward* [1956] 1 W.L.R. 471; *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297 and *Watts v. Morrow* [1991] 1 W.L.R. 1421. In such a case market rise or fall after purchase will be irrelevant to the assessment of damages, but that approach can only be appropriate where the property is readily saleable. Where a plaintiff in a no-transaction case extricates himself from the transaction after discovering the facts, or intends to do so, he should recover the full amount of his loss: see *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223; *Baxter v. F.W. Gapp & Co. Ltd.* [1938] 4 All E.R. 457; [1939] 2 K.B. 271; [1939] 2 All E.R. 752; *Rumsey v. Owen White & Catlin* [1978] E.G.D. 730; *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916; *Watts v. Morrow* [1991] 1 W.L.R. 1421; *First National Commercial Bank Plc. v. Humberts* [1995] 2 All E.R. 673; *McGregor on Damages,* 15th ed. (1988), p. 749, para. 1212; *Jackson & Powell on Professional Negligence*, 3rd ed. (1992), p. 283, para. 3-137, and *Chitty on Contracts,* 27th ed. (1994), p. 1224, para. 26–029.

The plaintiff's damages could not be assessed as the difference between the amount of the loan and the true value of the rights obtained by the plaintiff in consideration of the loan, taking account of the risk of default by the borrower. The plaintiff's rights are not a saleable commodity. Such an approach would be speculative, unreal and contrary to authority: see *The Kingsway* [1918] P. 344. Lending against an overvalued property carried with it the foreseeable risk of the borrower's default. The plaintiff's loss would depend not solely on the amount of the overvaluation but also on the state of the market at the material time. But so long as the defendant's act or omission was the effective cause of the plaintiff's loss it need not be the sole cause. Market fluctuations cannot be regarded as so abnormal as to constitute a novus actus interveniens: see *C. Czarnikow Ltd. v. Koufos* [1969] 1 A.C. 350 and *McGregor on Damages*, 15th ed. (1988), p. 113, para. 182. The plaintiff will succeeed in recovering damages for market fall where the contract breaker did not cause the fall but the plaintiff's exposure to the risk was a foreseeable consequence of the breach and therefore not too remote. [Reference was made to *Koch Marine Inc. v. D'Amica Societa di Navigazione A.R.L.* [1980] 1 Lloyd's Rep. 75; *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.* [1994] 1 W.L.R. 1271; *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)* [1949] A.C. 196; *Royscot Trust Ltd. v. Rogerson* [1991] 2 Q.B. 297 and *Dodd Properties (Kent) Ltd. v. Canterbury City Council* [1980] 1 W.L.R. 433.] *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1991] 2 A.C. 249 is distinguishable; the analysis of that case by Phillips J. in the *Banque Bruxelles* case is flawed and he was wrong to place reliance on it.

Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605 is not in point. The specific and known purpose of the valuation was to enable the plaintiff to decide whether to make a loan, rather than how much to lend.

The defendant therefore fell within the principle that if advice is given by a valuer for the purpose of enabling the plaintiff to make an investment decision the valuer may be taken to be aware that he will be liable for damages if in consequence of his carelessness the decision turns out to produce a loss. Where the plaintiff is a commercial lender it should not be inferred that it would have used its money to make another secured loan involving the same risk of market fall. Therefore, the defendant's reliance on *Seeway Mortgage Investment Corporation v. First Citizens Financial Corporation* (1983) 45 B.C.L.R. 87 was misplaced.

It was also misconceived to say that, although some degree of market fall might be foreseeable, it was in the contemplation of the parties that the lender would protect itself against market fall by lending only a proportion of the full valuation. It is prudent banking practice for a lender to limit the loan to value ratio to lessen its risk for a variety of reasons. Such a margin provides against, inter alia, ancillary expenses but it does not lessen the negligent valuer's liability in respect of the lender's foreseeable loss since the lender is basing the extent of his margin on the full valuation provided by the valuer.

Michael Briggs Q.C. and *David Blayney* for the plaintiff in the third action, adopting the arguments of Lyndon-Stanford Q.C. and Toulson Q.C. The judge was correct to hold that no deduction should be made in respect of market fall and correct in applying *Swingcastle Ltd. v. Alastair Gibson* [1990] 1 W.L.R. 1223; [1991] 2 A.C. 223, which affirmed *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 K.B. 271.

The approach of Phillips J. in the *Banque Bruxelles* case was wrong; its effect was to introduce a new principle that (a) where a party contemplates a commercial venture that involves a number of heads of risk, and obtains professional advice in respect of one head before embarking on the venture, that advice should not make the adviser the underwriter of the whole venture and (b) where that advice relates to the existence or amount of some security against risk in the venture the adviser should not be liable for all the consequences of the venture whether or not the security would have protected against them. Such a principle seeks to establish a limitation of liability for professional negligence whereby in no circumstances can an adviser be liable for harm occasioned to his client by the occurrence of an event as to the risk of which he has not been asked to advise, even where the client would not have exposed himself to that risk if competently advised. [Reference was made to *C. Czarnikow Ltd. v. Koufos* [1969] 1 A.C. 350 and *J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd.* [1976] 1 W.L.R. 1078.] That principle is inconsistent with the general approach of English law to the assessment of damages which first identifies whether a breach of duty has occurred and then, by reference to the principles of causation and recoverability of damages, identifies those consequences for which the defendant should be held liable with the overriding objective of putting the plaintiff in the position he would have been in if the duty had been performed. In a no-transaction case, therefore, the plaintiff is entitled to recover the whole cost of being extricated from the transaction: see *Philips v. Ward* [1956] 1 W.L.R. 471; *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297; *County Personnel (Employment Agency) Ltd. v. Alan*

A *R. Pulver & Co.* [1987] 1 W.L.R. 916; *Watts v. Morrow* [1991] 1 W.L.R. 1421; *Rumsey v. Owen White & Catlin* [1978] E.G.D. 730; *McElroy Milne v. Commercial Electronics Ltd.* [1993] 1 N.Z.L.R. 39; *Hayes v. James & Charles Dodd* [1990] 2 All E.R. 815 and *Chitty on Contracts,* 27th ed. (1994), vol. 1, ch. 26, pp. 1224–1225, para. 26–029.

Phillips J.'s principle should not be introduced into the law because (a) in a no-transaction case it offends against the restitutionary principle: B see *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916; (b) application of the principle to lending cases would, save in relation to interest and expenses, confine limitation of the valuer's liability to the amount of his overvaluation, and would represent a fundamental change in the law which can only be effected by Parliament, and (c) the principle is based on an unreal analysis of the lender's decision C making process which in reality balances all risks on benefits together, rather than assessing each risk in isolation.

The appropriate limits on damage in a case such as this are spelled out by the existing principles of causation, intervening act and remoteness. Such a test may be relevant where, on competent advice, the lender would have lent a lesser sum, because it sets an upper limit on his recovery by reference to what he would have lent and because it generally excludes the D expenses of realising the security, which he would in any event have incurred. But it does not provide a conclusive test: see *Alexander v. Cambridge Credit Corporation Ltd.* (1987) 9 N.S.W.L.R. 310 and *Galoo Ltd. v. Bright Grahame Murray* [1994] 1 W.L.R. 1360. The principal vice of that test is that it proceeds from the viewpoint of hindsight and is therefore likely to impose unjust burdens on the wrongdoer. For present E purposes it is to be tempered by the requirement that the wrongdoing must be the causa causans of the harm, that is, that the harm resulted from the occurence of a risk which was, in advance of the event, identifiably increased by the wrongdoing, rather than from a background risk which the wrongdoing did nothing to increase: *Roe v. Minister of Health* [1954] 2 Q.B. 66; *The Wilhelm* (1866) 14 L.T. 636; *Associated Portland Cement Manufacturers (1900) Ltd. v. Houlder Brothers & Co.* F *Ltd.* (1917) 86 L.J.K.B. 1495; *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)* [1949] A.C. 196; *HIT Finance Ltd. v. Lewis & Tucker Ltd.* [1993] 2 E.G.L.R. 231 and *Nyckeln Finance Co. Ltd. v. Stumpbrook Continuation Ltd.* [1994] 2 E.G.L.R. 143.

Viewed from the valuation date, the twin possibilities of default by the borrower and harm resulting from a falling market are both forseeable G events, the risks of which, to the lender, are materially increased if due to a negligent over-valuation he makes a loan which otherwise he would not have made. Although neither market fall nor borrower's default is a risk about which the valuer is retained to advise, that does not excuse him from liability: see *Singer & Friedlander Ltd. v. John D. Wood & Co.* (1977) 243 E.G. 212 and *Corisand Investments Ltd. v. Druce & Co.* [1978] E.G.D. 769.

H A plaintiff should not recover damages for a harm which would not have occurred but for his own free decision, after the wrong had occurred, to expose himself to the risk of harm. That free decision was a novus actus interveniens breaking the chain of causation between the harm and

the wrongdoing. The courts habitually give effect to that principle by A
applying the breach date rule of assessment of damages so as to exclude the consequences of that election: see *Philips v. Ward* [1956] 1 W.L.R. 471; *Waddell v. Blockey* (1879) 4 Q.B.D. 678; *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.* [1994] 1 W.L.R. 1271; *Galoo Ltd. v. Bright Grahame Murray* [1994] 1 W.L.R. 1360; *Ford v. White & Co.* [1964] 1 W.L.R. 885; *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R.
1297 and *Watts v. Morrow* [1991] 1 W.L.R. 1421. [Reference was also B
made to *Sachs v. Miklos* [1948] 2 K.B. 23 and *Industria Azucarera Nacional S.A. (IANSA) v. Expresa Exportadora de Azucar (Cubazucar)* [1982] Com.L.R. 171.] But that rule is not invariable: see *Chitty on Contracts,* 27th ed. (1994) ch. 26, pp. 1224–1225, para. 26–029. Where there has been no election by the plaintiff to stay in or out of a market, or he is locked
into it, the novus actus principle does not apply and he will generally C
recover damages in respect of any aggravation of his loss attributable to market movements between the date of wrongdoing and the date he extricates himself from the transaction: see *C. Czarnikow Ltd. v. Koufos* [1969] 1 A.C. 350; *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916; *Dodd Properties (Kent) Ltd. v. Canterbury City Council* [1980] 1 W.L.R. 433; *Wroth v. Tyler* [1974] Ch.
30; *Malhotra v. Choudhury* [1980] Ch. 52; *Alliance and Leicester Building* D
Society v. Edgestop Ltd. [1993] 1 W.L.R. 1462; *Rumsey v. Owen White & Catlin* [1978] E.G.D. 730; *Doyle v. Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158; *McElroy Milne v. Commercial Electronics Ltd.* [1993] 1 N.Z.L.R. 39 and *Johnson v. Agnew* [1980] A.C. 367. The same principle applies in reverse where the defendant is entitled to credit in respect of market rise:
see *Hayes v. James & Charles Dodd* [1990] 2 All E.R. 875. E

The rationale for adopting a process of quantification of loss by reference to the crystallisation of the mortgagee's loss which occurs on sale of the security is that the lender's primary purpose is not to become the owner of the property, but to obtain a financial return on the outlay of his money by punctual repayment of the loan with interest; the acquisition of the mortgage over the property is secondary: compare
Philips v. Ward [1956] 1 W.L.R. 471. It is the nature of the transaction F
itself which deprives the lender of the freedom to cut his losses: see *Alliance and Leicester Building Society v. Edgestop Ltd.* [1993] 1 W.L.R. 1462. There is no magic in the choice between the date of the transaction and that of crystallisation by sale of the property. The former is simply a convenient means of excluding from the mathematical calculation of
damages any harm occasioned to the victim by his free choice after the G
transaction date to hold rather than to sell the property. The choice of diminution in value as at the transaction date as the basis for the assessment of the lender's loss would require a valuation not of the security property but of the rights of the lender as mortgagee, which might be worth more or less than the value of the security property. A valuation of the rights of the lender as at the date of the transaction would be a
difficult task. Therefore the differences in the established rules for H
quantifying damages between the no-transaction purchase case and the no-transaction loan case are based on sound conventional principles in which the novus actus principle plays an important part.

In a no-transaction loan case a lender does not merely expose himself to the vagaries of the property market, but equally of the money market, particularly where he has to borrow the funds to make the loan. So long as there is no default he is exposed to neither vagary, but once there is such default he is exposed to the vagaries of both. If there is no bar to recovery of loss caused through fall in the money market leading to increased interest rates, then there should be no bar to such recovery in respect of the property market and the approach of Phillips J. in the *Banque Bruxelles* case was inconsistent in that respect. The same is true of a case involving a locked in purchaser.

Romie Tager and *Ingrid Newman* for the plaintiff in the fourth action, adopting the arguments of Lyndon-Stanford Q.C., Toulson Q.C. and Briggs Q.C. The judge was wrong to apply the *Banque Bruxelles* case, since that was wrongly decided. The present case is indistinguishable from *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 K.B. 271 which is binding authority on the court. [Reference was also made to *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223; *London and South of England Building Society v. Stone* [1983] 1 W.L.R. 1242; *McGregor on Damages,* 15th ed. (1988), pp. 752–754, para. 1218; *Jackson & Powell on Professional Negligence,* 3rd ed. (1992), pp. 281–288, paras. 3–136–146 and *Chitty on Contracts,* 27th ed. (1994), vol. 1, pp. 1238–1239, para. 26-046.

The question whether there is a duty to protect a plaintiff against loss caused by market fall, although significant in the context of a duty arising in tort, is irrelevant here since the defendant valuer's contractual duty was to give advice on the open market value of the property and on current and immediately foreseeable market conditions. The defendant should have foreseen the possibility of the loan being a no-transaction case, that the borrower would default and that after re-possession the sale proceeds of the property would be diminished by market fall: see *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605 and *Murphy v. Brentwood District Council* [1991] 1 A.C. 398.

Where there is a special relationship giving rise to a duty in tort on the part of a professional man, it is contrary to public policy to differentiate between the required duties of contract and tort. The duty in contract is to carry out the professional service with reasonable skill and care: see section 13 of the Supply of Goods Act 1982. There can be no basis for limiting that duty by reference to the consequences of a subsequent fall in the market. The principles of assessment should apply equally in contract and in tort: see the *Swingcastle* case [1991] 2 A.C. 223. It would be unsound to differentiate between the elements making up the plaintiff's loss. There are no policy considerations which require the capital deficiency (the loss suffered by the difference between the true value and the ultimate sale price) to be treated differently from the funding deficiency (the cost of funding the advance, including the lender's own borrowing in order to create the fund) in a no-transaction case. The lender does not benefit from a rise in the market because his interest in the property is limited to his security; he earns a marginal profit on the transaction, measured as the difference between the cost of funding and the interest receivable. He should not therefore be required to suffer the consequences of a fall in the market. The valuer is closer to the market conditions giving rise to a capital deficiency than to the borrower's personal circumstances which have resulted in the funding deficiency, yet if Phillips J. was correct in the *Banque Bruxelles* case the valuer is fully liable for the funding deficiency but not for the capital deficiency.

The question of causation is answered by a common sense approach: see *Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport* [1942] A.C. 691; *Galoo Ltd. v. Bright Grahame Murray* [1994] 1 W.L.R. 1360; *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 K.B. 271; *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223 and *London and South of England Building Society v. Stone* [1983] 1 W.L.R. 1242. Accordingly, the plaintiff was entitled to recover as damages the costs, expenses and disbursements (including the cost of funding) which had been reasonably incurred as a result of the loan, giving credit for receipts from the borrower and the ultimate realisation of the security. It is the nature of any non-cash security, and not just property, that its value is likely to increase or decrease between completion of the loan and the occasion when the security has to be realised. It is unnatural and artificial to assume a stable future market for the security and the defendant should have foreseen the likelihood of the market falling. Equally he should have foreseen that the borrower might default. *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1991] 2 A.C. 249 is distinguishable. [Reference was also made to *Roe v. Minister of Health* [1954] 2 Q.B. 66; *Philips v. Ward* [1956] 1 W.L.R. 471; *Rumsey v. Owen White & Catlin* [1978] E.G.D. 730; *C. Czarnikow Ltd. v. Koufos* [1969] 1 A.C. 350 and *Watts v. Morrow* [1991] 1 W.L.R. 1421.] Remoteness of damage, although a different legal concept from causation, shares some of its characteristics: see *Stinnes Interoil G.m.b.H. v. A. Halcoussis & Co. (No. 2)* [1984] 1 Lloyd's Rep. 676. Causation is a question of fact, whereas remoteness of damage can involve issues of public or social policy: see *McGregor on Damages,* 15th ed. (1988), pp. 113–137, paras. 183–230, p. 162, para. 265 and the *Swingcastle* case [1991] 2 A.C. 223, 238.

Alternatively, if the defendant was not liable for the full loss attributable to market fall it had to bear that part of the fall which represented the difference between the true valuation and that amount which the lender would have been prepared to lend on that valuation, since that amount related to the risk he would have been prepared to take, but would not have taken on the true facts had they been presented to him. That difference was the direct consequence of the valuer's negligence.

Walter Aylen Q.C. and *Nigel Jones* for the plaintiff in the fifth action, adopting the argument of Tager. On the judge's findings the adviser is liable for any loss that flows from his breach, be it contractual or in tort. The loss crystallises inevitably after the loan by the default of the borrower, so that while credit is given for any repayments made by the borrower, on the debit side are the losses including that of market fall. The judge should have followed *Baxter v. F.W. Gapp* which was consistent with *London and South of England Building Society v. Stone* [1983] 1 W.L.R. 1242. [Reference was also made to *Singer & Friedlander Ltd. v. John D. Wood & Co.,* 243 E.G. 212; *Corisand Investments Ltd. v. Druce & Co.* [1978] E.G.D. 769; the *Swingcastle* case [1991] 2 A.C. 223; *HIT Finance Ltd. v. Lewis & Tucker Ltd.* [1993] 2 E.G.L.R. 231; *McGregor on*

Damages, 15th ed. (1988), pp. 749, 752, 752–753, paras. 1212, 1217, 1218 and *Clerk & Lindsell on Torts,* 16th ed. (1989), pp. 670–671, para. 11–45.] *Eagle Star Insurance Co. Ltd. v. Gale & Power* (1955) 166 E.G. 37 was wrongly decided and does not assist. Commonwealth authority, although persuasive only, supports the plaintiff's case: see *Trade Credits Ltd. v. Baillieu Knight Frank (N.S.W.) Pty. Ltd.* (1985) 12 N.S.W.L.R. 670 and *Duncan & Weller Pty. Ltd. v. Mendelson* [1989] V.R 386. *Lowenburg, Harris & Co. v. Wolley*, 25 S.C.R. 51; *Avco Financial Services v. Holstein* (1980) 109 D.L.R. (3d) 128; *Raylon Investment Ltd. v. Bear Realty Ltd.* (1981) 20 R.P.R. 288 and *Seeway Mortgage Investment Corporation v. First Citizens Financial Corporation,* 45 B.C.L.R. 87 are distinguishable.

In distinguishing between an event which is the effective cause of the loss and one that is simply the cause of the occasion of the loss, consideration must be given to the effect of the event in terms of the adoption or taking of risks by a plaintiff. An effective cause of loss would be an event which causes the plaintiff actually to take on the risk that gives rise to the loss or an event which exposes him to such a risk. An event which causes the occasion for the loss can be distinguished as an event which, while creating the risk that could give rise to the loss, does not without more place the plaintiff in a position of actually having taken or run that risk: see *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)* [1949] A.C. 196 and *Galoo Ltd. v. Bright Grahame Murray* [1994] 1 W.L.R. 1360. *Banque Keyser Ullmannn S.A. v. Skandia (U.K) Insurance Co. Ltd.* [1991] 2 A.C. 249 is distinguishable.

Nicholas Patten Q.C. and *Timothy Harry* for the plaintiff in the sixth action adopting the arguments of Lyndon-Stanford Q.C., Toulson Q.C. and Briggs Q.C. The *Banque Bruxelles* case, if it was correctly decided in respect of negligent valuers, was not applicable to a solicitor whose breach of duty was not directly related to the valuation but to the protection of the lender's interests. The solicitor's breach of duty caused the lender to make a loan which it would not otherwise have made and to expose its money to risks including a fall in the market. Even on the test in *Roe v. Minister of Health* [1954] 2 Q.B. 66 the solicitor was liable for the whole of the lender's loss.

On the basis of the findings made by the judge (that there was a duty of care, that there was breach of that duty, that it was a no-transaction case and that market fall was foreseeable and foreseen) the appropriate measure of damages is the difference between the actual advance and the sums recovered. The scale of the loss is irrelevant. On established principles there is no basis for making the deduction in respect of market fall. The breach cannot be said not to have caused the loss (see *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1991] 2 A.C. 249) since that would provide a complete defence to the claim. Nor can the deduction be justified on the ground of remoteness.

On the issue of reliance, the judge wrongly equated the position of the solicitor with that of a valuer. In any event, the question of reliance is relevant to establishing liability, but not to computation of damages. Damages are awarded on the basis of the loss flowing naturally and foreseeably from breach of duty. In any event the claim here is in contract so that reliance is unnecessary.

The judge was also wrong to hold by reference to the valuer's position that there was no causal link between the over-valuation and the loss. The relevant link was that between the negligent advice by the solicitor and the loss. The *Skandia* case was therefore not in point.

No policy reason precludes recovery in respect of market fall. The real nature of the loss in a no-transaction case is that the plaintiff has lost the money loaned. It is wrong to regard the lending of money on the security of real property as if it were an investment in real property. Considering the true nature of the present transaction and calculating the damages by the difference between the outgoings and the recovery, the question of what is recovered is a matter of mitigation. A lender has a discretion as to when to realise the security. The loss is not the reduction in the value of the security although, prima facie, the loan and the value of the security are relevant as a credit which must be provided at the date of crystallisation of the loss on realisation. The application of that principle in the normal way provides for the market whatever it might be. Therefore in a rising market credit must be given just as recovery of loss is given on a falling market. If it is treated simply as a matter of mitigation, the value of the security is taken as at the date of realisation, subject to mitigation. [Reference was made to *Bristol & West Building Society v. Kramer* (unreported), 16 December 1994, Blackburne J.]

Michael Harvey Q.C. and *Simon Brown* for the defendant in the fourth action. The judge was right to apply the principles explained by Phillips J. in the *Banque Bruxelles* case and to disallow that part of the plaintiff's claim which was attributable to market fall. The issue was solely as to causation since the market fall was not caused by the valuer's negligence. The correct approach is a three-stage process: (1) to identify the actual loss for which the plaintiff claims compensation; (2) to determine whether that loss was caused by the defendant's fault, by application of the "but for" test and, if that is satisfied, by application of the causative link test; and (3) to consider whether the damage is too remote. [Reference was made to *Chitty on Contracts,* 27th ed., vol. 1, p. 1211, para. 26–015; *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All E.R. 1621, 1623; *March v. E. & M.H. Stramare Pty. Ltd.* (1991) 171 C.L.R. 506, 510 and *Alexander v. Cambridge Credit Corporation Ltd.*, 9 N.S.W.L.R. 310.] The concept of "symmetry of risk" is irrelevant. In determining whether the defendant's breach of duty was the legal cause of the lender's loss it is not sufficient to show that "but for" his breach the loss would not have occurred: see *Galoo Ltd. v. Bright Grahame Murray* [1994] 1 W.L.R. 1360 and *March v. E. & M.H. Stramare Pty. Ltd.*, 171 C.L.R. 506. The breach of duty must be an effective or dominant cause and the court ultimately must adopt a common sense approach: see *Roe v. Minister of Health* [1954] 2 Q.B. 66 and *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)* [1949] A.C. 196; the *Galoo* case [1994] 1 W.L.R. 1360 and *Alexander v. Cambridge Credit Corporation Ltd.*, 9 N.S.W.L.R. 310. Foreseeability is not to be conflated with causation: the concepts are distinct. An event may be foreseeable but will be irrelevant unless a causative link is first established. In *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 K.B. 271 market fall was not in issue. *Corisand Investments Ltd. v. Druce*

& Co. [1978] E.G.D. 769 was a straight transaction case. Both cases are therefore distinguishable.

In a no-transaction case the valuer's breach of duty is not the legal cause of the loss attributable to market fall because market fall is the dominant or effective cause of that part of the lender's loss. A distinction must be drawn between (1) the cause of the making of the loan and (2) the cause of the lender's loss referable to market fall. The consequence of the valuer's breach is that the lender has less security for the loan than he intended, but that part of his monetary loss referable to market fall is caused, not by the breach, but the collapse in the market: see *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1991] 2 A.C. 249. The loss referable to market fall does not flow naturally from the valuer's breach: see *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673 and *Philips v. Ward* [1956] 1 W.L.R. 471.

To establish the required causative link calls for consideration of the function, role or purpose of the defendant in relation to the loss suffered by the plaintiff and the question whether there is as a matter of common sense the necessary nexus. In *Berg Sons & Co. Ltd. v. Adams* (unreported), 10 July 1992, Hobhouse J.; *The Wilhelm,* 14 L.T. 636; *Sachs v. Miklos* [1948] 2 K.B. 23; *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)* [1949] A.C. 196; *March v. E. & M.H. Stramare Pty. Ltd.,* 171 C.L.R. 506; *Rumsey v. Owen White & Catlin* [1978] E.G.D. 730 and *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916 the causal link was established. In *Quinn v. Burch Bros. (Builders) Ltd.* [1966] 2 Q.B. 370; *International Shipping Co. (Pty.) Ltd. v. Bentley,* 1990 (1) S.A. 680; *Associated Portland Cement Manufacturers (1900) Ltd. v. Houlder Brothers & Co. Ltd.,* 86 L.J.K.B. 1495; the *Skandia* case [1991] 2 A.C. 249 and the *Galoo* case [1994] 1 W.L.R. 1360 it was not. In *C. Czarnikow Ltd. v. Koufos* [1969] 1 A.C. 350 the causal link was not in issue. The valuer's function is to advise on the contemporary value of the property, not to give forecasts of how the market will or may move in future. That function contrasts with that of an investment adviser or merchant banker whose function would be to consider and advise on the future movement of markets and who would be liable for negligent advice in the event of a market fall. It is not sufficient to point to the risk to the lender arising from entering into the transaction. It is self-evident that anyone who enters into a venture incurs a greater risk than if he does not. The question is whether there was anything the valuer did which increased or was relevant to the risk of a market fall. The answer is that there was not since market fall was a separate risk. The analysis therefore of Phillips J. in the *Banque Bruxelles* case is correct.

The court must reach a recognisably fair result. It is common knowledge that there has been a collapse in the property market. That collapse caused part of the plaintiff's loss. Liability for that loss should not therefore be laid at the valuer's door. In the analogous case where the acquisition of property is induced by negligent advice or innocent or fraudulent misrepresentation the diminution in value rule has the effect of disallowing any damages in respect of loss attributable to market fall: see

Philips v. Ward [1956] 1 W.I.R. 471; *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297; *Watts v. Morrow* [1991] 1 W.L.R. 1421; *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.* [1994] 1 W.L.R. 1271, 1280; *Waddell v. Blockey,* 4 Q.B.D. 678; *William Sindall Plc. v. Cambridgeshire County Council* [1994] 1 W.L.R. 1016; *Twycross v. Grant* (1877) 2 C.P.D. 469 and *Naughton v. O'Callaghan* [1990] 3 All E.R. 191; and compare *County Personnel (Employment Agency) Ltd. v. Alan Pulver & Co.* [1987] 1 W.L.R. 916. There is also guidance from foreign authority: see *Lowenburg, Harris & Co. v. Wolley,* S.C.R. 51; *Avco Financial Services v. Holstein,* 109 D.L.R. (3d) 128; *Raylon Investment Ltd. v. Bear Realty Ltd.,* 20 R.P.R. 288; *Seeway Mortgage Investment Corporation v. First Citizens Financial Corporation,* 45 B.C.L.R. 87; *Alexander v. Cambridge Credit Corporation Ltd.,* 9 N.S.W.L.R. 310; *Inder Lynch Devoy & Co. v. Subritsky* [1979] 1 N.Z.L.R. 87 and *McElroy Milne v. Commercial Electronics Ltd.* [1993] 1 N.Z.L.R. 39 and *International Shipping C. (Pty.) Ltd. v. Bentley,* 1990 (1) S.A. 680. The plaintiffs cannot be distinguished from other lenders on the basis that they were "locked" into their transactions since mortgages can be bought and sold.

Where the lender has advanced only a percentage of the valuation and thus has a protective cushion, the correct approach is to deduct the cushion from the true value since market fall down to the level of the cushion will not cause him any loss. Only fall below the cushion will be loss occasioned by market fall.

Ronald Walker Q.C. and *Vincent Moran* for the defendant in the second action. The judge was wrong to award damages in respect of loss attributable to market fall. The valuer's liability to the plaintiff for negligence was limited to the excess valuation and no more. If, therefore, the plaintiff's loss was less than that amount he could recover the whole of his loss, but if it was greater he could not recover more than the amount of the excess valuation. The reason why the plaintiff suffered loss was irrelevant. Loss due to market fall was not recoverable since it was not attributable to the valuer's breach of duty. It was for the lender to take his own precautions against market fall, as by lending less than the full valuation. The plaintiff relied on the valuation to determine the extent of the loan, but not whether it should be made: see *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605; *Lowenburg, Harris & Co. v. Wolley,* 25 S.C.R. 51; *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1991] 2 A.C. 249 and *Galoo Ltd. v. Bright Grahame Murray* [1994] 1 W.L.R. 1360. The decline in the market was not within the reasonable contemplation of the parties at the date of the breach of contract. Where the plaintiff is a commercial lender it should be inferred that the money would have been used for a similar transaction, and so would have been exposed to the same risk of market fall: see *Seeway Mortgage Investment Corporation v. First Citizens Financial Corporation,* 45 B.C.L.R. 87.

An appropriate method of assessing the damages would be (a) to assess the damages as the judge did, but to deduct such part of the loss in value of the security as was attributable to market fall between the date of the advance and the date of the sale (see the *Banque Bruxelles* case); or (b) to assess the damages as at the date of the negligent valuation, alternatively of the advance, and to compensate the plaintiff on the basis

A of the diminution in value of the security at that date attributable to the defendant's negligence; or (c) to assess damages as the judge did, but to limit the defendant's liability to the difference between the valuation advised and either the highest non-negligent valuation or the correct valuation.

Baxter v. F. W. Gapp & Co. Ltd. [1939] 2 K.B. 271 is not binding or it can be distinguished and, in any event, ought not to be regarded as any
B longer governing the applicable principles. *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223 is not in point. *London and South of England Building Society v. Stone* [1983] 1 W.L.R. 1242 is not inconsistent with the defendant's case.

The principles of assessment of damages should depend on the breach date rule which applies in contract (see *Johnson v. Agnew* [1980] A.C. 367)
C and in actions by purchasers against negligent surveyors: see *Philips v. Ward* [1956] 1 W.L.R. 471; *Ford v. White & Co.* [1964] 1 W.L.R. 885; *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297; *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916 and *Watts v. Morrow* [1991] 1 W.L.R. 1421. The plaintiff cannot choose to have his damages assessed by reference to some later date and assessment cannot depend on the date on which it takes place or on the
D date of trial. There is only one exception, namely, where the plaintiff has a right in rem or an action for specific performance or for detinue, in which case he can choose a later date for assessment: see *Malhotra v. Choudhury* [1980] Ch. 52. The same principles apply whether the plaintiff is a purchaser or a lender: both rely on a valuation as a basis for the transaction. No distinction is to be drawn between transaction and no-
E transaction cases: see *Philips v. Ward* [1954] 1 W.L.R. 471. In all cases damages are based on the diminution in value calculated at the date of the breach.

The quantum of the plaintiff's damages ought not to depend on market fluctuations, still less on the trial date, if it is not to produce arbitrary and illogical results. If the court were to assess damages immediately upon the breach, it would be necessary to evaluate the loss caused by overvaluation
F of the security, including the loss due to the borrower's default: see *Eagle Star Insurance Co. Ltd. v. Gale & Power,* 166 E.G. 37. Where the assessment takes place after such default the full extent of the latter loss is known: see *Jobling v. Associated Dairies Ltd.* [1982] A.C. 794. The damages attributable to the breach should be limited to the difference between the negligent valuation and the highest non-negligent valuation
G and not the difference between the negligent and true valuations: see *Corisand Investments Ltd. v. Druce & Co.* [1978] E.G.D. 769. The principle on which damages are assessed is the same whether the plaintiff was or was not locked into the particular transaction, although the fact that he was must be taken into account in making the assessment: see *Eagle Star Insurance Co. Ltd. v. Gale & Power,* 166 E.G. 37. If the plaintiff was locked in the court will have to reflect the risk of a decline in the value of
H the security between the date of the assessment and the date when the security may become realisable. The diminution in value is the maximum sum for which the defendant can be held liable. The lender cannot recover more than the sum advanced. Thus, where only a percentage of the

valuation amount has been lent, so that a proportion is retained by the A lender as a protective cushion, the assessment of damages at the breach date would require a valuation of the loss of the protective cushion. Where, prior to trial, it was known that the risks had manifested themselves and the value of the security was less than the advance then the value of the loss of the cushion is 100 per cent. of that loss. As to ancillary expenses, damages should be limited to those expenses which are attributable to the excessive valuation. B

Michael de Navarro Q.C. and *Jonathan Ferris* for the defendant in the third action, adopting the argument of Harvey Q.C. The issue is causation, not remoteness. Only when causation is established do issues arise as to the restitutionary principle and the assessment of damages: see *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916, 924–925. The issues should be approached as a matter of C principle, not precedent. *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 K.B. 271 and *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223 and *London and South of England Building Society v. Stone* [1983] 1 W.L.R. 1242 are not in point. Market fall was not an issue in those cases. In cases of economic injury it is necessary to limit a professional's liability for negligence to those events for which that negligence is responsible. It is the nature of the duty broken which determines the causal responsibility D for loss. This explains why on the particular facts of certain authorities market fall has been recovered. [Reference was made to *McElroy Milne v. Commercial Electronics Ltd.* [1993] 1 N.Z.L.R. 39 and *Hayes v. James & Charles Dodd* [1990] 2 All E.R. 815, 824.] Phillips J.'s analysis in the *Banque Bruxelles* case is correct: see *Alexander v. Cambridge Credit Corporation Ltd.* (1987) 9 N.S.W.L.R. 310; *Banque Keyser Ullmann S.A.* E *v. Skandia (U.K.) Insurance Co. Ltd.* [1991] 2 A.C. 249 and *Galoo Ltd. v. Bright Grahame Murray* [1994] 1 W.L.R. 1360. [Reference was also made to *Berg Sons & Co. Ltd. v. Adams,* 10 July 1992.] The valuer's terms of engagement required a present day valuation, not speculation as to the future at some unspecified date when the borrower defaulted. It is the valuer's duty to prevent lending on a security property which, at the date of valuation, is worthless, or worth less than the limit set by the lender. It F is not the valuer's duty to warrant that the value of the property will not fall below the contemporary value for whatever future period the valuation advice remains liability laden. Further, the lender makes its own judgment as to the extent of protection it requires against future fluctuations in the security's value. The valuer's causal responsibility should therefore be limited to the consequences of overestimating the value of the security G property, and not for depreciation in the value of the security subsequent to the loan. Since the valuer is retained to advise on the initial adequacy of the security and security is required as protection against the borrower's default he cannot escape liability for loss caused in the event of that default. What he is not to be held responsible for are subsequent changes in the value of the security as a result of later events over which he has no control, and which he has not been asked to advise about or predict. H *Seeway Mortgage Investment Corporation v. First Citizens Financial Corporation,* 45 B.C.L.R. 87 is not applicable. The existence of the protective cushion explains why the valuer should not be liable for market

A fall: the lender has made its own independent decision on the degree of protection it requires against that and other future contingencies. It is not the valuer's fault if the cushion turns out to be inaccurate.

A breach of contract is a breach of a duty which the parties agreed to impose by an express or implied term, whereas in tort the breach is of a duty imposed by operation of law. But in each case the question remains: was the resulting loss caused in law by the breach?

B As to the symmetry point, in a valuation case the nature of the duty is to provide protection rather than an opportunity for profit; it is not to supply an item which can be bought and sold. Therefore if there is a negligent overvaluation the lender suffers no loss if the borrower does not default or the market rises to cover the default; in such a case the lender has no cause of action and accordingly "symmetry" is irrelevant.

C *Christopher Gibson* and *Fiona Sinclair* for the defendant in the fifth action, adopting the argument of the Harvey Q.C. The *Banque Bruxelles* case was rightly decided and the judge was right to follow it. The factual distinctions between that case and the present do not call for application of different principles.

Genevra Caws Q.C. and *Ben Patten* for the defendant in the sixth action, adopting the arguments of Harvey Q.C. and de Navarro Q.C. The D *Banque Bruxelles* case was correctly decided and the judge was right to apply the analysis in that case founded on causation to the present case. Policy considerations are not entirely to be left out of account, but the court's focus is not so much on the scope of the defendant's duty as on the nexus between the particular breach of duty and the plaintiff's loss.

The plaintiff's independent decision, in cases where damages are E confined to the difference between the contract value and the market value at the date of the breach referable to the availability or otherwise of the particular market, may be reasonable or unreasonable but will not result in his recovering damages if he remains inactive where there is an available market: see *Koch Marine Inc. v. D'Amica Societa di Navigazione A.R.L.* [1980] 1 Lloyd's Rep. 75 and *Waddell v. Blockey,* 4 Q.B.D. 678.

Where an independent decison which results in loss is taken before the F breach, a fortiori that loss will not be recoverable since the chain of causation never comes into being. Here the plaintiff made its own decision as to the relevant lending criteria against a background in which the valuation was only a part. Where a plaintiff succeeds in establishing by evidence that, as a result of a negligent overvaluation, he has lost part of the cushion designed to protect him against market fall, then, and only G then, he may be entitled to recover part of that fall.

The judge was right to treat solicitors and valuers in the same way. It would be extraordinary if they were sued in the same action and the valuers were held liable for market fall but not the solicitors. The solicitor's duty is to use due skill and care in performing the functions falling within his retainer. He does not warrant the accuracy of the information available to the lender, nor is it his duty to pass on all the H information which comes to his attention during the course of his performing specific duties under the retainer. Even if the solicitor was in breach of duty he should not be liable for a risk which the lender took as part of its lending policy before the valuation, the advance or the breach.

Lyndon-Standford Q.C., in reply, referred to *Bank of Nova Scotia v.* A
Hellenic Mutual War Risks Association (Bermuda) Ltd. [1992] 1 A.C. 233.

Toulson Q.C. in reply. The legal concepts of remoteness and causation
are not in watertight compartments: the word "remoteness" is sometimes
used in two ways or in mixed sense. Thus, it may denote that there is
insufficient nexus. But it may also mean that an event is not foreseeable.
The two are often amalgamated, for if it is foreseeable that A may lead to
B and B occurs, there is likely to be a causal connection: see *Royscot* B
Trust Ltd. v. Rogerson [1991] 2 Q.B. 297 and the *Monarch Steamship* case
[1949] A.C. 196.

As to causation, all that it is necessary to show is the causal nexus.
Once it is established that the breach caused the advance, the natural and
obvious conclusion is that it also caused the loss, if that loss was not
caused by some unexpected intervening and improbable matter: see *Bank* C
of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd.
[1992] 1 A.C. 233. It is over-subtle to distinguish in many cases between
the cause of the advance and the cause of the loss of the advance. The
function test does not satisfactorily explain the authorities.

Briggs Q.C. in reply. *Eagle Star Insurance Co. Ltd. v. Gale & Power*
166 E.G. 37, although distinguishable on its facts, is consistent with the D
analysis of the court's treatment of the question whether a plaintiff, for
the purposes of the assessment of damages, is locked into a market or free
to decide whether to stay in it: see *Trade Credits Ltd. v. Baillieu Knight*
(N.S.W.) Pty. Ltd., 12 N.S.W.L.R. 670. *Twycross v. Grant,* 2 C.P.D. 469;
Naughton v. O'Callaghan [1990] 3 All E.R. 191 and *William Sindall Plc. v.*
Cambridgeshire County Council [1994] 1 W.L.R. 1016 are distinguishable
on their facts. There is no market for individual mortgages. Nor could E
such a market be imagined since any potential purchaser would obtain a
true valuation of the property. [Reference was made to *First National*
Commercial Bank Plc. v. Humberts (unreported), 30 July 1993, Judge
David Smith Q.C.] The defendant's analysis conflicts with the law's
established approach to awarding interest. Damages for vexation and
distress which were refused on policy grounds in *Hayes v. James & Charles* F
Dodd [1990] 2 All E.R. 815, 824 are sui generis and do not provide a basis
for rejecting the claim in respect of market fall. It is important to keep
concepts of remoteness and causation distinct: see *Monarch Steamship Co.*
Ltd. v. Karlshamns Oljefabriker (A/B) [1949] A.C. 196. Foreseeability lies
at the heart of remoteness but plays only a part in analysing the concept
of novus actus: see *McKew v. Holland & Hannen & Cubitts (Scotland)*
Ltd. [1969] 3 All E.R. 1621 and *Berg Sons & Co. Ltd. v. Adams,* 10 July G
1992.

Avco Financial Services v. Holstein, 109 D.L.R. (3d) 128; *Lowenburg,*
Harris & Co. v. Wolley, 25 S.C.R. 51 and *Raylon Investment Ltd. v. Bear*
Realty Ltd., 20 R.P.R. 288 do not support the defendant's analysis. The
lender and the valuer were within the principle in the *Caparo* case [1990]
2 A.C. 605 even though that case is distinguishable on its facts. The nexus H
is constituted not just by looking in the abstract at the duty and the loss
but also at what was done in reliance on the duty, and then by considering
whether that caused the loss.

A Alternatively if the *Banque Bruxelles* case is correctly decided, the proper amount of market fall which ought to be included in the award of damages is that reflected by the cushion, as a percentage figure of the negligent valuation, rather than the true value.

Tager replied.

Aylen Q.C. replied.

Patten Q.C. in reply. The plaintiff's analysis of the defendant's duty is
B consistent with *Koch Marine Inc. v. D'Amica Societa di Navigazione A.R.L.* [1980] 1 Lloyd's Rep. 75. Damages in respect of market fall were recoverable even on application of the function test since it was the defendant's duty (or function) to prevent the lender entering into the transaction in the light of the information the defendant had received.

Harvey Q.C. in reply. *Bank of Nova Scotia v. Hellenic Mutual War*
C *Risks Association (Bermuda) Ltd.* [1992] 1 A.C. 233 is distinguishable on its facts.

Walker Q.C. also replied.

Cur. adv. vult.

20 February. The following judgment of the court was handed down.
D

SIR THOMAS BINGHAM M.R. This is the judgment of the court, to which all three members have substantially contributed. The court is concerned in these cases with a very familiar, everyday transaction: the lending of money by a commercial lender to a borrower on a mortgage of real property. In such a transaction the lender looks to the borrower to
E repay the principal sum lent, with interest sufficient to give the lender a commercial return. Before entering into the transaction the prudent lender will take steps to satisfy himself that the borrower will be able to repay. But the lender does not rely on the borrower's payment covenant alone. He obtains additional security by taking a charge on the land itself. Before advancing money he will wish to satisfy himself that the land provides acceptable security for the loan to be made. To that end the lender will
F ordinarily turn to a professional valuer for his opinion on the value of the land.

In five of the cases before the court the relevant claim is a claim in negligence against a valuer. The sixth claim is against a solicitor. In each case the complaint is the same: that the valuer negligently over-valued the land in question. In each case in which there has been a decision that
G complaint was upheld; in one of them that finding is challenged, but the appeal against that finding is not now before us. A finding of negligence was also made in the solicitor's case; and there also it is challenged.

So the question arises: to what damages is the lender entitled against the negligent valuer? The general answer given by authority is clear. If the claim is in contract it is given by Parke B. in *Robinson v. Harman* (1848) 1 Exch. 850, 855:
H

> "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

If the claim is in tort the answer is given by Lord Blackburn in *Livingstone v. Rawyards Coal Co.* (1880) 5 App.Cas. 25, 39:

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

It is not suggested that for present purposes there is any practical difference between these two tests.

In *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673, 688–689, Viscount Haldane L.C. said:

> "In order to come to a conclusion on the question as to damages thus raised, it is essential to bear in mind certain propositions which I think are well established. In some of the cases there are expressions as to the principles governing the measure of general damages which at first sight seem difficult to harmonise. The apparent discrepancies are, however, mainly due to the varying nature of the particular questions submitted for decision. The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity. Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co. v. Lever* (1878) 9 Ch.D. 20, at p. 25, 'The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.' As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has

suffered may be taken into account even though there was no duty on him to act."

These unimpeachable statements of principle are the necessary point of departure in considering any novel issue of damages in contract or tort not involving fraud or intentional wrongdoing. But their practical application calls for observance of other rules. An injured claimant may be compensated only for loss which is held, on investigation of the facts, to have been effectively caused by the breach. He may not be compensated for losses which though caused by the breach are too remote, as being outside the reasonable contemplation of the parties at the relevant time as a consequence of the breach. And there are certain heads of damage which, even if they satisfy the tests already listed, are treated by law as irrecoverable: the innocent victim of a breach of contract cannot, for example, be compensated in the ordinary way for the anguish or vexation he suffers as a result of the breach, however direct and foreseeable these consequences may be.

In order to analyse the questions which arise in these appeals, and before turning to the facts of the particular cases, it is convenient to assume some hypothetical but not unrepresentative facts:

(1) A valuer (V) negligently advises a lender (L) that the value of a property is £1m.

(2) L's policy is to lend 80 per cent. of valuation on mortgage.

(3) So L lends the borrower (B) £800,000 in reliance on the valuation on terms that it is repayable on default or at some future date or over some future period with interest payable in the meantime.

(4) In fact the market value of the property at the date of valuation was £500,000.

(5) Had V so advised no loan would have been made.

(6) B defaults in repayment and L repossesses and sells the land.

(7) By this time there has been a sharp fall in the property market.

(8) L sells for the best available price: £300,000.

What is the measure of L's damage recoverable against V? The main answers advanced are (a) £300,000 (£800,000 minus £500,000) plus the costs of realisation, reasonable interest etc.; and (b) £500,000 (£800,000 minus £300,000) plus the costs of realisation reasonable interest etc. The crucial difference between these measures is the loss resulting from the fall in the property market, by which we mean that part of the debt not repaid which is equal to the diminution in value of the security attributable to the fall in the property market. At the heart of these appeals lies the question whether this element of loss is recoverable by L against V or not.

On these facts the following major questions arise.

(1) What is the duty which V has broken?

(2) What is the loss for which L claims to be compensated?

(3) Did V's said breach of duty cause L's said loss?

(4) Are the damages which L claims too remote?

(5) Is there any reason of policy why L should not recover the compensation to which he would otherwise be entitled?

Question 1: The duty

In the absence of special conditions, and whether the duty is contractual or tortious, V's duty to L is the same: to take reasonable care

to give a reliable and informed opinion on the open market value of the A
land in question at the date of valuation. In the ordinary way V does not warrant that the land would fetch on the open market the value he puts on it, any more than a medical practitioner warrants that he will cure a patient of illness. In each case the duty is to exercise a reasonable standard of professional care in the circumstances, no more and no less. It is not, as was argued in *United Bank of Kuwait Plc. v. Prudential Property Services Ltd.*, a duty limited to safeguarding L against loss amounting to B
the difference between the overvaluation figure and the true value of the property. The complaint made and upheld against the valuers in these cases is accordingly not that they were wrong. A professional opinion may be wrong without being negligent. The complaint in each case is that the valuer expressed an opinion that the land was worth more than any careful and competent valuer would have advised. C

V knows that L seeks and obtains his valuation in order to guide him in deciding whether he will lend on the security of the land in question and, if so, how much he will lend. Both of them appreciate that if V overvalues the land L may lend more than he would have been willing to lend if the land had been correctly valued. The valuation is given so that L knows the current value of the land offered as security. The risk both have in mind is the risk that L will either lend when otherwise he would D
not or that he will lend more than he would be willing to lend on a correct valuation of the land offered as security for the loan.

In the absence of special instructions it is no part of V's duty to advise L on future movements in property prices, whether nationally or locally. The belief among buyers and sellers that prices are likely to move upwards or downwards may have an effect on current prices, and to that extent such belief may be reflected by V in his valuation. But his concern is with E
current value only. He is not asked to predict what will happen in future. His valuation is not sought to protect L against a future decline in property prices. In no sense is he a guarantor of L's investment decision.

Question 2: The loss

In *Hayes v. James & Charles Dodd* [1990] 2 All E.R. 815, 818–819, F
Staughton L.J. distinguished two methods of assessing loss. One he called the "no-transaction method," the other the "successful-transaction" method. The first method applies in cases where, if the professional adviser had not advised negligently, there would have been no transaction whether because the buyer would not have bought or the lender would not have lent or because the seller would not have sold or the borrower have G
borrowed. The second method applies in cases where, if the professional adviser had not advised negligently, there would have been a transaction but on different terms: there would still have been a sale or a loan but at a lower price or of a smaller sum.

The facts assumed above are those of a no-transaction case. Had V not negligently overvalued the land no loan would have been made. All H
the cases before the court rest on a finding to that effect.

L accordingly claims, on a straightforward application of the restitutionary principle, to be indemnified against all the loss he has suffered as a result of entering into the transaction. Thus on the debit side

L claims the sum which he advanced to B; the cost to him (L) of borrowing that money, if he borrowed it, and if he did not the income he would have earned by investing it elsewhere; and the costs of repossessing the land and realising his security. On the credit side, as L accepts, must be set any sums which L receives from B by way of interest or otherwise, and any sum received on sale of the property. L claims as damages the net debit which remains to him after giving credit for these items and any other credit items there may be.

The general correctness of this approach to a no-transaction case is not in doubt. Controversy focuses on one element: that part of L's loss which is attributable to a fall in the property market. That element, V argues, should be excluded from the calculation of L's loss on the ground that it is not a loss caused by the breach of any duty which V undertook. So the central issue (save in the *United Bank of Kuwait* case, in which the defendants put the matter on the basis of duty) is one of causation, the subject of question (3). Since questions (4) and (5) may be shortly and uncontroversially answered it is convenient to answer them before returning to the major issue relevant to these appeals.

Question 4: Remoteness

It is trite law that a plaintiff may not recover damages which are held to be too remote from the breach of duty of which he complains. Somewhat different language has been used to define the test in contract and tort, but the essence of the test is the same in each case. The test is whether, at the date of the contract or tort, damage of the kind for which the plaintiff claims compensation was a reasonably foreseeable consequence of the breach of contract or tortious conduct of which the plaintiff complains. If the kind of damage was reasonably foreseeable it is immaterial that the extent of the damage was not.

These principles call for no detailed consideration or analysis in these appeals since it has not been argued that L's claim for any part of his loss, including that part attributable to the fall in the property market, is too remote. The reason is obvious. L and V know, as everyone knows, that in any market prices may move upwards or downwards. That is the essence of a market. No one in recent times has expected property prices to remain stable over a prolonged period. It was plainly foreseeable that if, on the strength of an overvaluation by V, L entered into a mortgage transaction he would not otherwise have entertained, his risk of loss would be increased if the market moved downwards or reduced if it moved upwards.

Question 5: Policy

There are, as already noted, some cases in which a plaintiff is precluded from recovering certain heads of damage on grounds of policy: *Hayes v. James & Charles Dodd* [1990] 2 All E.R. 815, 824, *per* Staughton L.J. Considerations of policy may also be relied on in holding that one party owes no duty of care to another. But here it is common ground that V owes a duty of care to L, and the content of that duty has already been defined. While occasional reference has been made in general terms to

policy considerations, it has not been argued that L should be denied A
compensation otherwise recoverable on policy grounds. Nor has any rule or principle of policy been identified. If any judicial decision is to be founded on policy considerations it is desirable, perhaps even necessary, that those considerations should be expressly described. We have not been asked to rule that L is disentitled on policy grounds to recover that part of his loss which is attributable to the fall in the property market and we
do not do so. B

Question 3: Causation

The approach of the courts to issues of causation is in principle simple, pragmatic and commonsensical. In *Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport* [1942] A.C. 691, 698, Viscount Simon L.C.
said: C

> "It seems to me that there is no abstract proposition, the application of which will provide the answer in every case, except this: one has to ask oneself what was the effective and predominant cause of the accident that happened, whatever the nature of that accident may be."

Lord Wright added, at p. 706: D

> "This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it."

This was said in the context of whether the loss was caused by the risk
insured and, although it remains a guiding principle as to the application E
of commonsense, is qualified in the present field by the further principle that the event which the plaintiff alleges to be causative need not be the only or even the main cause of the result complained of; it is enough if it is *an* effective cause. It is also plain that an event is not regarded in law as causative if it does no more than provide the occasion for the result complained of: *Quinn v. Burch Bros. (Builders) Ltd.* [1966] 2 Q.B. 370;
Alexander v. Cambridge Credit Corporation Ltd. (1987) 9 N.S.W.L.R. 310; F
March v. E. & M.H. Stramare Pty. Ltd. (1991) 171 C.L.R. 506; *Galoo Ltd. v. Bright Grahame Murray* [1994] 1 W.L.R. 1360. This is not a proposition which requires the dignity of the Latin tongue to sustain it. If X assaults a fellow guest Y at a party given by Z, it is plain that Z's invitation of X provides the occasion for the assault. But for his invitation
the assault would not have occurred. But it could not possibly be said, G
without more, that Z caused the assault.

In the present appeals the argument on causation is limited. It is not said that V's negligent overvaluation did not cause L to advance money to B. It is accepted that it did. The argument is that it did not cause that part of L's loss which is attributable to the fall in the property market. That makes it apposite to recognise the point neatly made by Cooke P. in
McElroy Milne v. Commercial Electronics Ltd. [1993] 1 N.Z.L.R. 39, 41: H

> "the ultimate question as to compensatory damages is whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances."

A V argues that on the assumed facts that test is not satisfied. He had no duty to advise on future movements of the market, or to protect L against the risk of a fall. He did not, Prospero-like, cause the fall in the market. L's loss was caused by market forces, not the negligence of V, and cannot therefore be laid at V's door.

To this contention L gives two answers, one short, one longer. The short answer is this. Once it is accepted, as it is, that V's negligence caused B L to enter into a transaction he would not otherwise have entertained and from which he cannot escape at will, V is liable for all the loss which L suffered as a result unless it is too remote or the result of a new intervening cause or of a failure by L to take reasonable steps to mitigate his own loss. There is here no question of remoteness or failure to mitigate. The fall in the market, being readily foreseeable, was not a new intervening C cause; if the extent of the fall was a surprise the fact of *a* fall was not.

The longer answer is that it is commercially unrealistic to seek to separate the risk of negligent overvaluation and the risk of a fall in the market and to ascribe different causes to each. It is one transaction and one loss. If, in the case of commercial property, V overvalues the land he is likely to overvalue the revenue which B will draw from it. In the case of domestic property V's overvaluation will have the result that B commits D himself to pay more by way of interest than he otherwise would. If, in either case, the overvaluation is such that L, even after deducting a percentage from the valuation figure, advances more than the sale price, B may be able to avoid committing any of his own funds to the purchase of the land. In any of these events, the risk of default by B is enhanced, the protective effect of any deduction made by L in advancing his loan is E reduced and the prospective loss to L, in the foreseeable event of a market fall, increased.

In seeking to choose between these arguments we must seek such help as is obtainable from authority.

English authority

F In many of the reported cases involving surveyors and solicitors rather than valuers, damages have been assessed according to the successful-transaction method. In such cases the correct measure of damages has usually been held to be the difference between the open market value of the asset acquired as it actually was and the lower of the price paid and the open market value of the asset in the state in which, as a result of the negligent advice, it was thought to be. Examples are to be found in such G cases as *Philips v. Ward* [1956] 1 W.L.R. 471; *Pilkington v. Wood* [1953] Ch. 770; *Ford v. White & Co.* [1964] 1 W.L.R. 885; *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297 and *Watts v. Morrow* [1991] 1 W.L.R. 1421. In *Corisand Investments Ltd. v. Druce & Co.* [1978] E.G.D. 769, 807–811, Ralph Gibson J. adopted a similar approach in what he held to be a successful-transaction case involving a valuer: he based his award of H damages on the difference between what the lender advanced on the strength of a negligent overvaluation and what he would have advanced had he been correctly advised on value. A similar approach was agreed between counsel in *Singer & Friedlander Ltd. v. John D. Wood & Co.* (1977) 243 E.G. 212. In a successful-transaction case this is accepted as

the correct approach, at least in the ordinary way. In a no-transaction A
case the correct approach is not necessarily the same because the
underlying premise is not that the lender or buyer would have entered into
the transaction on more advantageous terms but that he would not have
entered into it at all.

Baxter v. F.W. Gapp & Co. Ltd. was tried at first instance by
Goddard L.J. [1938] 4 All E.R. 457 and an appeal against his decision
was dismissed by MacKinnon and du Parcq L.JJ. and Macnaghten J. B
[1939] 2 K.B. 271; [1939] 2 All E.R. 752. (References to the Court of
Appeal decision are hereafter given in the All England report, which is
fuller.) The facts were that the defendant valuer negligently overvalued a
house at £1,800. In reliance on that valuation the plaintiff, a private
lender, made an initial advance of £1,200. When the borrower made
default, and the house was sold, the best offer obtainable was £850. On C
damages Goddard L.J. said [1938] 4 All E.R. 457, 465:

> "I now turn to the question of what damages the plaintiff is
> entitled to recover. The plaintiff says: 'My measure of damage is this:
> if you had given me careful information, made a careful valuation,
> this property would have been valued at a considerably lower sum.
> I should never have entered into this transaction at all.' That is to say
> (I ignore the £150 for this purpose): 'I should never have entered into D
> that first mortgage transaction under which I advanced £1,200.
> Whether I should have entered into another transaction advancing
> £1,000, or whether I should have advanced £800, I do not know, but
> I should never have advanced this £1,200. I therefore entered into a
> transaction into which, but for your advice, I should never have
> entered. Therefore, if I show that I have a cause of action, my damage E
> is the damage I have sustained through entering into this transaction.'
> That seems to be right, unless, of course, some different measure has
> to be applied in ascertaining the actual damage he has sustained
> through the negligent valuation."

Having added to the capital loss the lender had suffered a sum for loss of
interest, insurance premiums, expenses of sale "and one thing and F
another," and given credit for the sum raised on sale of the house, the
judge reached a net figure for which he gave judgment.

On appeal it was argued that the damages should be limited to the
difference between the value advised by the valuer and the correct value
at that time: see [1939] 2 All E.R. 752, 753F. This argument was rejected
and the judge's decision affirmed. The lender was entitled to recover the G
whole loss he had suffered owing to the valuer's breach of duty: see
pp. 757G, 760C, 760H. In neither court was a finding made as to the true
value at the valuation date. Such a finding was not necessary on the
approach adopted. It is, however, clear that the case did not proceed on
the basis that there had been a fall in the property market: this was a fact
expressly mentioned by MacKinnon L.J., at p. 755G, and Macnaghten J.,
at p. 760E, although in each case with reference to liability not quantum. H

In *Eagle Star Insurance Co. Ltd. v. Gale & Power* (1955) 166 E.G. 37
the defendants negligently failed to report structural defects in a house
and as a result overvalued it. Mortgagees who had made a loan on the

strength of the report and valuation claimed damages which they intended to use to pay for repairs. It was not, it would seem, a no-transaction case, since their witness said that if the mortgagees had known the true value and condition of the property they would not have made such a large loan. But Devlin J. concluded that the market value of the house (if realised) and the borrower's payments would more than cover the sum which the mortgagees had advanced. He accordingly awarded them a small sum to indemnify them against the risk that the borrower would not pay and the cost of later surveys and reports.

In *Rumsey v. Owen White & Catlin* [1978] E.G.D. 730 a vendor acting on the advice of solicitors agreed to sell three shops with vacant possession. The sale price was £120,000 payable in four equal instalments, the last of them on completion. After the buyer had paid £90,000 but before completion it became clear that the vendor could not, for legal reasons about which the solicitors had negligently advised him, give vacant possession. To overcome this problem a further agreement was made: the shops were to be conveyed at once; and the last instalment was to be paid on completion, by which date there was to be vacant possession; but if the buyers did not on that date obtain vacant possession the vendor was to repurchase the shops for £90,000, the sum he had already received. Vacant possession was not obtained by the completion date. The vendor accordingly became obliged to repurchase for £90,000. By this time, as Lord Denning M.R. put it, at p. 733, "the property market had fallen to the very bottom." He had become subject to an obligation to repurchase for £90,000 what was now only worth £58,000. He had no money to repurchase, and sued his solicitors for damages for negligence, which was in due course admitted. It was held that if the solicitors had given the correct advice the appropriate purchase price at the outset would have been £112,000. Since he had only received £90,000 his primary damage was held to be £22,000. But he was held to be entitled, in addition, to a further sum to represent his proper liability to the buyers, which would be affected by changes in the current value of the shops. Roskill L.J. observed, at p. 740:

> "It seems to me that it would be quite unrealistic to try to break this case down into separate compartments and say that one part of the loss flows and the other part of the loss does not. The entirety of the loss, in my view, flows from the original wrong advice and the exposure of [the vendor] by that wrong advice to a contract he should never have been allowed to enter into."

This was treated as a successful-transaction case, and the argument was whether the second agreement broke the chain of causation. It was held that it did not. On that basis the court held the solicitors potentially liable for any loss the vendor might suffer as a result of his increased exposure to the buyers caused by the market fall. The court appears to have assumed, in the absence of specific argument, that this element of loss was properly recoverable against the solicitors although they had not caused the fall in the market.

The correctness of *Eagle Star Insurance Co. Ltd. v. Gale & Power,* 166 E.G. 37 was questioned by O'Connor L.J. in *London and South of England*

Building Society v. Stone [1983] 1 W.L.R. 1242. In that case counsel agreed, at p. 1260:

> "that the true measure of damages for the breach of a defendant surveyor's duty to value a property mortgaged to a plaintiff building society is the difference between the sum the plaintiff advanced on the false valuation, which the defendant carelessly and unskilfully put upon the property, and the sum the plaintiff would have advanced on the true valuation, which a careful and skilful surveyor would have put upon it."

Since this was a no-transaction case (see pp. 1256H, 1258D), it followed that no advance would have been made on a correct valuation. Subject to recoveries, the lender's loss was accordingly the whole of his advance and this is what the lender was held to be entitled to recover by a majority of the court. The main issue in the appeal was whether the trial judge had been right to make a deduction to reflect the value of the borrower's covenant which the lender could have but had not enforced; on this issue Sir Denys Buckley dissented. The suggestion that *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 All E.R. 752 was decided per incuriam was rejected; it was held to be binding on the Court of Appeal.

County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co. [1987] 1 W.L.R. 916 was a no-transaction case (see p. 926E) concerning negligent advice by a solicitor. The court held that it was inappropriate to apply the diminution in value rule, and ruled that the plaintiffs were entitled at least to recover the cost of extricating themselves from the predicament into which the solicitor's negligence had led them. No change in market value was involved.

Hayes v. James & Charles Dodd [1990] 2 All E.R. 815 was a claim against solicitors, but for whose negligence there would have been no transaction: see p. 818. Staughton L.J. said, at p. 820:

> "I am quite satisfied that Hirst J. was entitled to award damages in this case on the no-transaction basis, and that he was right to do so. . . . So they should recover all the money which they spent, less anything which they subsequently recovered, provided always that they acted reasonably in mitigating their loss. But they were quite properly denied any sum for the profit which they would have made if they had operated their business successfully."

In this case there was an increase in market value. The plaintiffs bought (among other things) a freehold maisonette for an effective price of £45,000. This exceeded by £20,000 its true value at that time. When the plaintiffs came to sell, however, the maisonette fetched £38,000, presumably because the market had risen. The court gave credit to the solicitors for 80 per cent. of the difference between £25,000 and £38,000. Had the balance been struck without reference to market movements not caused by the solicitors it is hard to see how this credit could have been appropriate.

In *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223 the plaintiff moneylenders advanced £10,000 to borrowers on the security of a house negligently valued by the defendant at £18,000. A very high rate of interest was payable by the borrowers and provision was made for payment of an even higher rate on default. The borrowers defaulted, the moneylenders took possession and the house was sold for £12,000. The moneylenders claimed and the county court judge awarded the whole loss suffered by the moneylenders as a result of entering into the transaction including the outstanding sums owed by the borrowers. It was by concession a no-transaction case. In the Court of Appeal [1990] 1 W.L.R. 1223 Neill L.J. concluded, at p. 1230, that *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 All E.R. 752 was binding on the court and conclusive in favour of the judge's decision. He did, however, helpfully review a number of the authorities referred to above, observing [1990] 1 W.L.R. 1223, 1231E, that in a no-transaction case the lender would be awarded (a) the amount advanced less the aggregate of any sum recovered from the borrower and any sum recovered on the realisation of the security and (b) any expenses incurred by the lender in realising the security or in maintaining the value of the security until disposal.

The main issue on appeal concerned the moneylenders' entitlement to recover as damages against the valuer the contractual interest due from but unpaid by the borrowers. Neill L.J. said, at pp. 1231–1232:

> "A number of approaches are possible, including the following. (a) The lender could be awarded the unpaid interest owed by the borrower at the date when the security was realised. This was the method adopted by *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 K.B. 271. But to award damages on this basis is in effect to treat the valuer as the guarantor of the contract of loan. In the absence of authority I would for my part reject this solution. (b) The lender could be awarded a sum equivalent to the amount he would have earned by way of interest on another loan if he had had the money available for this purpose. In my view, however, such an award should not be made in the absence of evidence that the money lent would have been used for another transaction. This evidence would have to be directed to proving an unsatisfied demand for loans and I anticipate that such evidence might seldom be forthcoming. Moreover, even if evidence of a lost transaction were available, I see no reason why the interest should be at the default rate rather than at the ordinary rate provided for in a standard contract for this type of business. (c) The lender could be awarded a sum equivalent to the interest which would have been earned if the sum had been placed on deposit. (d) The lender could be awarded a sum to represent the loss of the opportunity to invest the money elsewhere. This was the solution adopted by the Supreme Court of British Columbia in *Seeway Mortgage Investment Corporation v. First Citizens Financial Corporation* (1983) 45 B.C.L.R. 87, where it was said, at p. 101: 'What the plaintiff lost then was the opportunity to invest its $50,000 in a security which had the same risks except that the appraisal would be accurate.'"

Neill L.J. expressed no concluded view about the last three methods of assessment, although suggesting that none would necessarily be right in all cases: see p. 1232B.

Farquharson L.J. recognised the force of the argument that if the A
moneylenders were to be placed in the same position as they would have
been in if they had never entered into the mortgage contract they could
not recover monies only payable under that contract, at p. 1233D, but felt
bound by authority to reject it: see p. 1235B.

Sir John Megaw, at p. 1235C, also regarded *Baxter v. F.W. Gapp &
Co. Ltd.* [1939] 2 All E.R. 752 as binding and conclusive. He did not
accept that the method of assessment varied, depending on whether it was B
a no-transaction or a successful-transaction case: see p. 1236B. In his view
the lender's loss was to be assessed when it was incurred (p. 1235H) but
subject to a qualification that the valuer should not be liable for an
amount greater than the amount of his original overestimate of value: see
p. 1236E.

In the House of Lords [1991] 2 A.C. 223 all their Lordships agreed C
with the speech of Lord Lowry. The ratio of the decision is found in the
following paragraph, at p. 238:

> "My Lords, it is clear that the lenders ought to have presented
> their claim on the basis that, if the valuer had advised properly, they
> would not have lent the money. Where they went wrong was to claim,
> not only correctly that they had to spend all the money which they D
> did, but incorrectly that the valuer by his negligence deprived them
> of the interest which they would have received from the borrowers if
> the borrowers had paid up. The security for the loan was the property
> but the lenders did not have a further security consisting of a
> guarantee by the valuer that the borrowers would pay everything, or
> indeed anything, that was due from them to the lenders at the date,
> whenever it occurred, on which the loan transaction terminated. The E
> fallacy of the lenders' case is that they have been trying to obtain
> from the valuer compensation for the borrowers' failure and not the
> proper damages for the valuer's negligence."

From that paragraph, and from his citation with apparent approval, at
p. 232, of a passage from *Clerk & Lindsell on Torts*, 16th ed. (1989),
pp. 670–671, paras. 11–45, it appears that he accepted the distinction F
between no-transaction and successful-transaction cases. He described
Baxter v. F. W. Gapp & Co. Ltd. [1939] 2 All E.R. 752 as "not an
attractive precedent" ([1991] 2 A.C. 223, 236G), in particular because there
was doubt about the lender's contention, there had been little argument
about interest and it was contrary to principle to award a plaintiff in a
no-transaction case interest which he could only have earned under the G
contract. He does not, however, as we understand him, throw doubt on
the broad thrust of that decision. His speech is irreconcilable with the
view that the lender's claim is limited to the difference between the
valuation figure and the true value of the property at that time. He throws
no direct light on a fall in the market, which was not in issue in the case.

Much reliance was placed in argument in this court on the decision of
the House of Lords in *Banque Keyser Ullmann S.A. v. Skandia (U.K.)* H
Insurance Co. Ltd. [1991] 2 A.C. 249, a decision also heavily relied on in
some of the cases under appeal. The facts of that case do not lend
themselves to pithy summary, but the bare outline is this. Banks agreed to

A make advances to a borrower on the security of gemstones and credit
insurance policies. Their agent misled them into believing that insurance
policies were in force at a stage when they were not. The underwriters
learned that the banks had been misled by their agent but did not tell
them. The advances were made, the borrowers defaulted and absconded,
the gemstones proved valueless and the loss fell within a fraud exception
in the insurance policies. The banks sued the underwriters for loss
B allegedly sustained as a result of their breach of duty in failing to alert the
banks to the fraud of their agent which, they said, would have caused
them to back out of the transaction. The claim failed on two main
grounds. The first was that the underwriters owed the banks no relevant
duty and so were guilty of no actionable breach. The second was that the
banks' loss was caused not by the underwriters' conduct but by the
C unforeseeable fraud of the borrower, against which the banks would have
enjoyed no insurance cover in any event (because of the fraud exception).

In argument particular reliance was placed on the speech of
Lord Templeman who, at p. 279B, with reference to the second ground,
criticised the banks' argument as confusing the cause of the advance and
the cause of the loss of the advance. He said, at p. 279:

> D "The fraud of [the broker] which caused the advance to be made did
> not affect the rights of the banks to recover their loss and therefore
> did not cause the loss of the advance. The policies of insurance did
> not or would not have protected the banks against the fraud of [the
> borrower] and his fraud was causative of the loss of
> the advance. Accordingly, the failure by [the underwriters] to inform
> the banks of the fraud of [the broker] was not causative of the banks'
> E loss."

The House regarded the unforeseeable fraud of the borrower as breaking
any chain of causation there might otherwise have been between the
underwriters' silence and the banks' loss. This would appear, in this
respect, to have been an application of familiar principles to the unusual
and complicated facts of that case.

F *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.*
(unreported), 21 December 1993, Phillips J., is one of the cases under
appeal before us. It is convenient to consider it at this stage since it
addresses the market-fall issue more directly than any of the other decided
cases and it has been relied on as determinative of some of the other cases
subject to the present appeals.

G The plaintiff ("B.B.L.") on 24 April 1989 lent £39·915m. to a single
purpose vehicle company (the wholly-owned subsidiary of a substantial
property company) principally on the security of an office block in
Westminster, Trevelyan House. The sum advanced was 90 per cent. of a
valuation of the block made by John D. Wood, the fifth defendant in the
action brought by B.B.L., on 12 April 1989, when they had valued it at
£44·35m. Eagle Star, the first defendant in the action, insured B.B.L.
H against possible loss of the money advanced. Phillips J. held this valuation
to be negligent. He found that the open market valuation at the date of
valuation was £27·5m. B.B.L. sued Eagle Star for the loss which it had
suffered. That claim was compromised during the trial. A claim by Eagle

Star against John D. Wood continued. As at 31 March 1993, the relevant date for the assessment of damages, Trevelyan House was agreed to be worth £20m. The decline of £7·5m. from £27·5m. to £20m. was due to a general fall in the commercial property market. It was a no-transaction case and one of the issues was whether B.B.L.'s damages against Eagle Star and Eagle Star's damages against John D. Wood could include losses attributable to the fall in the property market. Phillips J. held that they could not. A B

In the course of a long and admirably clear judgment, the judge first held that the risk of a fall in the property market was not one in respect of which B.B.L. were placing reliance on John D. Wood's valuation. Turning to the basic principle of assessment, the judge quoted an observation of Morris L.J. in *Philips v. Ward* [1956] 1 W.L.R. 471, 475 that the damages to be assessed were "such as could fairly and reasonably be considered as resulting naturally from the failure of the defendant to report as he should have done." He commented: C

> "I find this a compelling statement of the basic principle that should be adopted in a case such as the present. If it is open to me to apply it, B.B.L. will not recover as damages that part of their loss which is attributable to the collapse of the property market. It does not seem to me that such loss can fairly and reasonably be considered as resulting naturally from John D. Wood's failure to report as they should have done. Where a party is contemplating a commercial venture that involves a number of heads of risk and obtains professional advice in respect of one head of risk before embarking on the adventure, I do not see why negligent advice in respect of that head of risk should, in effect, make the adviser the underwriter of the entire adventure. More particularly, where the negligent advice relates to the existence or amount of some security against risk in the adventure, I do not see why the adviser should be liable for all the consequences of the adventure, whether or not the security in question would have protected against them." D E

For B.B.L. it was argued that once it was established that John D. Wood's negligence had caused them to enter into a loan transaction it followed as a matter of law that the negligence was at least a contributory cause of all the adverse consequences of that loan transaction. To the judge this argument resembled the banks' unsuccessful argument in *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1991] 2 A.C. 249. The judge then considered that case in some detail, concluding: F G

> "I have cited from this decision at length because, despite the submissions to the contrary of Mr. Cran for Eagle Star, I consider it to be highly relevant in the present context. In the *Skandia* case the plaintiff banks were induced by the defendants' breach of duty to enter into a loan transaction on the premise that they had insurance cover in relation to the risk when they did not. But had the cover been in place it would not have protected them against the loss which resulted from the loan transaction. For this reason the House of Lords held that the breach of duty was not causative of the loss. A two stage approach was adopted. Did the breach of duty induce H

A the loan? If so, did the breach of duty cause the loss of the sum
loaned? Because there was no causal nexus between the breach of
duty and the loss of the loan the plaintiffs' claim failed. In the
Skandia case the cause of the loss of the loan—the fraud of
Ballestero—was not reasonably foreseeable, but I do not consider
that fact to have been essential to the result.

"As I read the speech of Lord Templeman, had the insurance
B policies not been subject to the fraud exception, causation of (at least
some) loss would have been established, albeit that the fraud of
Ballestero would have been no more foreseeable. Whether the cause
of the loss of an advance is clearly foreseen or not reasonably
foreseeable I do not see how the negligent adviser can fairly be said
to have caused that loss unless his advice has been relied upon as
C providing protection against the risk of that loss. In my judgment the
decision in the *Skandia* case lends strong support to the submission
that John D. Wood's negligence did not cause that part of B.B.L.'s
loss which resulted from the collapse of the property market. It is
necessary, however, to consider the other authorities in the field to
see whether they preclude me from accepting this submission."

D The judge then considered *Swingcastle Ltd. v. Alastair Gibson* [1991]
2 A.C. 223, *Livingstone v. Rawyards Coal Co.*, 5 App.Cas. 25, *Lowenburg,
Harris & Co. v. Wolley* (1895) 25 S.C.R. 51 and other Canadian cases (see
post, pp. 630B–631D), *Scholes v. Brook* (1891) 64 L.T. 674 and *Baxter v.
F.W.Gapp & Co. Ltd.* [1939] 2 All E.R. 752. Of this last case he said:

"The decision of the Court of Appeal to permit the plaintiff to
E recover contractual interest was held in the *Swingcastle* case [1991]
2 A.C. 223 to be wrong in principle. Having regard to this and to
subsequent developments in this field of law, I do not consider that
Baxter v. F.W. Gapp & Co. Ltd. [1939] 2 All E.R. 752 can any longer
be relied upon as governing the principles to be applied to the
assessment of damages in a case such as this. At the same time,
contractual interest apart, the losses suffered by the plaintiff were
F losses against which he would reasonably have relied upon the value
of the security to protect him and they could naturally be considered
as resulting from the negligent valuation. I can see no reason to
question the inclusion of those losses in the damages awarded."

The judge then discussed *London and South of England Building Society
v. Stone* [1983] 1 W.L.R. 1242 and a number of other authorities including
G the *Swingcastle* case before expressing his conclusion:

"This analysis of the authorities leaves me persuaded that I am
not constrained to award to B.B.L. that part of their loss which was
caused by the collapse of the property market. For the reasons that
I have given I do not consider that John D. Wood should be held
liable for that loss. In the case of Trevelyan House I find that the loss
H attributable to the collapse of the property market was £7·5m., being
the difference between the value of the property at the time of
valuation, £27·5m., and the agreed value as at the date of assessment
of damages of £20m."

There was an issue before the judge as to the interest which B.B.L. could recover against John D. Wood. For the valuers it was argued that B.B.L.'s damages should not include interest on that part of the capital advanced by B.B.L. which had been lost as a result of the collapse in the property market. The judge rejected this. He held that B.B.L. were entitled to recover damages by way of interest on the premise that John D. Wood's negligence caused them to lose the use of the whole of the sums that they advanced from the dates of the advances to the dates when the properties securing the loans were sold.

The correctness of this decision is the central issue in these appeals, and is discussed below.

Canadian authority

In *Lowenburg, Harris & Co. v. Wolley,* 25 S.C.R. 51 a lender sued his agents who had negligently advanced his money on the security of land which had been overvalued. The borrower defaulted and the land proved impossible to sell. The trial judge ordered judgment to be given for the whole amount of the loan and interest, upon the plaintiff executing an assignment of the security to the agents. This decision was upheld by a majority of the Supreme Court of British Columbia, 3 B.C.R. 416 but reversed by a majority of the Supreme Court of Canada. Sir Henry Strong, the Chief Justice of Canada, giving the judgment of the majority, said, 25 S.C.R. 51, 56–57:

> "I am of opinion that this was not a correct disposition of the case. The effect of this judgment would be to make the appellants not only responsible for such damages as were caused by the negligent performance of their duty as the respondent's agents, in over-valuing the mortgaged property, but also for any depreciation (if any there has been) in the actual value of the property subsequent to the loan. It is manifest that any loss in this respect should be borne by the respondent himself inasmuch as it cannot be attributed to the neglect of the appellants. All that the appellants can possibly be liable for is the loss occasioned by the over-valuation adopted and acted on by them."

Gwynne J., dissenting, agreed with the trial judge save as to interest: in his view (p. 61) the lender was entitled to return of his money with interest:

> "The wrong to be redressed was theirs, and the burden to reinstate the plaintiff in the position in which, but for their wrong he would be, lies upon them."

In regarding the majority decision as consistent with his own in *Baxter v. F.W. Gapp & Co.* [1939] 2 All E.R. 752, MacKinnon L.J. plainly misapprehended its effect, as O'Connor L.J. held in *London and South of England Building Society v. Stone* [1983] 1 W.L.R. 1242, 1255C.

The plaintiff lender in *Avco Financial Services v. Holstein* (1980) 109 D.L.R. (3d) 128 advanced $17,200 on an overvaluation of real property which by the date of trial was found to be worth $3,000. In addition the lender had incurred additional expenses which he claimed against the negligent valuer. It was a no-transaction case, and in reliance on the *Lowenburg* case it was argued for the valuer that he could not be liable for any decrease in value after the date the borrower had abandoned the property. The judge interpreted the *Lowenburg* case as referring only to loss in consequence of market fluctuation as distinct from loss in consequence of physical deterioration. He attributed the latter loss to negligence of the valuer in failing to look after the property and awarded as damages the full outstanding balance of the loan plus ancillary expenses, subject to a deduction of $3,000 representing the current value of the property.

Raylon Investment Ltd. v. Bear Realty Ltd. (1981) 20 R.P.R. 288 was also a claim made by a mortgage lender against a valuer based on a negligent overvaluation. The judge treated the *Lowenburg* case as precluding recovery only of a decrease in value due to fluctuations in market value. He accordingly awarded the lender most of what it claimed, although he treated some part of the loss as due to its delay in enforcing its security.

The plaintiff in *Seeway Mortgage Investment Corporation v. First Citizens Financial Corporation* (1983) 45 B.C.L.R. 87 bought a fourth mortgage of a house which two defendants negligently overvalued at $260,000 when its true value was $190,000. The judge was unable to decide whether it was a no-transaction or a successful-transaction case: p. 101. After the valuation the market went down and the house was burned down. The court held that the plaintiff should be compensated for loss of the chance to turn down the mortgage, and divided his loss equally between him and the two defendants on a juridical basis which is not entirely clear.

Following the Supreme Court decision in the *Lowenburg* case, it seems clear that Canadian courts will not allow a mortgage lender in a no-transaction case to recover damages for loss attributable to a fall in the market.

Australian authority

In Australia it appears that a different rule prevails.

Trade Credits Ltd. v. Baillieu Knight Frank (N.S.W.) Pty. Ltd. (1985) 12 N.S.W.L.R. 670 involved a claim by a mortgage lender against a valuer who had overvalued one of three properties on the security of which the lender had lent money which he would not otherwise have done. It was a no-transaction case: p. 671G. It was argued for the valuer that the lender was restricted in its damages to the difference between the amount loaned and the amount it would have advanced upon the basis of the true value: p. 672E. This argument was rejected. It was held, applying *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 All E.R. 752, that the lender was entitled to claim the loss flowing from its entry into the transaction and was not limited in its damages to the difference between the amount it loaned and the amount it would have advanced upon the basis of an accurate valuation: see [1985] N.S.W.L.R. 670, 673B.

The valuer in *Duncan & Weller Pty. Ltd. v. Mendelson* [1989] V.R. 386 made two valuations, one of the current market value of a partially completed building, the second of the cost of completion. The second valuation was negligent, the first was not. It was a successful-transaction A case. The trial judge awarded the lender the full loss it had suffered as a result of advancing money on the faith of these valuations. This measure was held to be applicable where the lender would not, properly advised, have entered into the transaction at all: pp. 390, 398, 399. But where he would, properly advised, have lent a lesser sum the measure of the lender's loss was the difference between the amount advanced by the lender in reliance on the valuer's negligent valuation and the amount the lender B would have advanced on a valuation made with due skill and care: pp. 391, 398, 399.

New Zealand

In New Zealand it appears that the rule is similar to that in Australia.

The plaintiffs in *McElroy Milne v. Commercial Electronics Ltd.* [1993] C 1 N.Z.L.R. 39 were developers. They proposed to buy land and on it erect a number of buildings to meet the requirements of a specific tenant, to whom the development was to be let. The tenant's obligations under the proposed lease were to be guaranteed by its principal shareholder. The development was then to be sold with the benefit of the lease and the guarantee. Through the negligence of the defendant solicitors, the principal shareholder was not made a party to the agreement to lease, and in the D event the proposed tenant repudiated the agreement and there was no claim against the principal shareholder. The trial judge found that if the lease had been executed and guaranteed the developers would have been able to sell the development by January 1989 for \$5·25m. By the date of trial the judge assessed its value at \$4m. He assessed damages by taking the difference between \$5·25m. and \$4m. as the primary loss and adding E holding costs until trial (basically the difference between interest on borrowed money, rates etc. and rent and compensation received), but discounting the total so achieved by 25 per cent. to allow for contingencies. The correctness of this measure was the central issue on appeal. It was argued for the solicitors that the correct measure was the difference in the value of the development with and without the guarantee. It was also argued that factors other than the solicitors' negligence had caused the F developers' loss, including in particular the share-market crash and the serious decline in the property market which, it was said, could not have been in the contemplation of the parties at the material time. This challenge failed. Cooke P. held, at p. 44, that the link between the solicitors' breach of duty and the developers' inability to market the development in mid-1988 was very evident. He accepted that there might G be cases where a depressed market could not be said to be sufficiently clearly and strongly or naturally related to the breach but this was not one of them. The other members of the Court of Appeal agreed. The solicitors' unsuccessful argument was devoted to foreseeability and remoteness: once these issues were resolved against them it does not appear to have been thought that the solicitors' negligence was other than causative of the damage. H

General conclusions

1. Where a buyer is claiming damages for negligence in a successful-transaction case the diminution in value rule ordinarily provides an

accurate measure of the buyer's loss. As the cases show, to award, for example, the full cost of repairs will usually lead to over-compensation. The assessment will ordinarily be made as at the date of breach, for there is no other appropriate date. The same rule will usually be applied where the buyer decides to keep the property with knowledge of its defective condition or overvaluation even if, with that knowledge, he would not have bought in the first place. In such a case no account is taken of later fluctuations in the market, for the buyer remains the owner of the property as a result of his own independent decision and not of the negligence of the valuer or surveyor.

2. In a no-transaction purchase case, it seems clear on English authority that effect will be given to the restitutionary principle by awarding the buyer all he has paid out less what (acting reasonably to cut his losses, including selling the property) he has recovered. In no case before the *Banque Bruxelles* case has any head of foreseeable damage been excluded from the calculation.

3. A mortgage loan on facts such as those now assumed differs from a purchase in a number of important respects. First, the lender is concerned to be repaid with interest at the time or over the period the mortgage prescribes. Second, unless and until the borrower defaults the lender is not entitled to sell the security. Third, he is only interested in the property as security; he will never become the owner of it unless he obtains the relatively unusual order of foreclosure. Thus even assuming an excessive advance made on a negligent overvaluation the lender may suffer no actual loss on making the loan or at any other time since the borrower may repay the loan with interest in accordance with the terms of the transaction: see *First National Commercial Bank Plc. v. Humberts* [1995] 2 All E.R. 673. But the lender is at risk all the time for he cannot seek repayment of the loan except in accordance with the terms, he cannot sell the security even if he becomes aware of the overvaluation unless and until the borrower defaults and he cannot sell the mortgage loan either, for there is no evidence of any market in individual mortgages. Accordingly, a measure of the recoverable damages by reference to the diminution in value of the security as opposed to the amount of the loan not recovered cannot except coincidentally be the measure of the damage sustained by the lender.

4. In successful-transaction mortgage lending cases the practice has been to treat the difference between what was advanced and what would have been advanced on a proper valuation as the upper limit of what the lender can recover in damages. The lower limit is nil: for the borrower may make due payment, and even if he does not the land may raise enough when sold to reimburse the lender. If the land raises enough when sold to reimburse the lender because of a rise in the property market after the date of the transaction, the valuer must indirectly be entitled to the benefit of this: the lender will have received his money back with contractual interest and that will leave him with no net loss to claim against the valuer. It would be contrary to the common sense which is intended to reign in this field to ignore the rise in the property market and pretend that the lender has suffered a net loss when in fact he has not. By

parity of approach, if in such a case the lender suffers loss (within the upper limit already mentioned) because, when the borrower defaults and the security is realised, the sum raised does not reimburse him, in part because of a fall in the property market, that element of his loss is not to be separated out and disallowed. He cannot recover damages beyond the limit, because ex hypothesi he would have been lending and so vulnerable to a fall in the market anyway, but he would not have been lending at that level and there appears to be no reason to deny him recovery of damages which are not too remote within the amount of his excessive advance. In successful-transaction mortgage-lending cases the lender's cause of action against the valuer will arise, as in other cases, on the valuer's breach of contract or the lender's first suffering actual damage, but it may be impossible to assess the lender's loss otherwise than predictively until the financial out-turn of the transaction to him is known.

5. In no-transaction mortgage lending cases it has been the practice since *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 All E.R. 752 to award the lender his net loss sustained as a result of entering into the transaction, which may be expressed as the difference between what the lender advanced and what the lender would have advanced if properly advised (which is always nil) plus related expenses of sale and realisation less sums recovered. It may also, depending on the facts, be relevant to take account of a mortgage loan the lender would have made if he had not made it to the borrower. If, in assessing the lender's damages in such a case, it appears that he has suffered no loss because he has received the capital sum advanced with reasonable interest, he will have no more than a nominal claim against the valuer. Should a rise in the market have contributed to that outcome then, as in the successful-transaction case, that contribution will not be ignored so as to treat the lender as sustaining a financial loss which in fact he has not sustained.

6. If in such a case a fall in the property market between the date of the transaction and the date of realisation contributes to the lender's overall loss sustained as a result of entering into the transaction, it would seem to us, on a straightforward application of the restitutionary principle, that the lender should be entitled to recover that element of his loss against the negligent party. If the market fall were of modest proportions—say, 5 per cent.—it is hard to think that the point would be regarded as arguable. But once a fall in the market is accepted, inevitably, as foreseeable, nothing can in the ordinary way turn on the extent of the fall. Any distinction between large and small market falls would lack any basis in principle.

7. Since the valuer's negligence caused the lender to enter into the transaction, which he would not otherwise have done and because he cannot escape from the transaction at will, we regard that negligence as the effective cause of the loss which the lender suffered as a result. The market fall cannot realistically be seen as a new intervening cause. In *Iron and Steel Holding and Realisation Agency v. Compensation Appeal Tribunal* [1966] 1 W.L.R. 480, 492 and *Royscot Trust Ltd. v. Rogerson* [1991] 2 Q.B. 297, 307 the foreseeability of a cause was treated as a strong indication that that cause was not to be treated as a new intervening cause. In the result, we do not think that a fall in the market can be said to have

A broken the link between the valuer's negligence and the damage which the lender has suffered.

8. We differ from Phillips J.'s decision in the *Banque Bruxelles* case for these reasons.

(1) It does not appear to us that the authority of *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 All E.R. 752 is in any way impaired by subsequent authority save in so far as it dealt with contractual interest. Except in that
B regard, the effect of the decision was, as we understand, upheld by the House of Lords in *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223. The decision has been held to be binding on the Court of Appeal, and we must apply the principle it laid down. We do not know what "subsequent developments in this field of law" the judge had in mind as undermining its authority.

C (2) We do not gain the help which the judge did from *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1991] 2 A.C. 249. The unforeseeable fraud of the borrower in that case was understandably held not to have been caused by any negligence of the underwriters. The whole loss sustained by the lender on the facts here assumed was in our view caused by the negligence of the valuer, since the lender was induced by it to make a loan he would not otherwise have made and became involved
D in a transaction from which he could not escape at will. He thereby became vulnerable to a market fall which would not otherwise have injured him.

(3) We do not think the judge was right to distinguish between the risk of overvaluation and the risk of market fall and between the valuer's duty in relation to each. The valuer's duty was as we have defined it: see
E ante, pp. 618G–619C. If the valuer overvalued the land it was foreseeable that the lender would lend on inadequate security, perhaps in circumstances where (properly advised) he would not lend at all. It was foreseeable that the borrower might default, and if he did the lender's recovery would depend on what the land might fetch at the time of realisation. This would, foreseeably, depend on how the market moved. We agree, of course, that the valuer in no sense guaranteed or underwrote the lender's
F business investment. Had the valuer valued the land competently, he would have been under no liability to the lender no matter how disastrous the investment proved. But once it is established that the valuer's negligence led the lender to make a loan he would not otherwise have made it seems to us that the lender is entitled to be compensated for all the damage he has suffered. If the market moves upwards, the valuer
G reaps the benefit; if it moves downwards, he stands the loss.

(4) As the lenders submitted, it would give rise to artificial distinctions if the loss attributable to the consequences of one element of the single decision whether or not to lend could be divided up as the valuers suggest in considering the liability of the advisers to the lender. In many cases there will be more than one source of advice which goes to the final decision, namely the creditworthiness of the borrower from some credit
H reference agency, the prospects for the economy both local and national from a merchant banker and the value of the securities offered. If all three were negligent it would lead to untold and unnecessary complication if it were necessary for the lender to establish separate losses against each of

them. At present the lender would only recover the whole of his loss once, A
but from any one of the three, and it would be left to the three negligent advisers to take contribution proceedings against each other. It would then be for the court to deal with the matter on the basis of what is "just and equitable having regard to the extent of that person's responsibility for the damage in question:" Civil Liability (Contribution) Act 1978, section 2(1). B

(5) We regard the judge's decision on interest as consistent with our view rather than his. If part of B.B.L.'s loss was to be disallowed, we can see no basis for awarding interest on that part. As it is, we conclude that the judge's decision on interest was right and his disallowance wrong.

(6) We accept that the *Lowenburg* case, 25 S.C.R. 51 and the Canadian decisions based on it give some support to the judge's view. It does not,
however, seem to us that his view is supported by any English authority, C
or by the Australian and New Zealand cases we have mentioned. We regard general principle and also the clear trend of English authority as favouring the view we have reached.

We now turn to the six cases under appeal.

BANQUE BRUXELLES LAMBERT S.A. v. EAGLE STAR INSURANCE CO. LTD. D

Reference has already been made to the facts of this case and to the judgment of Phillips J.

B.B.L.'s claim against Eagle Star was for £23,490,091. During the trial Eagle Star settled this claim for £7,437,220 which Eagle Star sought to
recover against John D. Wood. Eagle Star was at the relevant time a large E
provider of mortgage indemnity cover to lenders in the property market. The purpose of this cover was to protect the lender if the market fell and the proceeds of sale of land taken as security proved insufficient to reimburse the lender on default by the borrower. B.B.L. relied on John D. Wood's valuation in agreeing to lend £39·915m. to the borrower, and but
for the valuers' negligent overvaluation there would have been no F
transaction. Eagle Star also relied on the negligent valuation in agreeing to cover B.B.L. for the whole of the sum advanced. In fact, unknown to B.B.L. and Eagle Star, the buyer bought Trevelyan House for £25·5m.: thus the purchase was made without the buyer having to contribute at all, and it was left with a cash sum in hand. Had Eagle Star known this it
would not have granted cover. G

The judge held that John D. Wood owed Eagle Star a duty of care in valuing Trevelyan House, that the valuers were negligent and that Eagle Star agreed to grant full cover in respect of B.B.L.'s loan of 90 per cent. of the valuation in reliance on the valuation. He held that Eagle Star was entitled to recover the sum of its compromise payment to B.B.L., subject to a deduction of £2,374,582. That deduction represented the same
percentage of Eagle Star's claim against John D. Wood as the figure for H
which Eagle Star settled represented of B.B.L.'s claim against it. The judge's reasons for making that deduction appear in the following passage of the judgment:

"*Causation and measure of damage*

"Eagle Star were providing 100 per cent. cover for the risks that the syndicate banks were accepting when making the loan. Once again it is material to distinguish between the risk that the sum advanced might be based on an over estimate of the value of the property and the risk that the market value of the property might fall. Eagle Star were no more relying on John D. Wood's valuation when considering whether to accept the latter risk than were B.B.L. Mr. Buxton [Eagle Star's insurance manager] made this particularly clear [in] a passage of his cross-examination by Mr. Goldsmith. He said that the whole raison d'être for doing this business and the protection we had was that the property market didn't fall and it generally rose.' He went on to say that Eagle Star tried to keep close to the market to detect trends in the market place and not to check valuations such as those given by John D. Wood. Eagle Star relied on John D. Wood to provide an accurate valuation of Trevelyan House, but they relied on their own valuation of the likelihood of market movements when deciding whether to risk a fall in value of that property. Their decision to take that risk was not influenced by the amount of the valuation. I have no doubt that Eagle Star would have been prepared to provide [mortgage insurance indemnity] cover at a lower level had they received a lower valuation—albeit that the borrowers would not have wished to proceed at that level. In those circumstances precisely the same approach to damages falls to be applied in the case of Eagle Star's claim as I have applied in considering B.B.L.'s claim. Eagle Star are not entitled to recover that part of their loss which is attributable to the effect on the value of the security of the fall in the property market."

For reasons that have already been given, we do not think the judge was right to deny B.B.L. recovery of loss attributable to fall in the market, and (like the judge) we see no reason to adopt a different approach to Eagle Star's claim over against John D. Wood.

Eagle Star make the point that they should recover against John D. Wood the sum for which they reasonably settled with B.B.L. even if the judge's ruling on the damages recoverable by B.B.L. is correct. On the view we have taken this point does not arise, but it remains open to Eagle Star hereafter if need arise.

Eagle Star also challenge the judge's finding that Eagle Star would have been willing to offer B.B.L. insurance cover at a lower level on a lower valuation. It is said, first, that on a lower valuation the proposal would never have been put to Eagle Star, because the borrowers would not have been willing to risk any money of their own, which on an accurate valuation they would have had to do, and secondly that Eagle Star would not have been willing to contemplate insuring a loan when the borrower had no financial stake in the transaction. John D. Wood were only intermittently represented, and called no evidence, at the trial. The firm has not been represented before us. Both these points seem plausible. But in our view they add nothing to the finding that on a correct valuation there would have been no loan: this was, therefore, a no-transaction case.

Eagle Star's appeal will be allowed and their damages increased by the A
sum which was deducted.

UNITED BANK OF KUWAIT PLC. V. PRUDENTIAL PROPERTY SERVICES LTD.

In May 1990 Sallows Developments Ltd. ("Sallows"), a property
development company, owed about £1·6m. to Lloyds Bank Plc., secured
by a first charge over a new development, Coachman's Court, Ipswich B
("the property"). Sallows applied to the plaintiff for long-term finance to
replace the Lloyds Bank lending, offering the property as security. In July
1990, the plaintiff, subject to a satisfactory professional valuation of the
property, offered Sallows an advance, restricted to the lower of £1·75m.
or 70 per cent. of the professional valuation, secured by a first charge.

In September 1990 the plaintiff instructed the defendant to prepare a
valuation of the property for mortgage purposes. On 28 September 1990 C
the defendant valued the property at £2·5m. The true value was found by
the judge (Gage J.) to be either £1·8m.–£1·85m. or £1·85m. On 19 October
1990 the plaintiff, having borrowed the money for this purpose, lent
£1·75m. to Sallows, secured by a first charge over the property. That was
70 per cent. of the defendant's valuation figure. Seventy per cent. of
£1·85m. would have been £1,295,000, which would not have enabled D
Sallows to meet the plaintiff's requirement of a first charge, so there would
have been no loan. On 28 December 1990 Sallows defaulted. The plaintiff
enforced its security. On 13 February 1992 the property was sold for
£950,000, payment of £250,000 of which was deferred to 31 January 1995.

The plaintiff claimed and the judge found that the defendant's
valuation was negligent and allegations of contributory negligence were
dismissed. The plaintiff sought damages for breach of contract and in tort. E
The judge, who was invited to decide only the principle, held in a
judgment delivered on 10 December 1993, that it was a no-transaction
case. He considered *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 All E.R.
752, *London and South of England Building Society v. Stone* [1983]
1 W.L.R. 1242 and *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223
and concluded that he was bound by the main principle in *Baxter v.* F
F.W. Gapp & Co. Ltd. [1939] 2 All E.R. 752 to hold that the measure of
damages was the difference between the sum advanced and the sum
recovered on the sale of the property, plus any consequential losses and
expenses.

The defendant appeals to this court challenging this approach and
inviting the court to prefer that of Phillips J. in the *Banque Bruxelles* case.
For the reasons given, we differ from Phillips J. It was contended before G
us on behalf of this defendant that damages for market fall are
irrecoverable not for want of causation but because the defendant owed
no duty in relation to such loss. Reliance was placed on the speech of
Lord Oliver of Aylmerton in *Caparo Industries Plc. v. Dickman* [1990]
2 A.C. 605, particularly at p. 651E–F. But that case was concerned with
the extent of the duty owed by auditors who negligently reported under
the Companies Act 1985. It was held that this duty was to shareholders to H
enable them to exercise their class rights and that the auditors owed no
duty to potential investors in the company. Seen in this context, we do
not find Lord Oliver's speech of assistance in the type of no-transaction

A case which is before this court where the extent of the duty is as we have
defined it under question 1: see ante, at pp. 618G–619C. We are
unpersuaded that this alternative approach compels us to any different
conclusion from those which we have already expressed. Accordingly
Gage J. was correct in deciding the principle as he did.

This appeal is dismissed.

B NYKREDIT MORTGAGE BANK PLC. v. EDWARD ERDMAN GROUP LTD.

In February 1990 the plaintiff was approached by property finance
brokers, C.L.P., to advance £2·6m. to enable a property company to buy
a development site, Warple Way, East Acton ("the property") for £3·7m.
The plaintiff instructed the defendant valuers to value the property, to
comment on its potential saleability and to advise whether the development
C costs were realistic.

On 2 March 1990 the defendant valued the property at £3·5m. and the
plaintiff on 12 March advanced 70 per cent. of this, £2·45m., secured by a
first charge on the property. The judge (Judge Byrt Q.C.) found there was
no justification for a valuation in excess of £2m. In June the borrowers
failed to make the first interest payment and the defendant gave an up to
D date valuation of £3·115m. In September 1990 the defendant was appointed
receiver of the property. In February 1993 the property was sold at
auction for £345,000.

The plaintiff claimed and the judge found that the defendant's report
and valuation were negligent and allegations of contributory negligence
were dismissed. The plaintiff sought damages for breach of contract and
in tort and the judge awarded damages of £2,105,000 plus interest. He did
E so having found that the plaintiff would not have made the loan had the
valuation been proper and, in the light of *Swingcastle Ltd. v. Alastair
Gibson* [1991] 2 A.C. 223, he concluded that damages were to be assessed
on the basis of the amount of the loan made, less the amount recovered on
the realisation of the security. His judgment, given on 1 October
1993, was the first of the judgments presently under appeal and in
F consequence neither the *Banque Bruxelles* case nor the *United Bank of
Kuwait* case was cited to him.

The defendant appeals to this court challenging Judge Byrt's approach.
The appeal has been conducted on the basis that the judge's findings of
fact are correct although these are challenged in a further, pending,
appeal. For the reasons already given the judge's conclusion was in our
G view correct. This appeal is dismissed.

B.N.P. MORTGAGES LTD. v. KEY SURVEYORS NATIONWIDE LTD.

Mr. Jakhu was the owner of Flat 10, Westfield Hall, Hagley Road,
Edgbaston, which he had bought in February 1989 with the assistance of
a mortgage on which £68,000 was still outstanding. He wished to
remortgage it and applied to the plaintiffs ("B.N.P."), through a broker,
H for a loan of a sum in excess of £72,000 to be secured on the flat. On
behalf of B.N.P. the broker instructed the defendants ("Key") to value the
flat. On 13 March 1990 Key produced a report assessing the value at
£90,000. Mr. Holloway of B.N.P. suggested that there should be a spot

check on Mr. Jakhu's application, including a further valuation, but this A was not done. On 3 May 1990 B.N.P. offered two loans to Mr. Jakhu in the total sum of £72,000 (being 80 per cent. of the valuation) with a 5 per cent. interest deferral for two years (that is to say that of the interest payable in the first two years the first 5 per cent. would be capitalised) to be secured by a first charge on the flat. The first loan in the sum of £68,000 was to redeem the prior mortgage and the second was for "improvements" to the flat being the purpose of the loan as described by B Mr. Jakhu in his application. This offer was accepted and the remortgage was completed on 31 May 1990.

B.N.P. is a "centralised lender," by which is meant that it does not have branch offices and depends to a greater extent on its valuer's advice as to the local conditions. In addition to giving its opinion as to the value of the flat Key expressed the view that residential values in the area were C stable, that demand was in balance but that a sale might take six months to achieve. The practice of B.N.P. was to borrow from its parent company, Banque Nationale de Paris, any sum needed in order to make the agreed loan. Thus as part of the remortgage transaction with Mr. Jakhu B.N.P. borrowed £72,000 from its parent.

Mr. Jakhu did not perform his obligations. Possession was obtained on 14 February 1992. The flat was ultimately sold with vacant possession D on 24 March 1993 for £45,000 but not before it had been damaged by vandals.

Proceedings were commenced by a writ issued on 23 February 1993. B.N.P. contended that in March 1990 the true market value of the flat was only £72,000, that the valuation was negligent and that had B.N.P. known of the true value it would not have lent any sum to Mr. Jakhu. E

The action came before Judge Fox-Andrews Q.C. who on 19 July 1994 gave judgment for B.N.P. The judge concluded that the open market value in March 1990 was £72,500 and that the defendants were negligent in valuing the property at £90,000. He decided that in making the loan B.N.P. relied on this valuation and but for the valuation would not have made any loan to Mr. Jakhu. But he also decided that the general decline in the property market accounted for £12,500 of the loss and, following F Phillips J. in the *Banque Bruxelles* case, deducted that sum from the damages otherwise prima facie recoverable. It was common ground that B.N.P. had failed to mitigate its loss so that the sale of the flat should be treated as having occurred in August 1992 in the sum of £60,000. He also decided that B.N.P. was guilty of contributory negligence and 25 per cent. to blame for its failure to carry out the spot check which Mr. Holloway G had suggested and he held that the damage caused by the vandals was too remote to be recoverable from Key. In the result he awarded B.N.P. damages in the sum of £23,101 having deducted £10,473·89 on account of the decline in the property market.

B.N.P. appeals on the ground that the judge should not have deducted the £10,473·89 from the loss for which he gave damages because the decision of Phillips J. in the *Banque Bruxelles* case is wrong and because H even if right the advice given in the report about the local conditions and state of the market was directed to future market conditions and was therefore concerned with that risk.

In his judgment the judge referred extensively to the judgment of Phillips J. in the *Banque Bruxelles* case, in particular to his references to a collapse in the property market. He said:

> "Assuming that *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 All E.R. 752 save on contractual interest is still good law, nevertheless I find that it can be distinguished where the facts establish that there has been a significant collapse in the market. On my findings there was a fall in a period of about two years and a half of about 16·5 per cent. I find that to amount to a significant collapse. I find therefore that Key are not responsible for the loss resulting from the fall in the market."

As we have already concluded a distinction between large and small falls in the market lacks any basis in principle. It follows that in our view the judgment of the judge was inconsistent with *Baxter v. F.W. Gapp & Co. Ltd.* and wrong in law. Moreover as we consider the decision of Phillips J. in the *Banque Bruxelles* case to be wrong the alternative arguments based on the details of the advice given by Key and to which we have referred do not arise.

Accordingly we allow the appeal and increase the amount for which judgment was entered for B.N.P. by £10,473·89 together with corresponding increases in the interest recoverable.

B.N.P. MORTGAGES LTD. v. GOADSBY & HARDING LTD.

Mr. Liddle was the owner of 4, The Courtyard, Holt, Near Wimborne, Dorset, which was charged to the Halifax Building Society to secure £165,000. He wished to remortgage that property and applied to the plaintiff, B.N.P., for a loan of £196,000 having assessed the value of the property at £245,000. B.N.P., instructed the defendants ("G. & H.") to value the property on their behalf. On 21 February 1990 G. & H. issued their valuation in the sum of £245,000. In reliance on that valuation B.N.P. lent to Mr. Liddle the sum of £196,215 representing approximately 80 per cent. of the valuation of which £182,000 was needed to redeem the existing mortgage.

B.N.P. is a "centralised lender," by which is meant that it does not have branch offices and depends to a greater extent on its valuer's advice as to the local conditions. In addition to giving its opinion as to the value of the flat G. & H. expressed the view that residential values in the area were stable, that there was a lack of demand and that a sale might take six months to achieve. The practice of B.N.P. was to borrow from its parent company, Banque Nationale de Paris, any sum needed in order to make the agreed loan. Thus as part of the remortgage transaction with Mr. Liddle B.N.P. borrowed £196,215 from its parent.

In October 1990 Mr. Liddle defaulted. B.N.P. sold the property with vacant possession on 30 June 1992 for £100,000. After deducting the costs of sale B.N.P. recovered £95,854.

The action was commenced by a writ issued on 2 December 1992. B.N.P. alleged that the property had been worth £150,000 at the most, that the valuation was negligent and that had the plaintiff known of the true value it would not have lent any sum to Mr. Liddle. The trial of a number of preliminary issues was ordered and came before Judge Fox-Andrews Q.C. who gave judgment on them on 17 June 1994. He concluded that the valuation provided by G. & H. was negligent, that B.N.P. relied on it in lending £196,000 to Mr. Liddle, that the true value of the property as at the date of the valuation was £180,000 and that B.N.P. would not have lent any sum to Mr. Liddle if they had known that true value because Mr. Liddle would not have been able to remortgage his property with 80 per cent. of such true value. But in answer to issue 6 the judge concluded that B.N.P. could not recover that part of their loss which is represented by the reduction in the value of the property between the date of the valuation and the date of the sale. On that issue he followed Phillips J. in the *Banque Bruxelles* case.

B.N.P. appeals. It is contended that Phillips J. was wrong in the *Banque Bruxelles* case so that the decision of the judge on the sixth issue was wrong in law. It is also submitted, if it matters, that the judge was wrong in deciding on the evidence that the cushion of 20 per cent. was not at least in part intended to protect B.N.P. from all risks including the risk that the market might fall.

In his judgment the judge acknowledged that although *Baxter v. F.W. Gapp & Co. Ltd.* [1939] 2 All E.R. 752 was not regarded with much enthusiasm by the House of Lords in *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 A.C. 223 it had not been overruled save in respect of the interest point. He continued:

> "But whereas in many cases a court would be slow to distinguish a long standing authority, in this case it is somewhat easier to do so. I find the reasoning of Phillips J. on the issue I have to decide powerful. The plaintiffs did not look to the defendants for advice as to the likely movement of the property market in the coming months. In so far as the plaintiffs asked for some view as to the existing state of the market and received an answer in the form, I am not satisfied that the answer affected their judgment in any way. I have reached the conclusion that the answer to this issue is no."

It is apparent from our decision on the main question that we do not agree with the reasoning or the conclusion of the judge. Moreover in the light of that decision the second point argued on the appeal, namely, the purpose of the 20 per cent. cushion does not arise. In these circumstances we allow the appeal and answer the preliminary issue 6 in the affirmative.

Mortgage Express Ltd. v. Bowerman & Partners

The central facts giving rise to this appeal are the subject of agreement between the parties.

The plaintiff in the action is a mortgage lender and the defendant is a firm of solicitors. On 23 October 1990 a Mr. Hadi applied to the lenders for a loan of £198,000 in order to purchase a flat for £220,000. On 25 October 1990 the premises were valued by valuers instructed by the lenders at £199,000. The lenders' policy was to advance up to 90 per cent. of the lower of the purchase price or valuation when making loans in this range. Consequently on 25 October 1990 Mr. Hadi made a fresh application for a loan of £180,150. In the application he nominated the solicitors to act for him. He had had no previous involvement with them. Unknown to the lenders or the solicitors the true open market value of the premises at 25 October 1990 was £120,000. The lenders made a mortgage offer to Mr. Hadi of £180,150. They also instructed the solicitors to act on their behalf as well as his.

The registered proprietor of the premises was a Mr. Khedair. He had agreed to sell them to a Mr. Rasool. Mr. Rasool had agreed to sell on to Mr. Arrach who in turn had agreed to sell to Mr. Hadi. On 26 November 1990 the solicitors learned that Mr. Rasool had agreed to sell the premises to Mr. Arrach for £150,000. The solicitors immediately informed Mr. Hadi that the purchase was to be by way of sub-sale and informed him of the price that Mr. Arrach was paying. Mr. Hadi nevertheless decided to proceed. The solicitors also learned that the property had recently been sold to Mr. Rasool by Mr. Khedair although they were unaware of the price. The solicitors did not pass any of this information to the lenders. Mr. Arrach and Mr. Hadi exchanged contracts. The solicitors made their report on title to the lenders. The lenders advanced £180,150 to the solicitors on 18 December 1990. Completion then took place.

Mr. Hadi defaulted on his loan. Possession proceedings were commenced and in due course the premises were sold. They realised £96,000. The difference between this figure and the previous open market valuation of £120,000 was due to a general fall in the property market.

It was not alleged that the solicitors acted dishonestly or that any of the facts known to them should have put them on inquiry as to the possibility of fraud by Mr. Hadi. However, the lenders submitted that the solicitors owed them a duty to report to them information which came into their possession which cast doubt on the accuracy of the valuation.

In a very clear judgment handed down on 11 May 1994 Arden J. found that the solicitors ought to have realised that the price paid by Mr. Arrach cast doubt upon the valuation of the property and that having been so put on inquiry they were bound to inform the lenders of the relevant facts relating to the sub-sale. The judge's findings on liability are the subject of a cross-appeal, not now before the court.

Loss and damage were agreed save for that part of the lenders' loss which was attributable to the fall in the property market. The judge found that if the lenders had known of the relevant facts they would have had the property revalued and that such re-valuation would have led them not to proceed with the loan. She also found, however, that the lenders took the risk of a fall in market value after valuation. Following the analysis of Phillips J. in the *Banque Bruxelles* case, the judge found that the solicitors were not liable for the loss resulting from the fall in market value. The lenders challenge that decision.

The judge held that the duty of the solicitors was clear: "to protect the interests of the lender when carrying out his instructions." She also held:

> "In the same way, when a solicitor who is acting for a purchaser becomes aware of any information which puts him on inquiry as to the accuracy of a valuation obtained for the purposes of making a loan for a purchase, he is in my judgment bound to take some action. In my judgment he is bound to take action on behalf of both his clients, where he acts for both lender and borrower. He owes a duty

to each of them to protect their interests when carrying out their instructions. . . ."

Thus the judge held that the solicitors were in breach of their duty to alert the lenders to facts which they were entitled to know and which, if communicated to them, would have caused them to direct a further valuation of the property, which would have led to their withdrawal from the transaction. The question which arises on the measure of damages is different in this case from the cases involving valuers, since the duty owed in the two cases is different. It is, however, to be observed, accepting the judge's ruling on the nature of the duty and its breach, that the duty owed by the solicitors is wider than that of the valuer.

For the lenders, counsel submitted that the *Banque Bruxelles* case had been wrongly decided and that, even if that decision were right, the present case was distinguishable. The solicitors' duty was to protect the interests of the lenders as their client, and as a result of their failure to do so the lenders entered into a transaction they would not otherwise have entered into and as a result suffered damage for which the solicitors are liable. Once it was accepted that a fall in the market was foreseeable, and the solicitors were found to be aware that in late 1990 the property market was not rising and if anything was falling, there was (it was submitted) no legal basis upon which the lenders could be deprived of any part of the damage they actually suffered.

For the solicitors, counsel supported the correctness of the *Banque Bruxelles* case and further submitted that there was no ground of distinction between that authority and the present case. In argument, emphasis was laid on the independent decision of the lenders to advance the loan which they did. They appreciated the risk that the market might fall, it was said, and any damage they suffered as a result of it doing so was the result of their own decision and not of any breach of duty on the part of the solicitors.

It is of course correct that the lenders would have had no ground of complaint against the solicitors if they had entered into this transaction having received the advice which they should have received and had thereafter suffered loss due to a fall in the market. But that is not this case. The essence of their complaint is that they did not receive the advice which they should have received and which would have meant that they did not suffer from the general fall in the market; as it was, they entered into a transaction which they would not have entered into, and did suffer damage. They did make their own investment decision, but it was not a decision made after receiving proper advice and not the decision which they would have made had they received proper advice.

For reasons already given we have concluded that the decision reached in the *Banque Bruxelles* case was not correct, and in our view the same reasoning governs this case also. The lenders were in our judgment entitled to reimbursement of their loss without deduction of such part of that loss as was attributable to the fall in the market. In the course of her judgment the judge observed:

> "it would be extraordinary if in the same action, valuers and solicitors were both sued and the valuers were not liable for loss attributable to the fall in market value but the solicitors were."

A This is a result which could theoretically arise if their respective duties were sufficiently different to cause different heads of resulting loss. But in our opinion it does not arise here: the measure of damages against the solicitors is the same as the measure would be against the valuers had they been sued.

We would allow the lenders' appeal, and declare that the damages recoverable by the lenders should not be discounted by that part of the
B damages attributable to fall in the market. This decision is however subject to the decision of the court on the solicitors' cross-appeal, in which the judge's finding of liability is challenged.

Appeals allowed with costs in the first, fourth, fifth and sixth actions.
C *Appeals dismissed with costs in the second and third actions.*
Leave to appeal.

Solicitors: Lovell White Durrant; Clifford Chance; Clifford Chance; Eversheds Phillips & Buck, Cardiff; Eversheds Phillips & Buck, Cardiff; Rosling King; Davies Arnold & Cooper; Cameron Markby Hewitt; Williams
D *Davies Meltzer; Davies Arnold & Cooper; Pinsent & Co., Birmingham.*

D. E. C. P.