JUDGMENT : Mr Justice Lewison: Chancery Division. 19th April 2004.

Introduction

Acorn Televillages Ltd ("Acorn") is a developer. On 10 September 1999 it granted a debenture to Triodos Bank NV ("the Bank") to secure borrowing. Its principal assets at the time were a partially completed development at Crickhowell in Wales and a shareholding in Acorn Televillages LTD, a Missouri corporation ("Acorn USA"). Crickhowell is a small market town on the edge of the Brecon Beacons and within easy reach of the Black Mountains. On 20 October 2000 the Bank appointed Mr Morrison and Mr Gerrard, two partners in the firm of Grant Thornton, as Joint Administrative Receivers of Acorn ("the Receivers").

2. On 12 March 2001 the Receivers sold the Crickhowell development for £2.1 million. They have not sold the shareholding in Acorn USA. The Bank has suffered a large shortfall, part of which it seeks to recover from Mr Ashley Dobbs under a personal guarantee.

3. Mr Dobbs is a director of Acorn. He describes himself as a "*serial entrepreneur*". He believes that the receivership was improper; that the Receivers and the Bank mismanaged the receivership; and that Acorn's assets have been sold at an undervalue or not properly realised at all. He believes that the Bank used the receivership deliberately to destroy a sound business in order to benefit the Bank and the building contractor by protecting them from claims for breach of contract, incompetence and negligence. He says that the Bank breached its contractual obligations by withdrawing Acorn's loan facility; and, following the appointment of the Receivers, by not building out the development and not marketing the houses individually. He complains that the Receivers squandered the value of the shares in Acorn USA. He claims a large amount of damages, which has fluctuated between £16 million and £18.6 million. He relies on these allegations by way of defence to the claim against him on the guarantee; and he also makes them on behalf of Acorn, which I allowed to be joined into the actions as a claimant. His complaints are wide-ranging. I have to decide which, if any of them, are well-founded. In view of the seriousness of Mr Dobbs' allegations, I think that the best course is to tell the story, largely from the contemporaneous documents, before testing the oral evidence.

The beginnings of the Crickhowell development

4. For present purposes the story starts in March 1994. Acorn obtained planning permission from the Brecon Beacons National Park Committee for a change of use of farm buildings at Upper House Farm, Crickhowell to: *"televillage facility, craft workshops, youth club, studios, the construction of 32 houses and 2 flats (including home offices)."*

5. The permission was granted subject to conditions. These included the construction of a new storm drain before the first dwelling was occupied; landscaping; road building and the obtaining of listed building consent for the refurbishment of some of the buildings that were to be retained. The site consisted of a Jacobean farmhouse and some farm buildings, together with agricultural land.

6. A "televillage" is Mr Dobbs' brainchild. It is a development of environmentally friendly, low maintenance combined residential and workspace units linked to the Internet via a private fibre optic network, or Intranet. Its attraction is that residents can work from home rather than commute; and "televillages" can be built in attractive rural locations. Mr Dobbs' idea was that the problem of isolation faced by teleworkers could be overcome by grouping them together in a village. His vision was one of a working community living in high quality houses, built with local materials, served by the latest technology, and able to enjoy the beauties of the Welsh countryside.

7. Following the grant of planning permission, on 1 September 1994 Acorn took a transfer of the land from Powys County Council. The transfer contained a series of positive covenants which would have been enforceable against Acorn's successors in title, because of the statutory powers under which they were made. The covenants included obligations:

i) To install a private fibre optics network cable system linking all the dwellings and capable of being connected to the public system;

ii) To provide and equip a "Telecentre" (i.e. part of the property containing rooms equipped with computers and related equipment and available to local people to learn and work) which was to be fully functional before the first ten houses were occupied.

8. The development was to be constructed in two phases. Finance was provided by Allied Irish Bank. On 17 August 1994 the undeveloped site with the benefit of planning permission had been valued by DTZ Debenham Thorpe for Allied Irish Bank at £720,000. DTZ highlighted as potential difficulties the sloping nature of the site, the run down farm house and the expense of infrastructure. They also described some of the planning conditions as onerous. They recommended that if building finance was provided the estimated building costs should be approved by Allied Irish Bank with arrangements for certifying payment against work done. Phase I began in 1995.

9. One of the houses was the show home, and the other was bought by Mr and Mrs Dobbs. A mortgage valuation of £80,000 was provided for Lloyds Bank by Colleys Professional Services, Hereford, who commented that they had been unable to find any direct comparable evidence for valuing the property in such an unusual development.

10. However, the builder went into receivership after completing only two houses and some of the roads. At that point Allied Irish Bank pulled out, and the development came to a halt. By December 1995 Acorn owed Allied Irish Bank some £720,000. Allied Irish Bank had agreed to freeze the interest payments. In early 1996 it agreed to accept a reduced sum in settlement of its debt; provided that payment was made by 26 April 1996. Mr James Skinner, who was an investor in Acorn, and would shortly afterwards become a director of it, was already known

to the Bank in connection with other businesses. In March 1996 Mr Skinner told Mr Glen Saunders, the Bank's UK managing director, about the Televillage project. On 13 March 1996 Mr Dobbs wrote to Mr David Hawes, another of the Bank's executives, enclosing a proposal to raise finance for the development. He described the outstanding Allied Irish Bank loan as £400,000, the total cost of refinancing and completing Phase I £1.78 million and the total cost of Phase II as £1.177 million. Phase I consisted of 17 properties (13 houses, 4 flats) and Phase II a further 17 detached houses. Mr Dobbs met Mr Hawes on site on 21 March 1996 and at an "open day" at the Bank's Bristol office. Mr Dobbs said that he picked up some literature about the Bank, which advertised itself as "ethical, environmentally friendly and transparent". He said that this description was one of the reasons why he sought finance from the Bank, rather than pursing alternatives. Mr Dobbs followed this up with a letter to Mr Hawes stating that he was "persuaded Triodos was a bank I would like to work with". Thereafter Mr Dobbs provided Mr Hawes with further information in support of Acorn's application for finance; including an estimate of the construction costs provided by PA Rowlands Constructions Ltd, the new builder that Acorn expected to employ. Construction costs were estimated as about £539,000.

11. On 12 April 1996 Mr Hawes compiled a loan application report. He recorded that £400,000 was required to refinance Acorn's existing borrowing with Allied Irish Bank; and a revolving credit of a further £500,000 was required to finance the construction of 17 dwellings at the Televillage (i.e. Phase I). £200,000 was to be repaid by sales of the 17 properties, with the balance being carried forward and repaid on completion of Phase II of the development. He noted that approval would be required from the Bank's head office in Zeist, Holland for a loan of this size. He also noted that development on the site was at a standstill. The total sum actually owed to Allied Irish Bank was £720,000 on which interest had been frozen since December 1995. Allied Irish Bank had a first charge over the farm and a cash-supported guarantee of £220,000. They had agreed to accept the £220,000 and a further £400,000 if paid by 26 April 1996. Mr Hawes considered it "essential to rigidly control the finances throughout a project of this nature". He had seen a copy of Acorn's construction programme and had discussed it with a quantity surveyor. It seemed realistic. The quantity surveyor had also confirmed that the costs seemed realistic. Mr Hawes commented: *"The cashflow shows peak borrowing of £750,000 (including the land loan) with an exposure of £770,000 including accrued interest. However, the development could be affected by a number of factors such as bad weather or some plots being progressed faster than others to satisfy agreed sales etc. Therefore an overall facility of £900,000 is requested to cover these eventualities on the understanding that any variance from the cashflow for reasons other than timing would be immediately reported to the Loan Committee."*

12. Mr Hawes noted that there was to be a capital injection of £50,000 by Mr Skinner. Mr Skinner had also undertaken to buy the show home on mortgage if another buyer could not be found within the contemplated timescale. At the end of Phase I, Acorn was expected to owe £200,000 secured against the remaining Phase II land, worth at least £470,000. In addition to the DTZ £720,000 valuation, Mr Hawes had also seen one for £950,000. Mr Dobbs would be required to give a £50,000 guarantee to tie him to the project. Funds would be released in stages to minimise the Bank's risk, and no funds would be released until Mr Skinner had made his capital injection. Mr Hawes concluded: *"The nature of this Project is unlike anything that we have done in the U.K before and it will require close management. At the same time it must be appreciated that there will be variations against cashflow, and security values will fluctuate. Therefore, our main task will be to keep the development within the original parameters but with a degree of flexibility around timing and security cover."*

13. The application was approved by the Head Office on about 15 April 1996.

14. On 17 April 1996 the Bank agreed to make the loan. £400,000 was available for immediate drawdown to pay off Allied Irish Bank. A further revolving credit of £500,000 was to be made available in tranches to enable the development to be completed. Drawdowns from the development loan were to be in line with a cashflow forecast and supported by a certificate from the quantity surveyor confirming completion of the relevant work. Work was to begin with plots 23 - 27 and end with plots 28 – 33. The idea was that the proceeds of sale of the first batch of houses would help to finance construction of the second batch. Financing arrangements for construction of the remaining (Phase II) plots would then be subject to separate negotiations. By the end of Phase I the land loan of £400,000 was to have been reduced to £200,000. The Bank's facility letter also listed the security required by the Bank, to comprise a legal charge on the land, a floating charge on all Acorn's other assets, a guarantee for £50,000 from Mr Dobbs and an assignment of a keyman life policy written on Mr Dobbs' life.

15. On 18 April 1996 the Bank's security forms were sent to Gabb & Co, solicitors in Crickhowell acting for Acorn and Mr Dobbs. (Gabb & Co subsequently acted for the Bank as well on the grant of the mortgage). On 22 April 1996 Woodeson Drury, Acorn's quantity surveyors, confirmed that the construction costs for Phase I were realistic. On 25 April 1996 DTZ updated their valuation (this time addressed to the Bank) to £750,000 for the whole site, broken down into £315,000 for Phase 1, £360,000 for Phase II and £75,000 for the remaining buildings. Again they drew attention to the difficulties of development. Again they recommended that the Bank should approve cost estimates and reserve the right to approve detailed plans, specifications and builders' estimates. They had reservations about the saleability of the smaller units, and also about the income and capital values which could be produced for the refurbished farm buildings. So far as marketing was concerned they said:

"Of primary concern to us is the emphasis and concept being compounded by your customer. The subject property should, we believe, be marketed as a residential development site with ancillary potential studio/office accommodation available. The vast majority of value lies in the residential element of the scheme. Your customer's promotional video (which we viewed eight months ago) and brochure are heavily dependent on the "televillage"

concept which, we believe, may have the effect of deterring some potential purchasers. Much more emphasis should be placed on the residential dwellings themselves as residential development within the area, and on this scale, has not been undertaken for some years. The development proposal could be considered as "unique" without the televillage element. These points have been discussed with your customer."

16. DTZ also said that it was very difficult in view of the unique nature of the site to identify accurate values of all the proposed dwellings, but they thought that the asking prices were too high. They also referred to problems since the work commenced, including the fact that the original quantity surveyor's estimates were exceeded by a considerable margin and that additional costs in relation to road adoption and external works had been incurred. They were doubtful that the high quality and expensive finish would be translated into higher sales prices achieved. On the question of realising the security they commented:

"*You should note that it could be difficult to dispose of the existing property on the open market in view of the potential reluctance for developers to become involved with schemes which have already been started by another builder, ie part completed schemes can be perceived poorly in the open market. Combined with this, there is a complicated planning consent and considerable consultation will be necessary in terms of planning and in view of the uniqueness of this site."*

17. They added that perception of the development in view of past problems might be poor locally and regionally.

18. The loan documentation was completed on 26 April 1996. Condition 12 of the loan agreement said:
"For control purposes Phase One of the Development will be divided into three stages as follows:
1. Construction of Plots 23 to 27.
2. Construction of the Tower Block and Plots 3 to 3.
3. Construction of Plots 28 to 33.
Stage One will not commence until each of the Conditions numbered 1 to 10 above have been complied with. Stage Two will not commence until Triodosbank receives the proceeds from the sale of the showhouse, part of the farm buildings and the contribution towards the road due from the neighbouring property (£110,000 less costs). Stage Three will not commence until contracts have been exchanged for the sale of each of the Plots numbered 23 to 27 inclusive."

19. On the same day Mr Dobbs gave a written guarantee of Acorn's liabilities to the Bank, with a limit on liability of £50,000 plus interest from the date of demand. The terms of the guarantee entitled the Bank to agree variations in Acorn's liabilities without discharging the guarantee.

20. On 30 April 1996 P A Rowlands Construction Ltd submitted a tender in the sum of £739,450. On 10 May 1996 Woodeson Drury sent Mr Hawes a construction cash flow forecast on the basis of which Mr Hawes revised the cashflow forecast. On 2 July 1996 the planning permission for the development was varied to provide for an additional two flats to be included within the tower feature (these became plots 35 and 36).

21. The contractor was given instructions to proceed on 8 July 1996. By letter dated 27 August 1996, Acorn authorised the Bank to make payments on its behalf that were authorised by Woodeson Drury. By October 1996 the show house had been sold for £82,000 and the construction work was on schedule and on budget. The Bank had been asked to bring forward construction of flats in "block B". Mr Hawes recommended that this be done. In his report he said: *"Construction is progressing according to schedule and on budget. Sales interest is encouraging and generally speaking the project is performing well."*

22. On 13 November 1996 Mr Hawes visited the site. Mr Dobbs asked to bring forward construction of the tower at a cost of £71,000 and wanted to start renovating the farmhouse. Mr Hawes prepared a revised cashflow forecast. In a report to head office dated 1 December 1996, he recommended allowing the proposed work to the tower and up to £50,000 to be spent on the farmhouse. He commented:

"In adopting this approach, we will be gambling to some extent with our security values but I am encouraged by the progress of the project so far and the professional approach of both Ashley and the Quantity Surveyor. Therefore I believe this is a gamble worth taking on the understanding that the total borrowing does not exceed the £500,000 figure originally agreed for the Development Loan."

23. On 28 January 1997 planning permission was given to add a further 3 plots (37-39) within Phase II of the development. By March 1997 substantial sales income projected in the November cashflow had not materialised; and on 24 March 1997 Mr Hawes wrote to Mr Dobbs expressing concern that Acorn's borrowing was about to go more than £50,000 over budget. He said that the reason for this had been caused by the Bank's agreement to the acceleration of the building programme, while completion of the work had taken longer than anticipated. He agreed that Mr Dobbs could instruct the builder to start work on plot 3 and the interior of the tower. He added that this would expose the Bank far more than originally anticipated and said that the Bank would be unlikely to commit to any more expenditure until sale proceeds of plots 25-7, 29-30 and 33 had been received; and contracts exchanged for plots 24, 31-2 and one of the tower plots. Mr Dobbs replied on 25 March 1997 agreeing with this approach. By the end of May 1997 sales of 7 plots had been completed and contracts exchanged on plots 32, 34 and 36. Mr Dobbs was keen to start renovating the farm outbuildings. Mr Hawes therefore sought sanction in principle from head office in a report dated 29 May 1997. On 15 July 1997 the Bank commissioned a valuation report from Colleys. They produced their report as at 28 July 1997. They valued the property as a whole at £660,000.

24. The Bank recorded that by December 1997 Phase I costs were £180,500 over budget against increased sales revenues of £100,550. Much of the increase was due to delay which had in turn increased the interest payments.

25. In the meantime Mr Dobbs had been in contact with Countryside Properties plc. They were interested in the idea of televillages and in forming some sort of joint venture with Mr Dobbs or Acorn. Mr Dobbs had already invited Countryside Properties plc to tender for Phase II; and he said in his letter to Countryside Properties Plc on 23 December 1997, he favoured the idea of a "cost plus" contract. On 15 January 1998 Mr Dobbs produced a business plan for Acorn and Countryside Properties plc to form a joint venture company called Acorn Televillages UK Ltd to build televillages using profits made by Countryside Properties plc from building Phase II of the Crickhowell development. The plan recorded that Acorn and Countryside had agreed to construct Phase II on the basis that Acorn would pay "net cost plus 10%" and proposed that the 10% profit margin would be loaned interest-free to the joint venture company.

26. Phase I had originally been expected to have been completed by April 1997; but it did not achieve practical completion until 17 March 1998. A number of the completed houses were sold or reserved, although some of the infrastructure, including the fibre optics, roads and the storm drain had not been installed. The second builder went into receivership on 20 March 1998. Acorn terminated the building contract on 15 April 1998 on the ground of the contractor's insolvency. Costs had overrun budget, and despite increases in the selling prices of the completed units, Acorn's liability to the Bank at this stage was just under £550,000, with Phase II still to be built.

27. On 25 April 1998 Mr Hawes produced a recommendation for the Bank to approve finance for Acorn to renovate the farm buildings and build the Phase II houses. He noted that approval from the Bank's head office would be required. He reported that it had originally been expected that by May 1997 the Phase I plots would have been sold and Acorn's liability to the Bank reduced to £200,000. In fact completion of the last 2 sales (plots 23 and 30) was still awaited and Acorn's liabilities were £550,000. The main reasons were: unplanned expenditure on the farm house; increased professional and administrative costs caused by the project taking longer than expected; some work referable to Phase II and other cost overruns. He did, however, note that during the delay house prices had risen, generating an additional income of £140,000. A fixed price contract had been agreed with a local builder to renovate the farm buildings. The Phase II building contract had been awarded to Countryside Properties (South Western) Ltd ("Countryside"), a subsidiary of Countryside Properties plc which Mr Dobbs wished to employ even though its tender was the highest at £2.3 million; based on cost plus 3.25% for overheads and 3.5% profit. Mr Hawes had met Countryside's managing director, Mr Freeman, who had confirmed their desire to work with Mr Dobbs on similar projects in future. To complete Phase II in line with the cashflow projection, the development loan facility would need to be increased to £1.6 million, and bond liabilities increased to about £195,000; in addition to the £400,000 land loan. The total came to £2.195 million. Mr and Mrs Dobbs were buying plot 23, and contracts had been exchanged on plot 30. Phase II sales were expected to realise £4 million on completion. There was a security shortfall due to up-front costs and the Bank would need to have the right to build the project out if necessary. It would also need to curb Mr Dobbs' enthusiasm for constantly upgrading his product. The cashflow dated 26 April 1998 forecast a net credit balance for Acorn on completion in September 2000 of £86,178.

28. The Bank's UK loan committee reviewed the proposal on 27 April 1998 and agreed facilities of £2.195 million, subject to time penalties being built in the building contract; the Bank to be a party to the contracts without being liable; specification agreed at the outset; agreed protocol to prevent non-budgeted expenditure; assignment of the building contract to the Bank and head office approval. The proposal was approved by the Bank's head office on 28 April 1998.

29. It was originally envisaged that Phase II would itself be completed in stages, and that as each group of houses was completed, the proceeds of sale would provide funding for the next stage together with an element of repayment of the Bank's loan.

Phase II of the Crickhowell development

30. Countryside began work in about June 1998 under a letter of intent, although the building contract was not signed until the following February. The Contractor's Proposals (which were later incorporated into the contract) split the work into three stages. Stage one (to be begun in week 6 and completed in week 28 of the contract) consisted of plots 4, 5, 19, 20, 21, 37, 38 and 39. Stage two (to be begun in week 17 and completed in week 42) consisted of plots 6, 7, 8, 15, 16, 17 and 18. Stage three (to be begun in week 27 and completed in week 57) consisted of plots 9, 10, 11, 12, 13 and 14. The programme originally agreed was 15 months, with completion thus due at the end of August 1999. The forecast expenditure was £2.6 million. But things began to go wrong with Phase II almost from the beginning. Already by September 1998 the completion dates for plots 38, 39 and 19 had slipped as a result of difficulties in obtaining materials; and the project was over £100,000 over budget. During the course of October 1998 Woodeson Drury increased their costs forecasts twice: first from £2,616,660 to £2,663,460; and then to £2,706,415. Acorn's projected profit margin was being severely squeezed. On 14 October 1998 Woodeson Drury wrote to Countryside complaining about further delays in completing plots 38, 39 and 19; and costs exceeding budget, particularly in the areas of carpentry and brickwork, by considerable sums.

31. On 4 November 1998 two further on demand loan agreements were made by the Bank with Acorn for facilities of £380,000 and up to £1.6 million; to reschedule borrowing of about £800,000 which remained on completion of the first phase and to finance the further development work at the Televillage. The terms of the development loan

included conditions for the Bank to be provided with monthly sales projections (condition 8); the Bank to be provided with copies of change order notices under the building contract and to have the right to rescind any such orders (condition 10); each drawdown to be supported by a certificate from the quantity surveyor (condition 11); and limiting the use of funds to the Phase II work and farm building renovations subject to Bank consent for interior work on the farm house and farmyard (condition 12). Condition 13 said:

"The Borrower undertakes not to commit to expenditure which is not otherwise covered in this agreement which would increase the overall project costs including overheads and promotional expenditure beyond the currently forecast figure as detailed on the attached schedule and signed by both the Bank and the Borrower for the purposes of identification."

32. The cashflow forecast (which by now was a contractual document) again envisaged that Phase II would itself be split into three stages. The proceeds of sale from the houses in each stage would help to fund the cost of the next stage. The first stage consisted of plots 4, 5 and 19 to 39. Apart from plot 19 (which was the show house) these houses were to be sold by January 1999. The second stage plots were to be sold by May 1999; and the final stage (plus the show house) by September 1999.

33. On 23 November 1998 Woodeson Drury gave Countryside notice that certain work had not been completed and that liquidated and ascertained damages ("LADs") might be withheld. In the following month Woodeson Drury increased their costs estimate yet again; this time to £2,989,722. Anticipated costs now exceeded the original estimate of £2,616,660 by £343,456. Despite Woodeson Drury's threat, Mr Dobbs decided not to withhold any LADs from payment certified to be due to Countryside on 23 December 1998. At about that time Countryside intimated that there might be a claim from their groundwork sub-contractor for £36,000 representing the cost of additional work.

34. In his letter to Mr Dobbs of 6 January 1999 Mr Woodeson said: *"You will note that expenditure has increased above that originally forecast by Countryside Properties. Countryside Properties have acknowledged that in some areas their original estimate was too low and for other items they are having to pay higher than expected prices due to scarcity of labour and subcontractors."*

35. Because this was a "cost plus" contract, these additional costs would be payable to Countryside. On 8 January 1999 Mr Dobbs wrote to the Bank stating that Acorn and Woodeson Drury were concerned about the projected increased costs overall. He said that they were largely due to under-estimation by Countryside, and that he had increased asking prices as a result. He said that he was confident of achieving the increased prices. Mr Hawes recalculated his figures. If Acorn achieved the higher prices, it would be left with a profit of £660,000. But if it did not, it would be left with a loss of £98,000.

36. On 26 January 1999 Mr Dobbs wrote to Countryside expressing concern at poor site presentation. He accepted that there was an "excellent foreman and contracts manager" but asked for the site to be cleaned up. Mr Freeman replied that untidiness was inevitable due to the tight restraints of the site. Mr Dobbs now decided to withhold payments as liquidated damages. This produced a sharp reaction from Countryside. Mr Freeman wrote to Mr Dobbs on 1 February 1999. He complained that Mr Dobbs' decision to deduct liquidated damages in full had damaged the relationship between Acorn and Countryside and had demoralised staff. He added that sourcing materials to comply with Mr Dobbs' requirements had on occasions been unworkable. He stated that he was not prepared to continue with the development with the threat of further financial penalties. He proposed to complete plot 38 and then cease further work and let Acorn employ another contractor. Mr Dobbs responded on the same day by fax. He said that he did not intend to delay payments but pointed out that the first homes were taking about twice the projected time to complete. He referred to Acorn having deducted £17,100 but would pay this if the latest revised programme dates were met. On the following day Woodeson Drury granted Countryside an extension of time under the contract to 3 January 1999 (section 1 of the works), 27 June 1999 (section 2) and 3 October 1999 (section 3). By March 1999 costs were £365,000 over budget, and it was clear that the expected completion dates could not be met.

37. Mr Hawes visited the site in April 1999. None of the houses was near completion. There were partially completed houses all over the site. Mr Dobbs said in evidence that although Countryside were supposed to build the houses in phases, what they in fact did was to build "across the site at a similar speed". However, there is no record or evidence of any complaint made by Mr Dobbs to Countryside about that. There was a meeting between Mr Dobbs and the Bank (attended also by Mr Woodeson) on 18 May 1999. The Bank pointed out the cashflow problems, and said that they were real problems for Acorn. Mr Dobbs' response was that Acorn needed to borrow more money, to which the Bank said that if it lent any more, there would be conditions attached.

38. A meeting between Mr Dobbs and Mr Freeman took place on 21 May 1998. Mr Woodeson attended and took notes. His note records: *"There was a general agreement that delays on Phase I of the project had been encountered for a number of reasons. Some fault was attributable to [Countryside] due to poor management and control, some fault attributable to changes and variations required by [Acorn] (work to barns and courtyard, unresolved boundary dispute) and some fault attributable to difficulties in obtaining materials."*

In was agreed that in future Countryside would be paid on practical completion of each house; but Countryside later went back on that. Mr Dobbs agreed that Acorn would not deduct liquidated damages for delays to date.

40. By June 1999 only 6 out of the 13 units had been completed; and only five had been sold. Countryside claimed that Acorn owed them £760,000 and threatened to walk off site at the end of June unless they were paid. Mr

Dobbs explored the possibility of Countryside plc buying Acorn for an immediate payment of £2.5 million and the assumption of Acorn's liabilities, plus further possible payments of up to £2.5 million. But Countryside plc turned him down. In his letter of 18 June Mr Freeman, the managing director of Countryside, said: *"We have reviewed the content of the pack at some length and we still believe the concept you have created is well founded and of great merit. However, in reviewing the financial position of your Company, we have a number of significant concerns. In particular, the forecasted sales revenue is not a matter in which we share your views. Our own market assessment, which has been in depth, leads us to conclude that revenue is substantially overestimated, both in terms of achievable price, legal title matters which remain outstanding and several other marketing aspects."*

He also said that Countryside had concluded that, contrary to what had been agreed at the meeting, it would not fund the development without a secure guarantee from the Bank for the estimated final cost of the project. He therefore suggested a joint meeting with the Bank, with Mr Woodeson present. Mr Dobbs rang Countryside on 22 June to discuss this. On 23 June Mr Freeman wrote again. He said that Countryside would stop work on 30 June unless the current valuation, certified by Woodeson Drury, were paid. He again suggested a meeting with the Bank, but agreed to await the latest valuation. Mr Dobbs had commissioned a valuation from Countrywide Surveyors (not to be confused with Countryside). They reported on 28 June 1999. Their view was that Mr Dobbs' asking prices for the units "cannot be justified and sales are unlikely to be achieved at these levels of prices, unless there is a considerable general rise in prices in the locality overall." I set out their detailed figures later in this judgment. Mr Dobbs said in evidence that Countrywide's valuations were conservative and below achieved sales prices. However, a comparison of values ascribed to the houses by Mr Dobbs himself with those ascribed to them by Countrywide shows that Mr Dobbs was willing to sell plot 7 for £259,000, whereas Countrywide valued it at £280,000. I do not consider that Mr Dobbs' view of Countrywide's conservatism is sound. Countrywide's values were, in aggregate, nearly £500,000 less than Mr Dobbs'. However, based on these reduced values, Mr Dobbs calculated that Acorn would make a profit on the development of £371,000.

42. On 2 July 1999 Mr Freeman wrote to Mr Hawes expressing concern at the financial position of the development. He said that he believed that all parties were at financial risk. He said that he had requested a meeting with the bank on several occasions but that Mr Dobbs and the Bank had discouraged it. He claimed there was a total outstanding balance of £763,882 due for payment to Countryside on 30 June 1999 and that Countryside would cease work from Monday (5 July 1999). He also claimed problems had been caused by Acorn; and in particular by Mr Dobbs "continually ignoring the advice offered to him by his professional advisers and ourselves". He asked the Bank to consider authorising outstanding payments in full.

43. On 5 July 1999 Mr Hawes wrote to Mr Freeman. He recorded terms agreed at an earlier meeting. They were that the Bank would pay Countryside £264,000 on successful handing over of plots 20 and 21. Thereafter payments would be made on completion of plots and the outstanding debt of £500,000 owed to Countryside would be paid at the rate of £37,500 from plot sale proceeds and a bonus of £3,500 for each plot delivered on time. Mr and Mrs Dobbs were to provide a second charge on their house to support Mr Dobbs' guarantee. Acorn were to continue to be responsible for marketing at prices agreed with the Bank. There would be a review in mid-September when the Bank might act to take over if sales had not been achieved.

44. By now, Mr Hawes was very concerned. He thought that the Bank was "*seriously exposed*". On 6 July 1999 he prepared a report. He summarised the current situation as follows:
"The Project is in difficulty and we must now treat this as a recovery situation; they have not paid the building contractor for two months and owe £650,000 - £760,000 which is overdue for payment. There is insufficient leeway in the current facility to enable this payment to be made. The contractor is threatening to take his men off-site.

There are several factors which have contributed to this situation arising but the principal reasons are:
- Development was intended to be progressed 5/6 plots at a time with sales from the preceding batch cashflowing the next batch
- Contractor experienced serious difficulties in sourcing materials for the first batch of houses. The specialist nature of some components caused long lead times.
- Project therefore committed to work on plots before sales completed on earlier properties.
- Now in a position where all plots are part completed but very few are finished and saleable.
- Delays in completing showhouse and dirty site conditions caused Project to hold back on their marketing campaign.
- Project has priced properties significantly above market levels."

45. Acorn had already borrowed over £2 million and the limit of the facility was £2,195,000. There was under £200,000 left with which to meet Countryside's claim. Mr Hawes said that to realise the true value of the development the Bank would need to provide a further £1.3 million to complete the 15 unfinished plots. It would be difficult to do so using a different builder; but Countryside would leave site unless its exposure was reduced. He considered the Bank should keep the project going but take a more active role than normally. He estimated that if the properties were sold at the reported open market values, and Countryside agreed the proposals, the Bank "just about gets out"; but that if the properties had to be sold at forced sale values, the Bank would need to sell the farm buildings as well in order to cover its lending. He recommended the agreement as a means for the Bank to "*regain its current investment*".

46. Mr Freeman did not agree with Mr Hawes' proposals. He disagreed with the assumptions about open market value, and thought that the bonus of £3,500 per plot was unworkable. Mr Dobbs, however, was appreciative of

the Bank's efforts. In his letter to Mr Hawes of 7 July 1999 he said: *"I would firstly like to take the opportunity to thank you and Glen for the extraordinary efforts and negotiation skills you are employing to find a way forward for Acorn. We fully appreciate that the current situation is one that many banks would choose not to support and consider ourselves extremely fortunate to be working with bankers committed to the success of the televillage."*

He went on to agree to provide a second charge over his home. He made it clear that he wanted to keep open the option of selling Acorn to generate funds with which to repay the Bank. In his oral evidence Mr Dobbs said that it would have been possible to refinance the project with mezzanine finance, but he did not take any steps to find any such finance. Apart from trying to sell Acorn to Countryside, his only solution was to ask the Bank to lend Acorn more money.

48. On 8 July 1999 Mr Freeman set out his own proposals. They were that:
    i) Countryside would be paid £264,000 immediately based on successful handover of plots 20 and 21;
    ii) Countryside to be paid on a regular basis as and when future plots were available for build handover based on a programme agreed between Countryside and the Bank;
    iii) £500,000 of the money due to Countryside to be set aside and paid on a pro rata basis when sales completions were met; on the basis of £35,700 per completion, and Countryside's entitlement to have priority over the Bank;
    iv) Countryside to be paid a bonus of £3,500 on completion of each sale if open market value (based on Countryside's valuation) was achieved.

49. He added that the estimate of £1.391 million to complete the project "may be light". On about 2 July Countryside had provided their own estimate of the overall cost of the project. It came to £4.14 million, although costs savings of £382,000 were proposed, bringing the cost down to £3.82 million. There was a meeting at the Bank on 15 July attended by Mr Saunders, Mr Dobbs and Mr Woodeson, at which Mr Woodeson was asked to produce a report on costs. In their letter to Mr Saunders dated 16 July 1999, Woodeson Drury increased their estimate of the cost of the phase 2 works to £3,608,884.59 and the farm building costs to £474,834, making a total of £4,177,219. They attributed the majority of the increases to Countryside's budget deficiencies. They also quoted to act for the Bank in monitoring and reporting on progress on site to October 1999. However, the Bank did not instruct Woodeson Drury, who continued to act on behalf of Acorn. Woodeson Drury made a further report to the Bank on 20 July. There was a large gap between Countryside's figures and those that Woodeson Drury were prepared to accept. Mr Nuelle of Woodeson Drury then met Countryside to go through their respective cost assessments. Mr Nuelle thought that some of Countryside's points might be valid ones. He reported to the Bank on 23 July.

50. On 23 July 1999 Mr Dobbs wrote to the Bank, commenting on Woodeson Drury's figures, and making suggestions about terms to be included in any deal with Countryside. Efforts were made to reduce the costs; and cost savings of some £341,000 were agreed. The savings assumed that Countryside would not supply kitchens to the houses. The cost of completing the project was now estimated at £3.54 million plus a provisional sums allowance of £61,000. Woodeson Drury reported this to the Bank on 26 July 1999; but they warned that if Countryside terminated the contract and a new contractor had to be employed, the costs would increase by £150,000 to £500,000.

51. Mr Saunders and Mr Freeman met on 28 July. On the following day Mr Hawes sent Mr Freeman some revised projections. A further meeting was arranged for 30 July 1999 to "hammer out a deal". It was to be attended by Countryside, Acorn and the Bank. Mr Hawes and Mr Saunders urged Mr Dobbs to get legal representation, but Mr Dobbs said that he could not afford it. In anticipation of the meeting Mr Saunders sent Peter Blom, the managing director of the Bank at its head office in the Netherlands, a report setting out the proposed arrangements and sought approval to negotiate at the meeting. In the report he said that Acorn's liabilities were about £2 million and the only way to realise full value from the site was to complete and sell the properties, which would realise £3.7 - £4.5 million. Countryside was owed £800,000 - £1 million and was prepared to complete for a capped price involving £720,000 funded by the Bank. Acorn would need facilities bringing the Bank's exposure to £2.85 million. The proposed arrangements were intended to keep the project intact to maximise sale proceeds. Mr Saunders concluded: *"The Bank finds itself in a difficult recovery situation where it needs to lend a substantial amount of new money in order to maximise the possibility of achieving a full recovery. The project will require active management but the prospects of a full recovery look good."*

The Bank prepared bullet points for the deal. The main terms of relevance were:
    i) The Bank was to increase the facility to £2.6 million;
    ii) The facility was to be advanced in tranches on receipt of a requisition by Acorn in an agreed form;
    iii) The Bank was to have Acorn's authority to make payments direct to Countryside if satisfied that payment was due;
    iv) The facility was to be repayable on demand, but would expire at the end of February 2000;
    v) Acorn was to actively market the properties at prices agreed by the Bank;
    vi) Countryside were to undertake to complete the building contract at a fixed price of £3,625,574;
    vii) Countryside were to be released from their obligation to achieve adoption of the roads and drains by the local authority;
    viii) LADs were to be increased;

ix) Countryside would not sue Acorn for amounts unpaid, and Acorn released Countryside from LADs accrued to date;

x) Countryside would be entitled to additional payments if houses sold for more than anticipated open market value.

53. These points were agreed at the meeting on 30 July. Mr Dobbs attended, although he was not represented by a lawyer. Countryside were to supply some kitchens, so the fixed price was increased to reflect this. Countryside wanted an agreed procedure for handover of houses, and this was agreed too. Countryside also wanted a second charge over the site. The Bank did not object. Nor did Mr Dobbs. Countryside also asked for an obligation on the Bank's part not to sell the site as mortgagee in possession until such time as construction was complete unless Countryside was granted a right of pre-emption. The Bank wanted time to think about that. The responsibility for drafting the agreements was allocated. The minutes of the meeting were sent to Mr Dobbs on 1 August.

54. In early August Mr Dobbs instructed a solicitor at Piper Smith & Basham to look at the draft documents on Acorn's behalf. Although Countryside had not been paid for some months, they continued to work on site and made what Mr Dobbs later described as "substantial progress". Ultimately what was agreed was a financial package consisting of amendments to the construction contract, and the rescheduling of Acorn's debts. Although Mr Skinner was a director of Acorn, he took no part at all in any of the negotiations. The agreed package was put in place on 10 September 1999. It consisted of six agreements:

i) *A Debt Rescheduling Agreement*. This agreement was made between Acorn, the Bank, Countryside and Countryside Properties plc. Under this agreement:
   a) The Bank agreed to increase its loan to £2.6 million, and the loan agreement was to authorise the Bank to make payments direct to Countryside, subject to the Bank receiving confirmation from its own surveyors that payments were due under the construction contract (clause 2.1);
   b) The construction contract was to be varied by an agreed deed of variation; but no further variations to the construction contract were to be made without the Bank's consent (clause 3);
   c) Acorn agreed to grant Countryside a second ranking debenture over all its assets, and a second legal charge over Upper House Farm (clause 3.3);
   d) Acorn agreed to pay Countryside overage payments in relation to each plot based on the values that Countrywide had ascribed to each plot (clause 5.1); to pay the net proceeds of sale of each plot into a Debt Servicing Account (clause 5.2); and authorised the Bank to make payments to Countryside out of that account, if certain works had been completed according to a timetable (clause 5.3);
   e) It was agreed that each plot should be marketed for at least a month at the open market values fixed by the Countrywide valuation; but after that period Acorn was to be entitled to accept an offer which the Bank considered was the best price reasonably obtainable (clause 7);
   f) In the event that the Bank appointed a receiver, the Bank agreed to use reasonable endeavours to ensure that the plots were marketed at not less than their open market value for a period of one month (clause 7.4);
   g) Acorn and Countryside waived accrued claims against each other (Clause 8);
   h) n the event of the Bank appointing a receiver, the Bank undertook to exercise its step in rights under the construction contract (clause 9).

ii) *A Facility Agreement*. This was an agreement between Acorn and the Bank. Under this agreement the Bank agreed to make available to Acorn a facility of not more than £2.6 million. It was repayable on demand; but clause 9 of the agreement said that it was anticipated that the loan would be repaid out of the proceeds of sale of units, and that the Bank would not make a demand for repayment before 29 February 2000. The facility was to be used solely for the development of the Televillage. Clause 8.1 said that the bank would continue to have the benefit of Mr Dobbs' personal guarantee in the amount of £50,000; and required Acorn to procure that Mr and Mrs Dobbs executed a second mortgage in favour of the Bank over their property at 23 The Televillage;

iii) *A Deed of Variation of the construction contract*. This agreement was made between Acorn, the Bank, Countryside and Countryside Properties plc. Under this agreement:
   a) The contract sum payable to Countryside under the construction contract was increased to £3,755,574 (of which it was acknowledged that £2,008,054 had been paid) (clause 2.2.1.1);
   b) A new payment schedule to Countryside was agreed (clause 2.2.1.2.2);
   c) The Bank guaranteed those payments to Countryside (clause 2.2.1.3);
   d) The Bank's surveyors were given the right to review and approve instructions and notices given by Acorn to Countryside (clause 2.2.3.1)
   e) A new timetable was agreed (clause 2.2.4.1); and a new rate of liquidated damages for delay was agreed (clause 2.2.4.1.1). Practical completion was due on 29 February 2000;
   f) The Bank was given step in rights. This meant that if the Bank terminated the finance agreement it could take Acorn's place as the person entitled to give instructions to the contractor under the construction contract (clause 2.2.5). The Bank undertook to exercise these rights if it appointed a receiver over Acorn's assets;

iv) *A Debenture*. This was made between Acorn and the Bank. Under this agreement, Acorn charged all its assets to the Bank. Clause 9 empowered the Bank to appoint a Receiver as soon as demand had been made for

repayment of monies due. As is usual, clause 9.3 said that any receiver would be deemed to be Acorn's agent;

v) *A Fixed and Floating Charge*. This was made between Acorn and Countryside. Under this agreement Acorn granted Countryside a second charge over its property and a floating charge over its undertaking;

vi) *A Deed of Priorities*. This was made between Acorn, the Bank and Countryside. Under this agreement, the Bank and Countryside agreed a scheme for priority as between them. Countryside was to receive the first £10,000 per plot; the first £150,000 of the proceeds of sale of the farm buildings and 50 per cent of the balance up to a maximum of £408,927. Thereafter the Bank had priority over Countryside.

55. The general commercial pressure on Acorn is summarised in a recital to the debt rescheduling agreement which said: *"The Bank and Countryside have indicated to Acorn that in the absence of the arrangements and security set out in this Agreement, the Deed of Priorities and the Deed of Variation (as defined below) the Bank would not continue the Existing Loan Agreement and Countryside would terminate the Construction Contract."*

56. All the agreements into which Acorn entered were signed by Mr Dobbs on its behalf. Although Mr Dobbs did not give a new guarantee, it has already been held by HH Judge Havelock-Allan QC, on the trial of a preliminary issue, that the original guarantee covered Acorn's liabilities under the 1999 arrangements, either as a question of construction of the original guarantee, or by virtue of an estoppel by convention.

57. On 16 September 1999 Countryside wrote to the Bank complaining about the interpretation of "Stage 1" completion and pointing out difficulties with the site.

58. On 19 September 1999, as envisaged by clause 8.1 of the Facility Agreement, Mr and Mrs Dobbs executed a charge in favour of the Bank over 23 The Televillage.

59. Almost immediately Countryside fell behind the agreed timetable, giving rise to complaints by Mr Dobbs. Countryside had its complaints too. It alleged that Mr Dobbs was not marketing plots adequately. Countryside claimed an extension of time, which was refused by the Bank on 24 September (in a letter copied to Mr Dobbs). The Bank and Countryside met in early October. On 11 October Countryside wrote to the Bank. Its letter included the following: *"Buying out the Bank's position*
As discussed, we are continuing to prepare a proposal to put to the bank over the next week or so and a letter will be made available to you by a main board director shortly outlining our intentions."

60. Attached to the letter was a Preliminary Marketing Report, running to some six pages. The first of its recommendations was as follows: *"ReBranding*
If we are to take on the sales and marketing role Countryside must dissociate themselves with the name Acorn Televillages and Ashley Dobbs. As I mentioned earlier the name locally is now very much an anti sale and I would not be comfortable with Ashley Dobbs continual involvement or in a joint marketing campaign.
We must re brand the scheme under the Countryside banner and issue significant press releases announcing that a major PLC are taking over the project. This I believe will very much work in our favour."

61. The Bank replied on 13 October. Its letter included the following: *"Buying out the bank's position*
I await a letter from Richard Cherry setting out the basic terms and structure of the deal, so that we can let you know what we need to agree this."

62. The Bank joined in Countryside's complaint about the level of marketing. On 14 October 1999 Mr Dobbs wrote to Mr Saunders at the Bank seeking to justify his marketing activity. He acknowledged the Bank's support in the following terms: *"I have said to both David and yourself that I am extremely grateful for your effort and support in securing a way forward for the Televillage. It was not a problem of Triodos' making, and Acorn should take part of the blame. It has been a very frustrating and time-consuming negotiation which you both handled with skill and tenacity. I remain a fan of Triodos and fully recognise the extraordinary amount of support we are receiving."*

63. Mr Saunders was not impressed. He replied on 15 October: *"We are not sure that the marketing is being undertaken effectively. Many of the difficulties you describe appear to us to be special pleading. Many developments go through difficulties, most have to sell properties while the site is incomplete and dirty, snagging is a perennial irritation – all this is not ideal, but yet properties still manage to get successfully sold.*

I should clear up some other misunderstandings in your letter. We could have foreclosed and taken over the project some time ago. Then, of course, we would have had to undertake actions directly ourselves. So far we have not, which seems to us potentially in all our best interests and definitely so in your own case. This means that you must get on with things, and particularly the marketing, not us. We are not your business partners but your bankers, even though we have expended and continue to expend a very much higher level of time and management on Acorn than, I believe, most banks would do – but there are limits." (Emphasis in original)

64. Also on 15 October Countryside wrote to the Bank asking proposing an amendment to the payment regime. They copied their letter to Woodeson Drury. On 25 October 1999 there was a meeting between Mr Saunders, Mr Rawson and Mr Dobbs. Mr Rawson, who was Countryside's marketing director, made recommendations about the marketing strategy for the project. Two days later, on 27 October, Mr Dobbs wrote to Mr Saunders. He began by saying that he was very impressed with Mr Rawson's "Marketing Makeover"; and that all the points he made were valid. He went on to list some 31 points where expenditure for marketing was required. Mr Saunders replied on 8 November, listing the items for which he was prepared to release funds. However, he said: *"In each*

case, where funds are required I am indicating where we will release funds: it remains your decision which are the best things to do."

65. On the following day Mr Saunders received a report from Mr Dobbs informing him that Acorn had decided not to commit any more expenditure than that detailed in the report. Mr Saunders commented: *"So that there is no misunderstanding, that is your call, not ours."*

Because of continuing delays by Countryside, Acorn withheld payments on account of liquidated damages. Relations between Acorn and Countryside deteriorated, as did relations between Acorn and the Bank. On 20 November 1999 Mr Skinner sent a memo to Mr Saunders. He said that Mr Saunders was wrong to blame Mr Dobbs, rather than Countryside, for the problems with the project. He attributed the problems to Countryside's *"gross mismanagement";* and he cast doubt on Countryside's good faith. He continued:

"Armed with detailed knowledge of Acorn's position I suspect that they then determined to engineer the take-over of the company by buying out the bank and putting Acorn into receivership so they could buy it for £1. We know that the Cherry family like the concept of televillages and want to make it their own. This would have provided them with a neat way of acquiring all the knowhow and goodwill of Acorn for nothing except the cost of their own incompetence, which they would have to pay for anyway.

Unfortunately for them they encountered an unusual phenomenon – a bank which was loyal to its client, in this case Acorn."

67. Mr Skinner went on to say that he was confident that given resources, support and time, Acorn would sell the remaining houses and achieve a good profit for Acorn and the Bank.

68. Mr Saunders replied on 24 November. He said that whereas Mr Skinner was reliant on reports from Mr Dobbs, he himself had spoken to both sides and did not think that things were so cut and dried. His assessment of responsibility was as follows: *"I have not made it clear that I think Ashley is to blame for the current situation. I have modified my position from agreeing with you that Countryside is "90%" to blame, to thinking that the problems emanate in different ways but more or less equally between Countryside and Acorn."*

69. He concluded his letter by strongly recommending to Mr Skinner that he "get directly involved in the actions around Acorn".

70. Mr Rawson produced a report on marketing on 26 November 1999. Mr Dobbs described it as "an excellent report which follows a series of constructive meetings". He supported the general thrust of the report, which among other things, wanted to move the development away from the concept of the televillage. Mr Dobbs also accepted that his list prices were high, and that "some adjustment downwards will be necessary to conclude early sales." In December 1999 Mr Dobbs was interviewed on BBC television about the concept of the televillage.

71. On 2 December Countryside wrote to the Bank. They set out their case for arguing that the LADs should not have been withheld.

72. On 9 December 1999 Countryside wrote to the Bank again. They said that there had been a site meeting with Welsh Water which had revealed the need for remedial works to the drainage of Phase I carried out by the previous contractor. They pointed out that the street lighting layout included work which had not been carried out by the previous contractor. They estimated the cost of these additional works at £90,000 and ended by saying that they looked forward to *"receiving your further instructions."*

73. Mr Skinner and Mr Saunders had a discussion in early December 1999. It appears to have been acrimonious. It prompted a letter from Mr Saunders to Mr Skinner on 16 December in which he said: *"You appear to believe that we have entered into some sort of cabal with Countryside. We have not and I resent the continued suggestions otherwise. We were approached by Countryside to see whether there were terms under which we could be bought out. (Much earlier, Acorn also discussed with Countryside the possibility of selling out the company – as I remember, we were not really told about that either, but I place no sinister construction on it.) We said that we would listen to any reasonable suggestions, but that any proposal needed to ensure that Ashley and yourself were financially secure as well as the bank being paid out. Countryside attempted to get information from us before making a clear proposal, but we refused to be drawn and insisted that they must make clear their intentions before there could be any discussion. No proposal was ever put and the matter not mentioned further. This was no more than two or three very short conversations. Is this what has made you seemingly so suspicious of us?"*

He added: *"We have increased our exposure and our risks when we need not have done because we wanted to see the project built out as far as possible according to its original conception."*

75. On the following day Mr Skinner wrote a conciliatory reply, assuring Mr Saunders that he was not impugning the Bank's good faith; and blaming himself for not having become directly involved personally earlier.

76. Towards the end of November the Bank's surveyor issued completion certificates in respect of two plots, and the Bank made payments to Countryside. Mr Dobbs wrote to protest on 20 December that these payments had been made against his express wishes, as snagging had not been completed. He asked the Bank not to make any payments to Countryside without Acorn's express approval. These were the last payments that Countryside were to receive before the receivership. Mr Freeman also wrote to the Bank on the same day complaining about Mr Dobbs' unreasonable refusal to accept the handover of plots 6, 16, 17 and 18. In the same letter he said that Mr Rawson was advancing the sales and marketing "*but accept we still need your formal instructions."*

77. On 28 December 1999 Mr Skinner wrote to Mr Saunders. He said that he and Mr Dobbs "have agreed that I will take on overall responsibility for Acorn Televillages Ltd, as Executive Chairman, with immediate effect". He also repeated that payments to Countryside should be made "only after receiving authorisation from Acorn in writing".

78. Both Mr Dobbs and Mr Skinner were dissatisfied with the performance of Countryside's site manager. On 4 January 2000 Mr Skinner wrote to Mr Saunders to tell him that direct approach was being made by Acorn to Countryside "at the highest level" to insist on a change of management. Mr Skinner met Mr Alan Cherry, the chairman of Countryside Properties plc. Mr Skinner asked for a change of management. He followed this up with a letter of 10 January 2000, in which he made a "formal request" for the immediate transfer of the site manager. On 12 January Mr Skinner told Mr Saunders that he had arranged a meeting with Countryside on site. He said that he wanted the meeting to be between Acorn as employer and Countryside as contractor; and said that he would prefer the Bank not to be represented at the meeting. He informed Mr Saunders that his intention was to insist on a change of management. The meeting took place on 14 January. In accordance with Mr Skinner's request, the Bank were not represented. The meeting seems to have been a positive one. At the meeting, Countryside agreed to replace the site manager. On 20 January Mr Richard Cherry (one of Mr Alan Cherry's sons and a director of Countryside) confirmed that the site manager and the building manager had been replaced at Mr Skinner's request.

79. On 26 January Mr Saunders reported to Mr Blom. He said:

> *"Since November 1999, Acorn has become much more effective in addressing the problems of this project with Jimmy Skinner, an investor and non-executive director of the company, taking on the role of executive chairman. This has meant that the bank has been able to take a far less active role in managing this project out. …*
>
> *Subject to final confirmation, we are still likely to minimise our losses by keeping Acorn in place and active, provided that they are willing to work closely in accordance with the bank's wishes. Thus there is no recommendation to foreclose yet. We should review this after, say, a further two months, when, if there is no progress on sales, but the properties are physically completed, we should consider handing the completed sale to agents and crystallise our loss."*

80. There was good news on 27 January 1999, when the project won the award presented by the Royal Town Planning Institute for the most innovative sustainable housing development. Mr Skinner was also pleased with progress on site, but said that there was little chance of completing the houses before March.

81. On 31 January Mr Saunders updated his report to Mr Blom. By now he recognised that the Bank would need to make a provision against non-recovery of its debt. He estimated this as £471,000. This took account of the possibility that the Bank would have to sell on a forced sale basis.

82. The disagreements between Countryside and Acorn over completion of houses and LADs continued. In mid-February 2000 Acorn were on the point of completing the sale of two plots, but Countryside refused to release its charge over the site, which was necessary in order for completion to take place. This led to correspondence between Mr Skinner and Mr Richard Cherry, in which it was agreed that sums claimed by Acorn for LADs should be retained in the loan account until the dispute was resolved.

The renewal of the facility

83. Practical completion was not achieved by the end of February 2000, when the September 1999 facility expired. On 24 February 2000 the Bank offered to extend the facility of £2.6 million for a further period *"in the hope that the project will be able to reach a successful conclusion after the very difficult period which has gone through."* The Bank said that it would review the continued provision of facilities at the end of March 2000. However, this offer was declined, and subsequently withdrawn. By the beginning of March, therefore, the position was that Acorn had no authorised facility.

84. The Bank was continuing to withhold payments to Countryside, at Acorn's request, on account of LADs. By the end of February the deductions amounted to £154,500.

85. Acorn, for its part, had commissioned Mr Ivor Russell FRICS to report on the position. Mr Skinner wrote to Mr Blom on 28 February 2000 warning him that the report would be "critical of some alleged errors of omission and commission in the handling of the situation by Triodos." Even so, on 2 March 2000 Mr Hawes wrote to Mr Skinner, urging him to sign and return the offer of a renewed facility. Mr Russell's report, produced in March 2000, was highly critical of Countryside, and scarcely less critical of the Bank. In essence he criticised Countryside for concealing the truth; and the Bank for being taken in by Countryside. Mr Russell did not, however, see fit to make contact with anyone at the Bank before reaching his damning conclusions. Nor did he investigate the financial history of the project. Nor did he see much of the crucial correspondence leading up to the September 1999 agreements. Whatever the merits of his criticisms of Countryside may have been, as an independent report on the conduct of the Bank, his report was worthless. Mr Russell said in evidence that the real purpose of his report was to provide Acorn with a defence to potential claims by Countryside. That may explain why it was so partisan. Having received Mr Russell's report, Acorn did not accept the Bank's offer to extend the facility. On the contrary, on 3 March it alleged that there were grounds for suing the Bank for damages. It also alleged that the September 1999 tripartite agreement was unfair to Acorn. In the light of that, the Bank withdrew its offer of a renewed facility on 3 March 2000. On 7 March 2000 Acorn sent the Bank a copy of Mr Russell's report and simultaneously protested to the Bank's managing director, Mr Blom, about the withdrawal of the offer of the renewed facility. One of the problems that Acorn perceived was the continuing involvement of Mr Saunders as the responsible officer within the Bank. Mr Skinner explained in a letter to Mr Blom of 15 March 2000:

"Ashley Dobbs and I feel that it is important that we should meet privately with you as soon as possible, because we are not happy about the prospect of involving Glen Saunders in the negotiations between Acorn and Countryside. We believe that Glen misjudged the situation and consequently mishandled the previous negotiations with Countryside last summer. We consider that he negotiated a deal with Countryside that was unfair to Acorn and unduly generous to Countryside. Our view is supported by the professional study carried out by Ivor Russell and summarised in the report already sent to you.

We do not believe that it will be possible for Acorn to take a tough line with Countryside, which we believe is essential, whilst Glen is part of the Acorn/Triodos team. He is committed to the view that Acorn and Countryside are equally responsible for the contract being late and overspent. I have frequently argued this crucial point with Glen over the past nine months and he has stuck adamantly to his opinion. The Russell report supports my view and I believe we must be guided by that report in our negotiations with Countryside."

86. On the following day, Mr Skinner sent an e-mail to Mr Saunders in which he said that Mr Dobbs was awaiting legal advice about suing Mr Saunders for libel.

87. A meeting took place on 21 March 2000. Amongst other things, the Bank asked Acorn what its proposals were about the expired facility and the repayment of the loan. Acorn's response was to ask for a new facility and an interest freeze. No specific complaints about Mr Saunders were made at the meeting. Rather, the unhappiness focussed on Mr Saunders' personal style in negotiations. In the result, Mr Blom wrote to Mr Skinner on 27 March saying: *"I have also discussed the situation with Glen and I consider that he has a strong grasp on the current situation and consequently I believe he is the person best able to represent the interests of the bank throughout the remaining period of the Crickhowell development, and the difficult negotiations which appear to lie ahead."*

88. On the same day Mr Saunders wrote to Mr Skinner. He said: *"You seek a new Facility Letter in an agreed form. We have already offered to extend the facility on a temporary basis subject to certain terms and conditions, which you have refused to accept. Hence the offer has been withdrawn. In the absence of any such agreement the current borrowing is classed as unauthorised and, as such, under our usual terms of business could attract interest at rates considerably higher than those charged until the end of February 2000.*

I am very keen, as I hope you are, to put this borrowing back on a regular basis, but I do not see the current atmosphere of threats from yourselves as conducive to an ongoing banker/customer relationship. Two of the key criteria in agreeing bank facilities are the strength of the relationship between the bank and the borrower and the affordability of the eventual repayment. In this case point one appears to be flawed and point two is far from clear."

In the light of Mr Russell's report, Acorn pressed the Bank to continue to withhold money from Countryside. In his letter of 28 March Mr Skinner said that in practical terms "this will mean the bank cooperating with Acorn in withholding the final payments due to Countryside under the tripartite agreement and keeping them in an escrow account until such time as the dispute between Acorn and Countryside is resolved". He repeated this in another letter to the Bank on the same day; and in that letter he asked for the monies in the escrow account to be set off against the outstanding loan, for the purpose of calculating interest. He said this would not interfere with the payment to Acorn of any funds available over and above the amount in dispute. The level of monies to be withheld was expected to be in the region of £500,000. By April 2000 the level of monies withheld had reached £246,000. Countryside's solicitors wrote to protest; and to require an undertaking that the monies withheld would be retained in the development account and not paid over to Acorn. The undertaking, for a period of two months, was given on 17 April 2000. By now, Acorn had serious cash flow difficulties, not least because there was no facility in place. The Bank was considering extending the facility. Mr Skinner, on the other hand, considered that Acorn's best strategy was to work towards an outright sale of Acorn to Countryside. This was the subject of discussion between Mr Russell and Countryside's solicitor, which gave Mr Skinner cause for optimism.

90. At the end of March Mr Dobbs made a requisition for funds to pay estate agents' and solicitors' fees connected with the sales of plots 17 and 18. The Bank refused to pay, on the ground that the facility had expired.

91. In early April Mr and Mrs Dobbs moved from the Televillage to a new house in Cornwall. On 4 April 2000 Mr Dobbs produced a cashflow. This predicted that success or failure depended on Acorn's entitlement to the LADs. On 13 April Mr Dobbs prepared a cashflow to determine how much money Acorn needed to borrow from the Bank. He treated the LADs already deducted as having reduced Acorn's borrowings, giving a balance on the loan account of £1.98 million. Even so, there was a projected deficit on completion. On 10 April Mr Hawes replied. He said that since Countryside were disputing the deductions, they could not be treated as reducing Acorn's indebtedness. Thus, Mr Dobbs' cashflow indicated too low a borrowing requirement. Mr Hawes suggested that Acorn could manage with a facility of £2.4 million, reducing to £2.2 million by the end of May 2000. The LADs, were however, treated as not bearing interest, so that, in effect, the Bank was giving Acorn the free use of that money. Moreover, on Mr Hawes' calculations there would be a deficit on completion, ranging between £290,000 and £560,000, depending on the sale prices of houses. On the same day Mr Skinner provided his own calculations to the Bank. These showed that, in order to break even, Acorn would have to achieve sale prices at 4 per cent above open market value. Mr Dobbs revised his figures, and on 20 April told Mr Hawes that Acorn's peak borrowing requirement was £2.2 million taking account of LADs and £2.6 million without them. The revised figures showed a deficit of £81,000 if sales were made at open market values. Woodeson Drury had, by now, not been paid for two months. On 20 April they threatened to stop work unless their fees were paid. This alarmed the Bank, and Mr Saunders wrote on 26 April to say that, in order for a short term facility to progress, the Bank

required a letter from Woodeson Drury, addressed to Acorn, confirming that they would continue to act. Unsurprisingly, Woodeson Drury's attitude was that they would continue to act, if they were paid. A letter to this effect was produced on 3 May. This did not satisfy the Bank, because the cashflow did not allow for this payment. On 11 May Woodeson Drury said that, as a temporary measure, they would resume work if half their outstanding fees were paid.

92. On 12 May 2000 plot 32 was sold for £80,000. It was the last plot to be sold before the receivers were appointed. Contracts had been exchanged earlier in April. On 26 April Gabb & Co, who were dealing with the conveyancing had written to the Bank to suggest that instead of remitting the full sale price of £80,000 to the Bank, they would deduct fees due on an earlier sale of a different plot, and remit to the Bank the sum of £77,011.25. The Bank agreed. However, on 12 May Gabb & Co remitted only £73,544.50 to the Bank. On 18 May Mr Hawes wrote to Gabb & Co to say that although the deduction agreed from the sale proceeds of plot 32 was outside the terms of the tripartite agreement, the Bank would keep to that arrangement. But he said that the Bank had not agreed to the deduction of any further sums; and in consequence the Bank would not release its charge over plot 32. He said that on receipt of the balance of £3,366.75 the Bank would release its charge on the plot.

93. On 12 May Mr Hawes had prepared a report summarising the situation as follows:
"Existing borrowing facility expired 29/02/00
Acorn commissioned an investigating surveyor (Ivor Russell) who produced a report blaming the difficulties the project now faces on a combination of the building contractor and the Bank.
On the basis of this report Acorn have sought Counsels Opinion as to their ability to set aside one clause in the rescheduling agreement, signed last September, which preclude them from pursuing any other parties for acts or omissions prior to the signing of the agreements.
Acorn has also threatened Glen with a private action for libel.
We have taken our own advice, which concludes that it would be highly unlikely that Acorn could succeed in either of the above actions.
Acorn now wish us to join with them trying to force the contractor into conceding more in damages than would be liable to under the September Agreements.
At the same time the contractor has declared their intention to contest payment of the damages on the basis of "acts of prevention" on the part of Acorn's agent (Woodeson Drury) and on the part of the Bank's surveyor (Banks Wood).
Woodeson Drury have threatened to stop work unless their fee arrears of £20,000 are paid up to date.
Meetings have taken place between Ivor Russell and the contractor's lawyers, and between Ivor Russell and our lawyers. Our lawyers have also spoken to the contractor's lawyers.
A meeting between the Bank and its lawyers and Acorn with Ivor Russell has been arranged for 20/05/00 with a further meeting attended by the Bank, Acorn, Ivor Russell, the contractor and each parties lawyers arranged for 24/05/00.
Acorn are desperate for a facility letter so that funds are available to continue marketing, pay Woodeson Drury, and complete their audited accounts which are overdue for submission to Companies House."

94. Mr Hawes recommended agreeing a facility of £2.5 million until the end of the month. An offer in these terms was made to Acorn on 16 May 2000, which Acorn accepted on the following day. LADs withheld now amounted to £388,000. In a letter to Acorn on 16 May Messrs Saunders and Hawes said: *"We are happy to extend facilities to [Acorn] for a further period in the hope that the project will be able to reach a successful conclusion after the very difficult period which it has gone through. This agreement is conditional upon the company agreeing to the points below, and confirmation from you that you understand that the effect of the revised agreement dated 10th September 199 which means that we now have a primary liability to Countryside – this places us in a quite different position from when we were merely Acorn's bankers and so at one stage removed."*

95. Amongst the conditions attached to the offer was the condition that: *"all correspondence, contacts, meetings and involvement between Acorn and Countryside must be copied and reported in full to Triodos by Acorn – in addition, Acorn will submit weekly sales reports to Triodos detailing in full all sales activities undertaken, sales achieved and all other contacts"*

On 30 May 2000 Mr Dobbs and Mr Skinner met Richard and Alan Cherry of Countryside. Countryside indicated it had claims against Acorn. They agreed to ask their surveyors to meet to try to resolve the LADs issues. Mr Skinner suggested Countryside buy out Acorn. Countryside agreed to consider the suggestion. Countryside also suggested that, as an alternative, it might make a cash offer to Acorn for the remaining plots. There was also concern expressed about complaints by residents, who would need to be pacified.

97. By the beginning of June the withheld LADs amounted to some £406,000. Woodeson Drury and Countryside's surveyor met on 5 June. Countryside's surveyor had been instructed to put forward a counterclaim, which he assessed at £290,000. The counterclaim was based on allegations of late inspections, defective windows supplied by nominated suppliers, the cost of window repairs and a claim for extensions of time.

98. On 8 June 2000 Countryside produced a marketing report. It summarised the position as follows: *"The development has now reached the final stages of construction and the units are all but finished. Presentation externally, with soft and hard landscaping is good but we do now have a problem of stock units and the impression*

that there are a lot of units for sale and little or no interest. If we are not careful we will create a "ghost town" image."

The main recommendation was that prices should be reduced and that particular note needed to be taken of the rise in the rate of stamp duty if prices exceeded £250,000.

100. Simultaneously the Bank consulted Gleeds on what to do if it exercised its step in rights under the building contract.

101. On 9 June 2000 there was a meeting attended by representatives of the Bank, Acorn and Countryside. Withheld LADs now amounted to £465,000. Countryside alleged that it had a counterclaim for £320,000; considerably more than the claim that had previously been intimated. Mr Saunders indicated that he supported Acorn's claim to be entitled to deduct LADs. The discussion then turned to marketing. Mr Skinner said that: *"units were not selling because of a bad atmosphere in the village directed at Ashley Dobbs created by Countryside. Further Countryside's own development was attracting potential buyers away from the Televillage. Also until outstanding works, which Acorn did not have funds for (i.e. drainage remedial work, fibre optic network, landscaping etc.) were complete marketing at the present time was a waste of money."*

Countryside agreed to consider buying the plots itself. Countryside agreed to put proposals forward for it to contribute funds towards the cost of marketing. The Bank agreed that its undertaking not to disburse the LADs could be extended. It was agreed that Countryside would put its proposals in writing and submit a written counterclaim.

103. On 14 June a damaging article about the development appeared in the local newspaper. At about the same time Countryside stopped work on site, apart from a token presence. They had not received any money since the previous November.

104. On 16 June 2000 Countryside made an offer to buy the freehold of the 12 houses remaining unsold and also the farm buildings. The offer was £3.3 million, from which there were various deductions to be made. The deductions amounted to £1,657,000, leaving a net cash payment to Acorn of £1,643,000, to which the withheld LADs of £465,000 might be added if it turned out that Acorn was entitled to them. On 19 June Mr Skinner rejected the offer.

105. On 3 July 2000 Acorn's solicitors wrote to Countryside's solicitors. Among their complaints were that:
   i) Countryside had instructed sales staff not to accept reservations for houses;
   ii) There had been virtually no building on site since 14 June;
   iii) Mr Rawson had been telling residents that Countryside was owed over £1 million.

106. Towards the end of June the Bank had commissioned a valuation of the unsold plots from Alder King. They reported on 7 July. Their valuation was based on the assumption that all the works were completed (including drainage, roads, and fibre optic cabling). They commented:

"Although the completed buildings are of a very high specification and the development has created an attractive environment, the plot sizes for individual buildings are very small and in many cases gardens are overlooked by adjoining units affording very little privacy. At the upper end of the market, between £150,000 and £300,000, most purchasers would expect greater privacy and space and the lack of these important features will restrict the marketability of the development.

The recent difficulties encountered with the development are well documented in the local press and have undoubtedly depressed interest in the completed units, particularly from local purchasers. …

In terms of time scale to achieve disposals, the high asking prices and problems outlined above have undoubtedly delayed sales provided units are realistically priced and the outstanding problems have been resolved, under current market conditions, it would be reasonable to allow a marketing period of 12 to 18 months in which to complete sales of the remaining units."

107. They estimated the aggregate value of all the units and the farm buildings at £3,315,000. This estimate was broadly in line with Countryside's offer, before deductions. Of that, £525,000 was attributed to the farm buildings. They added that if marketing were restricted to three months, the selling prices would be reduced by up to 20 per cent.

108. On 7 July 2000 Mr Saunders wrote to Mr Skinner. He said that the Bank had no obligation to fund the project to completion, and also said that if Acorn wished to refinance the loan, it should give the Bank its proposals. He said that since the LADs were subject of dispute, the Bank would continue to regard those sums as being at risk. He said that the Bank had honoured its commitments but would not consider renewing the credit facility until the LADs dispute was resolved and a new valuation obtained. His letter also included the following: *"I have not asked you to take over the running of Acorn's affairs at any point – something which you have said before and stated to Countryside, and which I sought to correct at the time. I did ask you in December 1999 how you saw your role as a director of a company which appeared to be in significant financial trouble, and made it clear that arrangements at the end of last year would not, in my view, lead to a positive outcome for any of the parties involved. You then offered to take a lead."*

109. Mr Skinner replied on 11 July. He said he had hoped the Bank would reach its own decision on the LADs. He accepted that Mr Saunders did not ask him directly to take over managing Acorn. He accused Mr Saunders of undermining his attempts to resolve the problems. He told Mr Saunders that Acorn had decided to resolve the dispute with Countryside over the LADs and other matters by adjudication. His letter also said: "*You did not ask*

me directly to take over responsibility for Acorn's management in December, you simply took me on one side and made it clear to me that if I did not do so the bank would almost certainly put the company into liquidation."

On 12 July 2000 Alder King presented a series of exit strategies to the Bank. They recorded their view that current asking prices were significantly in excess of current open market values, and that that had contributed to the lack of sales interest. Their advice was that because the development was virtually complete it would be unlikely to appeal to third party contractors. However, they thought that it would be of interest to property dealers/speculators who could rebrand it and initiate new marketing initiatives. However, they warned that a sale on this basis would attract a discount for risk and developer's profit which could be as much as 25 per cent. They then discussed Countryside's interest in buying out Acorn. They thought that this could be of "significant attraction". They also warned the Bank that if it enforced its security by appointing a receiver, the Bank might be obliged to exercise its step in rights. The last option they discussed was that of building out the development and selling the units piecemeal. They said that capital receipts on this basis would be spread over a marketing period of 12 to 18 months, and advised that the scheme had acquired a stigma which was not conducive to marketing without rebranding.

111. On 13 July Mr Skinner wrote a long letter to Mr Saunders. He accused the Bank of behaving unethically; of using its financial power to seize control of the development; of ignoring Acorn; of negotiating a deal that was too favourable to Countryside; of exhibiting personal prejudice against Mr Dobbs and of vindictively bullying him. This was followed up by a letter on 19 July from Acorn's solicitors. They alleged that the agreements of September 1999 had been procured by economic duress and claimed damages against the Bank of over £1 million. Mr Saunders replied to Mr Skinner, at even greater length, on 31 July. He summarised the Bank's view of how the September 1999 agreements came into being. He said:

"However, it gradually became clear that Countryside were materially exceeding the original cost estimates and timescales and – of even more concern to us – were building the site out of the programmed sequence so that substantially all properties would be completed at the same time. We understood from Ashley Dobbs, to our surprise, that this was with Acorn's explicit agreement. This meant that, even had Countryside stayed within the estimated costs and timescale, Acorn would need substantial additional finance to complete the project. As the full extent of the problems became clear, we called Acorn in to discuss the progress of the project and what plans or proposals they had to deal with the problem. Through several meetings (also with Acorn's advisers, Woodeson Drury) it became clear that the company had no such plans (certainly, none were presented), did not understand the seriousness of the situation and were very reluctant to take up matters with Countryside, fearing, as Ashley Dobbs said several times, that Countryside would walk off site. We tried to make clear that, as things stood, the project would fail for lack of funds. But several requests to lay proposals before the bank met with no serious response except that the bank should simply lend more money. It also became clear that relations between Acorn and Countryside were very poor with both sides accusing the other of failing to meet their obligations.

So, Acorn had run out of money and had no plans to solve its problems save a simple request to the bank to extend a significant amount of additional credit while employing a contractor who they appeared not to be able to control, who was at no immediate financial risk because of the cost-plus contract, and who appeared to be hostile to the company and was threatening to cease work. The bank, apart from providing finance on agreed terms, had no part in creating this situation.

The conventional route in these circumstances, as I am sure you are aware, is for the bank to realise its security. We considered this and we think we could have done so without loss to the bank, but we wanted to find a way for the project to realise its original intentions, something we try to do when borrowers find themselves in difficulty. We therefore had a series of intensive meetings with Acorn and Countryside trying to arrive at a modification of the original agreements which could create the conditions under which the bank would feel able to extend further credit and would strengthen Acorn's hand in dealing with Countryside. These meetings were held in nearly every case in all three parties' presence and always with the full knowledge of Acorn and their ready agreement."

112. He went on to refute Mr Skinner's allegations, one by one. Mr Skinner replied on 4 August, disagreeing with Mr Saunders' account. By now the relationship between Acorn and the Bank was on the verge of breakdown; and the Bank was now seriously considering enforcing its security. On 7 August it made its first demand for repayment of the loan. The amount outstanding was stated as £2,560,741 plus interest. No substantial credit had been made to Acorn's account since mid-May, two and a half months earlier.

113. A few days earlier Mr Hawes had prepared some financial calculations. These said that the Bank was owed £2,568,025 and that the Bank was contractually obliged to pay Countryside £505,949 in respect of new houses, and £309,324 in respect of the farm buildings. Total potential liability was, therefore, £3,383,284. He pointed out that this total might be reduced by the LADs then in dispute. The latest valuation suggested that the Bank might receive £3,315,000 gross from sales, but there would have to be deducted the cost of works to be completed before the site was saleable and the cost of sales. Continuing accrual of interest also had to be taken into account. Based on these figures, the Bank could be facing a loss of up to £0.5 million.

The adjudication

114. The adjudication got under way on 2 August 2000 when Acorn's solicitors served a notice of intention to refer. A statement of case was served on 16 August and both Countryside and the Bank served statements of case on 29 August.

115. Acorn's complaints against Countryside were:
   i) It was guilty of delay in building, thus justifying the deduction of the LADs;
   ii) It was in breach of its obligations under the Tripartite Agreement by disclosing confidential information and casting aspersions on Acorn's financial strength;
   iii) It was in breach of its obligations under the Tripartite Agreement in failing to promote the Televillage; failing to maintain a tidy site; discouraging potential purchasers; installing fittings and materials of a lower quality than specified and undermining the Bank's confidence in Acorn;
   iv) It compelled Acorn to enter into the Tripartite Agreement by economic duress.

116. Acorn made the same complaint of economic duress against the Bank; and also claimed against the Bank that it was obliged to release the LADs to Acorn.

117. The Bank denied the claim that the Tripartite Agreement was the result of economic duress, and said in paragraph 10 of their Statement of Case that the LADs were costing Acorn nothing because the Bank was allowing Acorn interest on the LADs at the same rate as that charged on the loan.

118. Countryside also denied the claim that the Tripartite Agreement was the result of economic duress. In addition it made a number of complaints about Acorn. It said that the contract had been mismanaged from the start. It also alleged:
   i) That Acorn had failed to comply with conditions of the planning permission and the land transfer;
   ii) That Acorn had acquired insufficient land on which to construct the development;
   iii) That Woodeson Drury had failed to inspect the dwellings in accordance with the contractual timetable;
   iv) That Woodeson Drury delayed in producing snagging lists;
   v) That Acorn imposed higher standards of workmanship than the contract required;
   vi) That the snagging lists included items which were not incomplete or defective works;
   vii) That Woodeson Drury failed to issue a completion certificate for plot 15 despite the fact that it had been completed and sold;
   viii) That Woodeson Drury delegated its functions of inspecting and certifying completions to Acorn;
   ix) That Acorn was late in giving instructions;
   x) That extensions of time were wrongly refused, and that if extensions of time had been properly given they would have extinguished the liability for LADs;
   xi) That the LADs were in fact a penalty and irrecoverable.

119. The adjudicator gave his decision on 12 September 2000. He adjudged that:
   i) Acorn were entitled to deduct the LADs. He said that he had no power to decide whether the Bank had a duty to release the LADs to Acorn; but he noted the Bank's "proper conduct" set out in paragraph 10 of its Statement of Case and said that, if he had had jurisdiction he would not have made an order against the Bank;
   ii) He had no jurisdiction to decide the allegations of breach of confidence, but if he had had jurisdiction he would not have made an order against Countryside "*in the context of this adjudication";*
   iii) He had no jurisdiction to decide the allegations of breaches of the Tripartite Agreement; but if he had had jurisdiction he would not have made an order against Countryside "in the context of this adjudication";
   iv) There would be no order against Countryside for damages for economic duress; that he had no jurisdiction to make an order against the Bank and that had he had jurisdiction he would not have made an order against it;
   v) There would be no order against Acorn on Countryside's claims;
   vi) Countryside were not entitled to any further extensions of time;
   vii) The LADs were not an unenforceable penalty.

The Bank appoints the Receivers

120. By now the Bank had been in touch with Grant Thornton, who would be the receivers if it decided to go down that route. On 6 September 2000 Mr Hawes sent Mr Gerrard a letter in which he gave his assessment of the financial position. He made a number of calculations, based upon different outcomes of the adjudication (which was then pending). The Bank's best case scenario was on the assumption that the LADs were allowed in full and Countryside's counterclaims failed (which is in fact what happened). On that basis, if the Bank sold the site to Countryside it could expect to be paid £2.23 million. But if it sold to a third party, it could expect to be paid £1.61 million. He concluded that the Bank's best option was to strike a deal with Countryside. In the course of his letter he referred to the Acorn name and website. He commented: *"Whilst I doubt if these could be sold, we feel it is important to control them to prevent any attempt by the directors to raise a phoenix from the ashes."*

However, on 12 September Countryside put forward an offer to pay the Bank £1.4 million. On 15 September it made a formal claim for extension of time and loss and expense caused by delay. The claim amounted to £398,000; and also asserted that Acorn was in fact only entitled to retain some £19,000 of the LADs.

122. On 14 September Mr Dobbs had asked the Bank to renew Acorn's credit. On 19 September Mr Hawes wrote to him to say that it was unrealistic to assume that the banking relationship could be resumed. He said that the Bank's patience was at an end. He did, however, say that if Acorn had any proposals for repayment, they should be put forward by return.

123. On 21 September Mr Dobbs wrote to Mr Hawes. He said that there were two options for refinancing. One was that a company called Regime Ltd was interested in investing in Acorn. The other was through bank finance. Mr Dobbs said that he had met John Charcol, mortgage brokers, who would be coming up with a list of potential lending institutions.

124. On 25 September Mr Saunders responded to Countryside's offer of 13 September. He said that it was too low; but indicated that an offer of £2 million, while still leaving the Bank with a loss, would be acceptable.

125. On 26 September the Bank's solicitors called on Acorn to put forward any refinancing proposals in writing as a matter of urgency.

126. On 28 September Countryside increased its offer to £1.6 million.

127. On 2 October Regime wrote to the Bank expressing interest in the Televillage, and suggesting a meeting. The meeting took place on 5 October.

128. On 6 October 2000 Mr Dobbs contacted the Bank of Wales with a view to interesting them in refinancing the project. He sent them a copy of the Countrywide valuation; Acorn's draft audited accounts for the year ending 31 March 1999 and an analysis of sales.

129. On 10 October Regime wrote to the Bank. They said that further investigations had led them to conclude that without redesign and further work, two of the units were unsaleable. In consequence they had decided that the level of returns would be unacceptable and that they did not wish to pursue the matter any further.

130. On 11 October 2000 the Bank of Wales wrote to Mr Dobbs. They said that they would be: *"delighted to continue discussions in the Bank of Wales providing facilities to replace your current lenders – Triodos Bank and also provide a modest uplift to assist with ancillary works."*

131. They stressed that a valuation was a key requirement and asked for one in early course. Mr Dobbs asked Countrywide to value the plots. He said that he estimated a period of 12 months would be needed to sell the remaining houses. On the following day he wrote to the Bank's solicitors. He said that Regime were still interested. He also said that Acorn had found an alternative lender and he enclosed a copy of the letter from the Bank of Wales. He said that a valuation would take approximately one week and that the Bank of Wales would take about 10 days from receipt of the valuation to make an offer of finance. On the same day Mr Dobbs formally instructed Countrywide and said that the valuation was required by 20 October.

132. On 16 October Mr Maddocks of Gabb & Co, Acorn's solicitors, rang the Bank's solicitors to ask for an extension of time. That was refused on the following day. On 17 October Mr Maddocks wrote to say that the valuation was taking place that day; that the report would be ready by 24 October, and that the Bank of Wales would make a decision within 7 to 10 days thereafter. However, in a PS he said that the inspection would not take place until the following week. He followed this up on 19 October, again asking for more time, and asserting that the Bank had not given Acorn enough time to refinance.

133. On the same day, the Bank made a second demand for immediate repayment. The debt was stated as £2,606,846.84 plus interest. No significant credit had been made to Acorn's account since mid-May, some five months earlier.

134. On 20 October the Bank appointed the Receivers as joint administrative receivers. They did not tell Mr Dobbs or Mr Skinner in advance. The receivership attracted wide publicity. There were articles in the national press, including The Times, the Daily Telegraph, the Financial Times, the Guardian, The Independent, the Western Mail and an item on Radio 4. Many of the articles said that Acorn had run up debts of over £1 million. At the date of the receivership, the parts of the development that remained unsold were plots 6, 7, 8, 9, 10, 11 12, 13, 14, 16, 19, 20 and 26, together with the farmhouse, the granary, the studios (which had been let on short term leases), the café, the east barn and the west barn. The houses were virtually finished, although snagging remained to be done. The farmhouse and the other buildings had been externally renovated; but internally were shells. There remained items of infrastructure still to be completed (such as the wearing course on the roads). The fibre optic system had yet to be installed. The Telecentre had yet to be provided. There were also serious problems with the drains. No work had been carried out on site for several months, as Countryside had not been paid. Many of the residents were unhappy with the state of the development. In addition Countryside had their second charge on the site, securing their entitlement under the building contract, and the tripartite agreement. Part of Countryside's debt had priority over the Bank, in accordance with the deed of priorities.

135. At the date of the receivership, there were sales staff operating from the show house. They were employed by a local estate agency, Maitland Selwyn, although their wages were paid by Countryside until 26 November 2001. From 27 November until at least 18 December, they were paid by the Receivers, at a cost of some £539 per week.

Valuations

136. It is convenient here to gather together in tabular form the values (and actual sale prices where known) that have been put on the plots at various times. They will help to understand the action that the Receivers took.

Plot	Countrywide (ERRP)	Alder King	Edward Symmons	Actual
6	£210,000	£220,000	£210,000	
7	£250,000	£230,000	£250,000	£320,000 (August 2002)
8	£250,000	£230,000	£250,000	
9	£210,000	£220,000	£210,000	£250,000 (December 2002)
10	£220,000	£230,000	£280,000	£280,000 (April 2002)
11	(not valued)	£250,000	£250,000	£250,000 (July 2002)
12	£210,000	£260,000	£250,000	
13	£210,000	£220,000	£190,000	
14	£260,000	£260,000	£260,000	£240,000 offered (January 2001)
16	£200,000	£220,000	£230,000	
19	£250,000	£220,000	£230,000	
20	£150,000	£150,000	£180,000	£230,000 (August 2002)*
26	(not valued)	£80,000	£75,000	£89,000 (November 2001)
Farmhouse	£175,000	£185,000	£175,000	
Granary	£100,000	£100,000	£100,000	
Studio units	£80,000	£70,000	£120,000	
Cafe	£25,000	£30,000	£25,000	
East barn	£80,000	£75,000	£80,000	
West barn	£60,000	£65,000	£70,000	
Total	£2,940,000 (two units not valued)	£3,315,000	£3,435,000	

137. * Mr Dobbs accepted an offer of £185,000 for this plot before the receivership.

138. **The Receivership**

137. On 22 October 2000 the Receivers called a meeting of the residents of the Televillage. They refused to allow Mr Dobbs and Mr Skinner to attend the meeting. Had they done so, Mr Dobbs and Mr Skinner would have denounced the receivership. Mr Saunders sent the residents a circular letter on the same day. The letter explained that the principles of a contract had been agreed with Countryside, although a contract had yet to be completed. It also explained that the Bank had not taken its decision to appoint receivers lightly; but had made it in the light of the directors of Acorn having been unable to come forward with proposals that met the Bank's concerns.

138. On 23 October Mr Dobbs met the Bank of Wales who informed him by letter on the following day that the receivership had precluded that bank from taking the refinancing any further.

139. The publicity generated by the receivership alerted a number of potential buyers, even before any marketing took place. In addition Countryside made an increased offer to the Receivers on 24 October. The offer now stood at £1.625 million. On the same day the Receivers instructed the sales staff on site to forward details to them of anyone interested in buying a house.

140. On 25 October Acorn's solicitors wrote to complain that a spokesman for the Receivers had said that Acorn had debts "other than secured debts to the bank" of £1 million. In fact the articles in the press did not say whether the debts referred to were secured or unsecured. The letter also complained that the Receivers' press release was misleading in saying that lack of sales of houses had led to cash flow difficulties; and asserted that, on the contrary, it was the Bank that was in breach of its obligation to provide a working facility of £2.6 million. Mr Morrison replied on 26 October to the effect that no member of his staff had disclosed the level of Acorn debt. In

a later conversation (on 3 November) with Mr Rothschild, who was employed by the public relations company instructed by the Receivers, Mr Morrison learned that Mr Rothschild had indicated to a journalist that the debts were "a seven figure sum", but that he did not imply that they were non-bank debts. On 26 October the Receivers were told that Mr Dobbs' attempts to refinance with the aid of the Bank of Wales had ceased; and they invited him to make an offer for Acorn's assets.

141. On 31 October Mr Morrison had a conversation with Mr Saunders. He outlined to Mr Saunders the various options:
    i) Sell to Countryside, in which case the Receivers would require an indemnity;
    ii) Market the site, which would cover the Receivers' position and fulfil their duty to get the best price;
    iii) If no better offer than £2.4 million was forthcoming, then there should be a comparison between the Countryside offer and building out.

142. Mr Saunders confirmed that he was happy that the Receivers should market the site, bearing in mind the possibility of challenge and the duty to get the best price. On the same day the Receivers were told that they had missed that week's deadline for advertising in the Estates Gazette. However, they were in time for advertising in the Financial Times; and an advertisement appeared on 3 November. Mr Dobbs telephoned the Receivers that day to say that he was pleased to see the FT advertisement because it showed that the Receivers were looking at selling to parties other than Countryside. Edward Symmons also reported on 3 November. Their appraisal placed a value on the site of £2,262,115. This was a residual valuation. They began by estimating the value of the completed units. The gross value of £3.36 million was slightly higher than that placed on the units by Alder King. They then deducted the cost of selling the units, to give a net realisation figure of £3,284,600. From that they deducted the site purchase price and stamp duty; the cost of completing the development (estimated at £235,000) and marketing costs. This gave a developer's profit of £672,000 or 20 per cent. So far as I can tell, there are no interest or carrying costs built into the calculations; so the valuation may be on the high side.

143. Details were also sent to some 600 companies on Edward Symmons mailing list. These went out on about 7 November. Although early drafts of the details suggested an asking price of £2.5 million, this was omitted from the final version, which specified no asking price. However, Mr Price of Edward Symmons said in evidence that although there was no asking price on the particulars, any interested buyer would have been told that offers in the region of £2.25 million to £2.5 million would be looked at. Mr Dobbs was among those who received a copy of the particulars.

144. At the end of October Mr Dobbs had contacted Mr Slatter of Royalstone Ltd, who was interested in buying the development. On 8 November Royalstone made an offer to buy the development. They offered £2.1 million and the discharge of the Bank from its liabilities to Countryside. They revealed that they had agreed terms with the main shareholders of Acorn (i.e. Mr Dobbs and Mr Skinner) to assist them with the purchase. On the same day Mr Dobbs spoke to the Receivers. He repeated his view that the FT advert was good, but said that buyers would need a month or so to consider the position. He asked if the receivers intended putting another advertisement in the press, and was told that that was the only one. Mr Dobbs then complained that "the whole thing was a stitch up" between the Bank and Countryside. He also said that he had funds with which to do a deal with a little bit of bank borrowing. On 8 November Mr Morrison wrote to Mr Dobbs urging him to submit any proposal as soon as possible.

145. On 9 November 2000 Intobeige Ltd expressed their ability to make an offer of £2.25 million for the site. Mr Rhodes (who gave evidence) was the lead negotiator for Intobeige. He said that he had rung Edward Symmons and had been given an indication of the asking price. He said that if he had not been given some indication of an acceptable price, he would not have pursued the matter any further. The fact that his offer was at the lower end of the bracket that Edward Symmons would have quoted seems to me to support Mr Price's evidence.

146. Over the next couple of days further offers were received, but none of them exceeded £2 million.

147. On 10 November the managing partner of Grant Thornton (South East region) wrote to Mr Dobbs. He said that the journalists had confirmed that they had not obtained quotes from Grant Thornton referring to Acorn's debt levels. Strictly speaking this was true; but given that Mr Rothschild had indicated that the debt level was a seven figure sum it was misleading. Mr Morrison accepted in evidence that his managing partner had been given incorrect information. Mr Dobbs alleged that the letter was a lie.

148. On 14 November 2000 the Receivers met Mr Slatter and Mr Dobbs. The meeting lasted some two and a half hours. In the course of the meeting Mr Slatter indicated that he had an agreed source of finds, and that if his offer were accepted he could do a ten day exchange of contracts and a ten day completion. However, he said that the timescale was too short. At this stage one of the unanswered questions was whether the Bank could assign its position under the tripartite agreement to a purchaser. Mr Slatter and Mr Dobbs thought that it could, and said that they had legal advice to that effect. Two days later, Mr Slatter had another conversation with the Receivers. Also on 16 November Edward Symmons analysed the Royalstone offer as being worth in excess of £2.7 million, and reported this to the Receivers.

149. This information was also given to Mr Saunders. Mr Saunders asked whether the Royalstone offer was a serious one. The Receivers said that as far as they were aware it was; and that they were investigating it.

150. By 20 November Edward Symmons had reconsidered their advice. They now advised the Receivers that the Countryside deal was the best way forward. They referred to the Royalstone offer and commented that it would be funded with borrowed money; and that a valuation would be unlikely to support it.

151. Also on 20 November Powys County Council wrote to Edward Symmons. They raised a number of points relating to the infrastructure. First, they said that the surface water drainage was inadequate, and that they would not approve a drainage connection between the existing system and the watercourse. Second, they raised problems over drainage into the hydro-brakes which collected run off. Third, they said that obligations in the land transfer agreement had not been performed; namely: the provision of the telecentre, the private network fibre optic system and the storm water drainage facility. They also claimed that Acorn owed the Council some £33,000.

152. On 21 November the Receivers reported to the Bank. The position with Countryside was that their offer equated to a sum of about £1.4 million, which would leave the Bank with a shortfall of about £0.7 million before costs. Countryside had also indicated that they would accept £500,000 in full settlement of all claims and cross claims. The Royalstone offer was one that the Receivers had investigated. However, the Receivers commented that, despite requests, Royalstone had not produced evidence of funding. They also pointed out that there was a difference of opinion over the question whether the tripartite agreement could be assigned. Royalstone had also said that they did not intend to obtain a valuation until their offer had been accepted. Of the remaining offers the best one was from Intobeige, at £2.25 million. Acceptance of this offer would leave the Bank with a shortfall of £350,000. The upshot was that the Receivers were not yet in a position to make a firm recommendation. Mr Morrison spoke to Mr Slatter for over half an hour on 23 November. Mr Slatter had independently discovered from Countryside that they would be willing to accept £500,000 in settlement of all their claims. Mr Slatter was "comfortable that he could work with that number". However, there were still other issues that were concerning him. He also told Mr Morrison that Countrywide were standing by to carry out a valuation, and could do it within two working days. Mr Morrison said that the Receivers were close to another deal. Mr Slatter asked whether it was a better offer. Mr Morrison replied that it was structured differently, in that it was a simple offer for the assets. He suggested that Mr Slatter should reconsider his position and make a simple offer for the assets backed by funding. Mr Morrison said that if it was a better offer the Receivers would consider it. Mr Slatter ended by saying that he needed to work out how much he could give away if he had to pay Countryside £500,000. On the same day he made a revised written offer on behalf of Royalstone of £2.25 million. Since the first offer had been worth, on the Receivers' calculations, some £2.7 million, this was a significant reduction. Mr Slatter said in his letter that Royalstone had the funding to proceed at that level. He also said that Messrs Dobbs and Skinner intended to seek compensation "for various alleged injustices from various parties related to this project". The evidence of funding that Mr Slatter produced was a letter from the Bank of Ireland which said:

"I have pleasure in confirming that we would be interested in funding the proposed purchase of Upper House Crickhowell, South Wales."

153. That afternoon Mr Morrison rang Mr Joyce of Intobeige and left a message for him enquiring about his funding. Shortly afterwards he was telephoned by Mr Richard Norgan who expressed interest in buying the site. Mr Norgan was aware that a contract had been issued, and said that he was thinking of offering £2.25 million, but that was before he had seen the letter from Powys County Council. Mr Morrison said that he would need to pay a minimum of £2.25 million and that he needed to put an offer in, with evidence of funding, by the following day. Mr Rhodes, on behalf of Intobeige also rang on 23 November. He said that the Bank of Wales would confirm funding, and that the funding was not dependent on a valuation. He said that exchange of contracts would take place as soon as a contract had been issued and reviewed by his solicitor. About an hour later Mr Dobbs rang. In the course of a long conversation he confirmed that Mr Slatter's deal was £2.25 million for the unencumbered site. He also said that he did not want to give up the right to sue Countryside.

154. Also on 23 November 2000, against the background of Countryside's expressed willingness to settle for £500,000, Mr Hawes calculated Countryside's potential entitlement. This was made up of payments on completed houses, Countryside's entitlement on sales of remaining plots and certain disputed payments. Mr Hawes calculated that Countryside were entitled to be paid something between £891,000 and £1,197,000, but most probably in the region of £1,125,000. From this the LADs would have to be deducted. Having reworked the figures, taking account of the LADs, he estimated that the net amount due to Countryside would be something between £329,000 and £693,000; most probably £596,000.

155. On the following day Mr Slatter rang Mr Morrison again. He confirmed that his offer was £2.25 million, leaving the Bank to sort out Countryside. He said that he was not really concerned what the Bank paid Countryside as long as he was given free title. Mr Morrison pointed out that the sale could not go ahead unless Countryside were sorted out, which Mr Slatter said he understood. Mr Slatter also said that Mr Dobbs would agree to £500,000 being paid to Countryside because it would allow the Royalstone deal to go ahead, and Mr Dobbs stood to make some profit. Mr Morrison repeated that he needed to see a letter from the Bank before he could put the proposal to Edward Symmons for their advice. Mr Slatter said that letters would be available either that day or the following Monday. Mr Morrison said that things might develop into a contract race; or the Receivers might seek best and final offers.

156. On 24 November Mr Morrison wrote to the Bank. He told them about the revised Royalstone offer. He said that they had not yet supplied evidence of funding, and that if they were able to do so the Receivers' solicitor's recommendation would be to issue contracts to both Intobeige and Royalstone, and that whoever completed first would be successful. Mr Slatter then sent a fax saying that he was in a final meeting with his financiers and he would ring before 12.12 p.m.

157. On 27 November, Mr Slatter sent a fax enclosing a letter from Baltic Property Finance expressing a willingness to lend £1 million. Baltic said that they would have to carry out due diligence and make a site inspection. Mr Morrison asked one of his team to call Mr Slatter to find out the Bank of Wales' position.

158. On the same day the Receivers received a letter from the Bank of Wales, relating to Mr Lawson (who was one of the backers of Intobeige). The letter said that the Bank of Wales had not yet received a formal proposal for the site, but also said that it seemed to be consistent with other projects Mr Lawson had undertaken. In an off the record telephone conversation, the Bank of Wales confirmed that funding would not be a problem.

159. On 30 November 2000 Manhattan Loft Corporation made an offer of £2.3 million.

160. On 1 December Mr Morrison wrote to Mr Slatter. He said:

"Your latest offer of £2.25m was received 23 November 2000 together with letters received from Bank of Ireland and Baltic Property Finance plc. The letter from Bank of Ireland is non committal regarding future funding and appears to be only an expression of interest. Similarly we have not received any direct confirmation from Bank of Wales of their intention to fund your offer and the level of funding that they would provide.

You state that you could exchange and complete within two weeks but the correspondence regarding funding does not appear to substantiate this timetable.

You also state that the agreement of Mr Dobbs and Mr Skinner would be required by Countryside in order for your offer to proceed. We have not received confirmation from these persons that they would provide the agreement required.

I therefore consider it inappropriate to issue a contract to you whilst the above issues remain outstanding."

161. Mr Slatter replied on the same day. He said that both the Bank of Wales and the Bank of Ireland had agreed in principle to support Royalstone's bid. He had valuers standing by to complete a survey for the banks and would instruct them once the Receivers sent out a contract. He was set up to exchange and complete within 14 working days, and that the processing of the loan and the legal work could proceed concurrently. He said that Mr Dobbs and Mr Skinner had agreed to meet Countryside's requirements subject to a sale being completed to Royalstone, and invited Mr Morrison to confirm that direct with Mr Dobbs. He enclosed a letter from Bank of Wales which said:

"I am writing to confirm that I would be interested in supporting a proposal from the company to provide a maximum of 70% assistance towards the purchase of the above properties on a lower of cost or Bank appointed valuation basis.

I very much look forward to receiving a revised development appraisal from you in order that I can review your requirements in some detail."

162. However, Mr Morrison still refused to issue a contract unless Mr Slatter could provide unconditional evidence that funds were immediately available. Edward Symmons in the meantime advised the Receivers to issue a further contract to Manhattan Loft Corporation.

163. The Receivers commissioned Craigdam Services Ltd to review the proposed settlement with Countryside. They reported on 6 December. They concluded that Acorn's indebtedness to Countryside was a minimum of £628,826 (and might be considerably greater); and that the Bank's liability to Countryside would be a minimum of £590,000 (and was likely to be considerably greater). On that basis they recommended the settlement with Countryside at £500,000.

164. By 6 December there were two contracts out: one to Intobeiege at £2.25 million and one to Manhattan Loft Corporation at £2.3 million. Edward Symmons now advised the Receivers on the question whether the Receivers should themselves build out the development. They concluded that the project was a risky one, and that it would be preferable to conclude a sale to either of the current parties who had contracts; but that if all other options failed a build out should be considered as a last resort.

165. The frenzy of activity subsided for a few days. On 13 December Mr Rhodes of Intobeige telephoned. There were problems raised by Powys over outstanding works. Mr Rhodes did not believe that he could get a clear title until those issues were sorted out.

166. On 18 December the Receivers reported to the Bank. Based on offers thus far received, and the proposed settlement with Countryside, they estimated a shortfall for the Bank of £537,000.

167. On 22 December Acorn (acting by the Receivers), the Bank and Countryside entered into a compromise agreement. The Bank agreed to lend Acorn a further £500,000 plus VAT on part of the sum, which was to be used to settle all Countryside's claims. There was a mutual release of all claims; Countryside released the Bank from its obligation to exercise its step in rights, and Countryside also agreed to release its debenture and charge over the site. The agreement also contained a confidentiality clause. Clause 9 said: *"Acorn, by its receiver, warrants with [Countryside] that it is not currently negotiating to sell, transfer or otherwise dispose of its interest in the site to Messrs Ashley Dobbs and James Skinner and that it will use its best endeavours in any sale, transfer or other disposal of the site to a third party to procure a warranty that that party is not connected with or will not deal with Messrs Ashley Dobbs and James Skinner in like terms. In the event that Ashley Dobbs and James Skinner are the only or best purchasers of the site Acorn by its receiver will use its best endeavours to procure from Ashley Dobbs and*

James Skinner a release of all and any claims they have or believe they have against Triodos [and Countryside] and further that Messrs Dobbs and Skinner and any third party controlled by them will not make any statements or claims to the media relating to [Countryside's] involvement in the Building Contract the September Agreements or the site."

168. On 8 January 2001 Countryside's solicitor rang the Receivers' solicitor. The attendance note records the latter as saying: *"It may yet be that we will have to do a deal with a party associated with Skinner and Dobbs simply because one of our prospective purchasers may be dropping out … obviously we are under a duty to sell at the best possible price and if in fact there is a genuine interest and a genuine prospect of selling to a company with which they are involved we can't actually refuse it."*

On 16 January 2001 the solicitors for the Manhattan Loft Corporation wrote to say that their client was "dealing with some fine tuning" relating to the purchase. The "fine tuning" resulted in a reduced offer of £2 million.

170. Powys County Council now raised concerns over the adequacy of the drainage, and suggested that a balancing pond might be needed. Mr Rhodes of Intobeige learned of this at a meeting. He thought that Intobeige would have to investigate the effect of this. The effect was to cause Intobeige to reduce its offer from £2.25 million to £2.1 million at the beginning of February 2001. Even that offer was not unconditional; and it envisaged completion deferred for up to six months. Edward Symmons recommended the issuing of a contract on the basis of the reduced offer.

171. On 13 February Mr Norgan, who had previously been in sporadic telephone contact with the Receivers, made a written offer of £2.1 million. There were no conditions attached to it, apart from the investigation of title. He also produced a letter confirming the availability of funding.

172. There were now two offers of £2.1 million on the table. All other offers received were below that level. Intobeige's offer was conditional, and Mr Norgan's was not. On 16 February, the Receivers decided to issue a contract to Mr Norgan. At that stage the purchase was to be taken in the name of a company called Stapleford Estates Ltd. Intobeige's solicitors were told that there was now a contract race.

173. Mr Norgan, now acting on behalf of a newly incorporated company called Whitegate Developments Ltd, was the first to exchange contracts on 12 March. The contract was an unconditional contract at a purchase price of £2.1 million. Completion was due on 23 April 2001. Mr Rhodes was very disappointed.

174. On 13 March (the day after contracts had been exchanged) Mr Slatter telephoned Mr Lovett, one of the Receivers' colleagues. He asked what was happening about the sale of the property. Mr Lovett said that he could not tell him. Mr Slatter then said that his son had died, and that he had lost interest in the property. He was, however, interested in doing some cabling work, and Mr Lovett agreed to pass this information on.

175. On 5 April 2001 the Receivers reported to the Bank. They estimated that on the basis of the agreed sale, and taking into account the settlement with Countryside, the Bank's shortfall would be £724,000.

Acorn USA

176. Acorn owned (and still retains) a 70% shareholding (21,000 shares) in Acorn USA, a Missouri corporation. The other shareholders were Don Russell (10%); Alan Kenyon (10%) and Dreyton Advisory Services Ltd (10%). The shareholders had pre-emption rights under an agreement dated 16 September 1997.

177. Acorn USA had acquired a 50 acre site in Missouri with the intention of developing a televillage near the city of Nevada. The site had been gifted by the local authority, subject to various conditions as to its development. Mr Dobbs had resigned as a director of Acorn USA in July 1999, in order to devote his time to the Crickhowell project. When the Receivers were appointed in October 2000, Acorn USA's board consisted of U.S. directors; and there was no direct UK management. The value of the shareholding was stated as £20,000 in Acorn's balance sheet to the year end 31 March 1998. Taking this figure at face value, the value of the shareholding was relatively small compared to the value of the Crickhowell site.

178. Acorn had entered into a sale agreement dated 15th July 1999 with Acorn USA's CEO, Jason Klumb, for the sale of its 70% holding for $87,570 ($4.17 per share). For some reason, this had not been completed. A further option agreement was entered into on 28 April 2000 but again the option was not taken up.

179. Acorn USA did not trade but it had installed infrastructure and had partially built two houses on the 50 acre site. This had been undertaken using a secured loan of $170,000 from Tri County Bank. By August 1999, Acorn USA owed its architects $110,000, secured by a lien over the site and was in financial difficulty. Work on site had stopped. Assistance came in the form of outside investors, Terry Hoeper (a builder) and Roger Irvin (an attorney). Both became directors and officers of the company. A line of credit from Metz bank was obtained which they personally guaranteed, although it is uncertain whether all the funds obtained were spent on site. The Tri County loan was repaid and the architects' fees were largely paid. Mr Hoeper lent tools and equipment and work re-commenced.

180. By early 2001, the site infrastructure was completed but Acorn USA had amassed debts of around $600,000. No further works were being undertaken. However, the option to acquire a further 530 acres from the local Council for approximately $580,000 was of potential value.

181. Mr Morrison said that he had been told by Mr Skinner in a meeting on 23 October 2000 that the holding in Acorn USA was "valueless". Mr Skinner said in evidence that Mr Morrison had misunderstood what he had said. He said that he had told Mr Morrison that the receivership had rendered the US company valueless, because the only

ingredient that made the shares valuable was Mr Dobbs, and without him Mr Skinner could not see any great prospect. In substance, therefore, he did tell Mr Morrison that the shares were valueless, whatever the reasons for that might have been.

182. There were very few papers on the US company in the UK files. Soon after the Receivers were appointed, on 30 October 2000, Mr Lovett faxed Grant Thornton's Kansas City office seeking information on the company. The information and company search that came back was limited. A subsequent site visit showed no activity. The Receivers also obtained information from the internet and entered into a regular dialogue with the directors, primarily Mr Klumb and Mr Russell.

183. In February 2001, the Receivers were contacted by the company's US lawyers Blackwell Sanders Peper Martin, and given further background, including the steps that had been taken to sell the 70% shareholding. All offers for the shares had ranged between $0.5 and $4.17 per share. Shortly afterwards, on 2 March 2001, the lawyers put forward an offer on behalf of unnamed investors to buy the shares at $4.17 each but the offer was withdrawn almost immediately.

184. On 5 March 2001 and 12 March 2001, Mr Lovett held two long conference calls with the directors, shareholders and Mr Dobbs to discuss the affairs of the company and the option to acquire the further 530 acre site. The option had been granted by the Council on condition that at least $250,000 worth of improvements had been made to the 50 acre site by 31 December 1999 and that $581,000 was deposited in an escrow account on or before 6 March 2001. There was an issue over whether the option was still valid but it was agreed at the first meeting that it should be exercised if possible. A notice was sent on 6 March and the funds were placed in an escrow account. These funds were borrowed from Community First Bank with the help (and possibly guarantee) of Messrs Hoeper, Irvin and James Corral. The local authority subsequently disputed the company's right to exercise the option. Litigation ensued and the company was successful.

185. At the beginning of January 2002, Terry Hoeper expressed interest in buying Acorn's 70% stake in Acorn USA but made no formal offer. Shortly thereafter, he and Roger Irvin commenced proceedings in the Vernon County Court against Acorn USA. They claimed $500,000 for money and services invested. They claimed, among other things, that Acorn was in breach of an agreement whereby, in consideration for them investing capital and giving support to the company, Acorn would issue them with stock; that Acorn was in breach of an agreement to pay them $50,000 each and had failed to secure the payments as promised by means of deed of trust. They also claimed a constructive trust over the land. Acorn USA defended the claims and counterclaimed for damages for breach of fiduciary duty and tortious interference with the company's contractual rights. Most of the factual events behind this dispute occurred before the Receivers' appointment.

186. As a result of this dispute and the fact that Messrs Hoeper and Irvin indicated they wished to withdraw their personal guarantees, on 30 April 2002, Metz Bank called in its loans of $450,000 and $50,000 and threatened foreclosure.

187. Shortly prior to these events, in January 2002, the land option had been exercised, using $650,000 advanced by James Corral, a local businessman who had invested in the original development. Mr Corral operated a development company called JCC Enterprises. Mr Corral's loan was secured on the original 50 acre site and newly acquired option land by means of a Deed of Trust. Having lent the company significant sums, Mr Corral wanted to take control and buy Acorn's 70% holding. He had plans to re-organise the plots and sell some off at $22,500 each. He was in discussions with Mr Klumb, the CEO, about these plans and other matters such as payment to Mr Klumb of sums due for director's fees. Mr Russell felt that Mr Corral's plans were speculative, given the small population of the city and doubts over whether the land could be used for commercial purposes.

188. On 4 March 2002, Mr Corral made an offer to purchase the 70% holding for $52,500 ($2.50 per share). He also sought an immediate proxy from the Receivers so that he could exercise control immediately. However, the Receivers could not sell the shares immediately because of the obligation under the pre-emption agreement to offer the shares on the same terms to the existing shareholders. On 18 March 2002, TLT sent letters to the existing shareholders (Don Russell; Dreyton and Alan Kenyon) giving notice that Acorn was willing to sell at the price offered by Mr Corral.

189. Before the expiry of the 90 day period required by the pre-emption agreement, on 30 May 2002, Mr Corral withdrew his offer. Even before this, on 2 May 2002 Mr Corral sent letter of default to Acorn USA and threatened foreclosure. By this stage, Acorn USA had no funds and no way of servicing its debts. Mr Corral's change of heart coincided with an agreement reached in May 2002, between him, Messrs. Hoeper and Irvin; Metz Bank and Acorn USA whereby they resolved their respective disputes and claims. This was almost certainly the reason why Mr Corral withdrew his offer to purchase Acorn's shares. The terms were incorporated in a written agreement dated 31st May 2002, the principal heads of which provided as follows:

    i) Acorn USA transferred to Corral/JCC, Hoeper and Irvin a 450 acre plot of land lying to the west of Ash Street, leaving Acorn USA with approximately 130 acres. Acorn also agreed to pay them $47,805 in interest payments due under the Metz loans

    ii) Hoeper and Irvin and Acorn USA dropped all their respective claims made in the Vernon County Court action;

    iii) Corral/JCC released its security over all the land, including that retained by Acorn USA;

    iv) Corral/JCC took over the liability to Metz Bank and

    v) Metz Bank released Acorn USA from liability on its various promissory notes and loans.

190. Although this left Acorn USA free of any liability to Mr Corral and Metz Bank, the land it retained was still encumbered by other secured debts of about $425,000, including a debt of $155,000 to First National Bank.

191. On 31 May 2002, Don Russell wrote to the Receivers giving notice of acceptance of the offer to sell under the pre-emption agreement for $52,500. This acceptance was confirmed in a letter dated 12 July 2002, in which Mr Russell sought closure of the agreement. The Receivers' solicitors replied on 17 July 2002 confirming that the Receivers wished to proceed. The funds were received by TLT on or about 2 August 2002 and were held to Mr Russell's order.

192. However, at Mr Dobbs' insistence the Receiver's gave an undertaking to the Court on 30 July 2002 not to dispose of the shares until trial or further Order. So the sale could not proceed. Although the Receivers were released from their undertaking in December 2002, the Court order was not drawn up until May 2003. On 6 June 2003, Brian Lovett spoke to Mr Russell who explained that he had financed loans for the company which he now considered worthless. The effect of the undertaking had created problems for him and Mr Klumb and he was reluctant to provide any further funds to support the company. As at November 2002, the company had to make monthly interest payments of $5,425 but had no way of servicing this debt. Mr Russell therefore had to pay it himself.

193. There is no doubt that, by then, Acorn's shares in Acorn USA were indeed worthless; and Mr Dobbs had prevented the only real possibility of selling them.

Mr Dobbs' allegations against the Bank

194. Mr Dobbs' Statement of Case is part narrative, part evidence and part argument. It is not easy to distil from it the allegations that he makes. As far as I can see he makes the following allegations (which I have attempted to put in chronological order):
    i) The Bank misrepresented itself as an ethical Bank, and this misrepresentation induced Acorn to deal with it (paras 9 and 101);
    ii) The Bank wrongfully attempted to sell Acorn to Countryside in 1999 (para 14)
    iii) The September 1999 financial package was unfair (para 21);
    iv) The Bank took over the management of the project, thereby becoming a shadow director or a de facto director of Acorn, and is liable for breach of fiduciary duty in ruining Acorn (para 34);
    v) The Bank was in breach of contract in failing to hand over the liquidated damages to Acorn even after the adjudication (para 49);
    vi) The Bank is liable for breach of contract in failing to fund the project to completion (para 41);
    vii) The Bank knowingly overstated its demand before appointing receivers (paras 52 and 105);
    viii) The Bank wrongfully discouraged investors from investing in Acorn (para 44);
    ix) The Bank failed to explore refinancing and other options (para 65);
    x) The Bank conspired with Countryside to put Acorn into receivership (para 103-4);
    xi) The Bank appointed the receivers for improper purposes and in breach of UK banking principles (para 58);
    xii) The Bank damaged Mr Dobbs' reputation by issuing false press releases in October 2000 (para 63);
    xiii) The Bank is in breach of the debt rescheduling agreement by failing to market individual plots for at least one month (para 70);
    xiv) The Bank is liable for breach of contract in failing to exercise its step in rights under the construction contract (para 78);
    xv) The Bank is liable for the Receivers' conduct in refusing to accept the offer from Royalstone (para 68).

195. Mr Dobbs also wanted to argue that the Bank is liable for having concluded a settlement with Countryside on disadvantageous terms (para 87). However, this was a new allegation which was raised against the Receivers only days before the trial. The Receivers were not prepared to deal with it, as it would have required expert evidence on the merits of the settlement with Countryside. Nor did Mr Dobbs have expert evidence of his own. I ruled that Mr Dobbs should not be allowed to make this allegation.

Mr Dobbs' allegations against the Receivers

196. Mr Dobbs alleges against the Receivers that:
    i) They disposed of the Crickhowell project at an undervalue, in breach of their duty of care; and
    ii) They negligently managed, controlled and wasted Acorn USA.

197. Mr Dobbs also alleges that the Bank is vicariously liable for these breaches. Mr Dobbs had made a variety of other allegations against the Receivers; but all the allegations apart from those I have set out were struck out by Neuberger J. I refused him permission to raise those arguments again before me.

Discussion of and conclusions on the allegations against the Bank

198. ***Misrepresentation.*** Mr Dobbs says that before dealing with the Bank he acquired some promotional material in which the Bank described itself as an "ethical" bank. He says that this is what induced him to deal with the Bank as opposed to other potential lenders. He was not able to produce a copy of the material on which he relied, but said that he picked it up at the open day that he attended. I am prepared to accept that Mr Dobbs did acquire some promotional literature before he began dealing with the Bank. However, the promotional material that Mr Dobbs produced as dating from about the time that he acquired the promotional material on which he said he relied, did not describe the Bank as "ethical". Rather it emphasised the Bank's desire to invest in environmentally and socially responsible projects. I am prepared to accept that the Bank's description of itself had some influence

on Mr Dobbs at the time. Mr Levy suggested that the sole reason why Mr Dobbs dealt with the Bank was because he was in urgent need of finance, and Mr Skinner was able to pull strings within the Bank. Mr Skinner's connection with the Bank and its responsiveness to the urgency of the situation were undoubtedly very important. But to found a claim in misrepresentation it is not necessary for the representation to be the sole cause, or even the dominant cause of the representee's action. It is sufficient if it is one of the causes. However, what Mr Dobbs understood about the Bank's self-description was exactly what Mr Saunders explained about the Bank's subsequent use of the word "ethical" to describe itself; namely that it proactively supported environmental and socially responsible projects. As Mr Dobbs said in oral evidence:

"the greatest encouragement in going to the bank was the fact that they shared our beliefs in environmental lending, and would mean that whatever nuances in the difference between the two arrangements the relationship was likely to be better because they understood what we were hoping to achieve."

199. He also said in oral evidence that the literature that he acquired described the Bank as "ethically environmental".

200. In his closing argument Mr Dobbs changed the focus of his complaint. He said that Mr Skinner, many years earlier, had done business with Mercury Provident (a company that the Bank subsequently took over) and that it had been Mercury Provident that had described itself as "ethical". However, I do not consider that self-descriptions by Mercury Provident can have had any causative effect on Mr Dobbs' decision to approach the Bank. Moreover, in my judgment even if the Bank had described itself as an "ethical" bank, a statement of that kind is far too vague and subjective to give rise to a claim for misrepresentation, even if the statement was untrue.

201. In addition, for reasons which will appear, I am satisfied that the Bank behaved properly throughout, and was more than ordinarily supportive of Acorn. If the Bank's description of itself as "ethical" had been a representation sufficient to found a cause of action if it had been untrue, I would have found that it was in fact true.

202. This allegation fails.

203. *Wrongful sale to Countryside*. Mr Dobbs alleges that the bank wrongfully attempted to sell Acorn (or its assets) to Countryside in 1999. There is no evidence to support this assertion. The highest that Mr Dobbs can put his case is that there was a tentative proposal for Countryside to buy out the Bank; in other words for Countryside to take a transfer of the Bank's securities. There is nothing improper in this. In any event the suggestion never even reached the stage of a written offer. Although the Bank invited Countryside to put any proposals it had in writing, it never did. The allegation that the Bank tried to sell Acorn itself (as opposed to its assets) is legally impossible, quite apart from being completely unfounded in fact.

204. The only discussions about the sale of Acorn itself to Countryside were those initiated by Mr Dobbs himself, and pursued at various times by Mr Skinner. Indeed, Mr Skinner's view for a considerable period was that Acorn's best strategy was a sale of itself to Countryside. The Bank did not participate in those discussions. It is true that in 2000 (not 1999) the Bank did have negotiations with Countryside for the sale of the site to Countryside. But by then the Bank was on the point of enforcing its security; and since Countryside had a second charge on the site, a deal of some sort with Countryside was imperative.

205. This allegation fails.

206. *The September 1999 arrangements were unfair*. The legal significance of this allegation is obscure, in the absence of any claim that the agreements should be set aside. But in any event the allegation fails on the facts. The situation in the run-up to the making of the September 1999 agreements was:
    i) Countryside claimed to be owed more than £750,000 and had threatened to leave the site at the end of June unless they were paid;
    ii) Acorn had less than £200,000 left to spend before reaching the limit of its facility;
    iii) Two builders had already become insolvent while working on the development, and to lose a third would have made it very difficult for the development to be completed at all;
    iv) A change of contractor would have also incurred extra cost, which might have been as much as £500,000;
    v) It was therefore imperative to keep Countryside on site;
    vi) Acorn had tried and failed to sell itself to Countryside, and had no alternative source of finance;
    vii) Countryside did not trust Acorn, and therefore insisted on having security over the site to secure its payments;
    viii) Countryside also required the Bank to guarantee payments to it under the building contract;
    ix) Phase I of the development had been completed late and substantially over budget, and the Bank were concerned that the same thing might happen all over again. Since the Bank were to guarantee payment of Countryside under the building contract, it would have been quite unreasonable to expect it to guarantee payments under a cost plus contract. A fixed price contract was an essential goal, and was a benefit to Acorn as well as the Bank;
    x) For the same reasons, it was entirely reasonable, given that the Bank were undertaking a direct liability to Countryside, that changes to the specification should not be made without the Bank's consent;
    xi) Countryside had fallen behind the contractual schedule and, contrary to initial promises, were not completing houses in stages. It was therefore a desirable goal to tie Countryside to completion dates that they said they could achieve;
    xii) The Bank took the view that this was already a recovery situation and that it might just get out if all went well.

207. I accept that Acorn had little choice but to accept the package. But I cannot accept that the Bank can be criticised for entering into it. Mr Skinner emphasised in his oral evidence the importance of the "rescue culture". The Bank's willingness to extend further credit to Acorn and to guarantee payment to the building contractor, on the basis of doubtful security, was in truth an attempted rescue. In deciding not to call in the loan in the summer of 1999 the Bank was, in my judgment, living up to its self-description as an ethical bank. It is difficult to conceive of many (if any) other banks exposing themselves to direct liability to a building contractor on the basis of such doubtful security. In addition the Bank, unusually, agreed to postpone part of its secured debt to Countryside.

208. The reason why Acorn had little choice but to accept the package was largely because it had made no attempt to refinance the project; it had run out of money; and it was in dispute with the third building contractor to attempt the development. Mr Dobbs had no idea how to rescue the project other than by borrowing more money from the Bank; and Mr Skinner was so distant from the day to day running of the project that he took no part in the discussions at all. If Acorn had not entered into the September agreements, the contractor would have left site, and the project would have failed. In addition, Acorn had the benefit of legal advice and the advice of Woodeson Drury.

209. This allegation fails.

210. The Bank took over the management of the project thus becoming a shadow director. The goal of this argument is to establish that the Bank owed fiduciary duties to Acorn, over and above its duties as a mortgagee. Mr Dobbs relies on the definition of shadow director in section 741 (2) of the Companies Act 1985, namely: *"a person in accordance with whose directions or instructions the directors of the company are accustomed to act."*

211. This definition is relevant for the application of statutory duties imposed by the Act and other legislation relating to company directors. It is not directly relevant to the question whether a person owes fiduciary duties to the company in equity. However, I am prepared to assume that if a person would fulfil the statutory definition of shadow director, he is a person on whom equity will impose the fiduciary duties imposed upon a company director. Another concept of relevance is that of a de facto director. He is a person, analogous to a trustee de son tort, whom the law will treat as a director. It has been said that the concepts of shadow director and de facto director are mutually exclusive. But in ***Re Kaytech International plc*** [1999] 2 BCLC 351 at 423 Robert Walker LJ said that this was not necessarily so. He said: *"However the two concepts do have at least this much in common, that an individual who was not a de jure director is alleged to have exercised real influence (otherwise than as a professional adviser) in the corporate governance of a company. Sometimes that influence may be concealed and sometimes it may be open. Sometimes it may be something of a mixture, as the facts of the present case show."*

212. I think also that Robert Walker LJ must be taken to have approved the statement by Jacob J in ***Secretary of State for Trade and Industry v. Tjolle*** [1998] 1 BCLC 333 in which he said: *"it may be difficult to postulate any one decisive test. I think what is involved is very much a question of degree. The court takes into account all the relevant factors. Those factors include at least whether or not there was a holding out by the company of the individual as a director, whether the individual used the title, whether the individual had proper information (e.g. management accounts) on which to base decisions, and whether the individual had to make major decisions and so on. Taking all these factors into account, one asks "was this individual part of the corporate governing structure", answering it as a kind of jury question. In deciding this, one bears very much in mind why one is asking the question. That is why I think the passage I quoted from Millett J is important. There would be no justification for the law making a person liable to misfeasance or disqualification proceedings unless they were truly in a position to exercise the powers and discharge the functions of a director. Otherwise they would be made liable for events over which they had no real control, either in fact or law."*

213. I was also referred to the decision of Judge Baker QC in ***Re PTZFM Ltd*** [1995] 2 BCLC 354. That was a case in which it was alleged that a lender had become a shadow director of the borrower company. Having quoted the statutory definition of "shadow director" the judge said: *"This definition is directed to the case where the nominees are put up but in fact behind them strings are being pulled by some other persons who do not put themselves forward as appointed directors. In this case the involvement of the applicants here was thrust upon them by the insolvency of the company. They were not accustomed to give directions. The actions they took, as I see it, were simply directed to trying to rescue what they could out of the company using their undoubted rights as secured creditors. It was submitted to me that it was a prima facie case of shadow directors, but I am bound to say that that is far from obvious."*

214. He then concluded: *"I find that there is no prima facie case made out, and it is unlikely that further information will come to light to show that they are shadow directors. The central point, as I see it, is that they were not acting as directors of the company, they were acting in defence of their own interests. This is not a case where the directors of the company, Steven and his colleagues, were accustomed to act in accordance with the directions of others i.e. the applicants here. It is a case here where the creditor made terms for the continuation of credit in the light of threatened default. The directors of the company were quite free to take the offer or leave it."*

I was also referred to the lengthy and illuminating discussion of both shadow directors and de facto directors in the judgment of Chesterman J in ***Emanuel Management Pty Ltd v. Fosters Brewing Group*** [2003] QSC 205. The judge drew the same distinction as Judge Baker QC had drawn, namely that a creditor acting to protect its own interests is unlikely to have become either a shadow director or a de facto director.

216. Mr Dobbs' first allegation is that the role of the Bank in promoting and negotiating the financial package of September 1999 shows that they took over the project and became shadow directors of Acorn. So far as promoting the package is concerned, that was, in my judgment, an attempt on the part of the Bank to rescue Acorn from its financial difficulties and to keep the development alive, in order to maximise its own chance of recovering its debt in full. Mr Saunders' report to Mr Blom of 30 July 1999 makes that clear. In order to do that, the Bank was willing to put itself into the firing line. It was not an attempt to take over Acorn itself. The Bank urged Mr Dobbs to get legal advice for Acorn in time for the meeting at which the deal was negotiated; but he did not. He did, however, subsequently obtain legal advice. Mr Skinner said that they were advised not to sign the agreements. However, since Mr Skinner played no part in the negotiations, I regard that evidence with scepticism. But even if it is true, Acorn must have decided not to follow that advice. Mr Dobbs said in evidence that Acorn could have sought alternative sources of finance; so in my judgment Acorn's decision was not forced upon it. The terms of the agreements were the terms on which the Bank was prepared to continue to allow (and indeed increase) credit to Acorn. Acorn was free to accept or reject those terms.

217. The package itself required the Bank's consent to any changes in the specification, but that was understandable in view of the Bank's own liability to Countryside. The tripartite agreement did not give the Bank the right to initiate changes in the specification, and it did not do so. The tripartite agreement also left marketing the houses in Acorn's hands, and merely required regular reports to be made to the Bank. Since the only means of repaying the Bank was through the sale of houses, this, too, was a legitimate means of protecting the Bank's own interests and did not amount to assuming the role of shadow or de facto director.

218. Mr Dobbs also claimed that the Bank compelled Acorn to appoint Mr Skinner as its Executive Chairman. This allegation was, to some extent, modified in the course of the trial. As it finally emerged, the allegation was that Mr Saunders threatened to call in the loan unless Mr Skinner accepted that role. The allegation was put to Mr Saunders and he denied it. Mr Saunders had said in his letter of 24 November 1999 that Mr Skinner should become more involved in Acorn's affairs. Mr Skinner said in evidence that he discussed this with Mr Dobbs and by 28 December they had decided that Mr Skinner would assume the role of Executive Chairman, as he said to Mr Saunders in his letter of 28 December. That was the day before the meeting at which Mr Saunders was alleged to have threatened to call in the loan. So the decision had been made by then. Part of Mr Skinner's cross-examination proceeded as follows:

"Q. I suggest that the view that Mr Saunders made clear was that unless someone took firm control of the project on behalf of Acorn the project was likely to fail and Acorn fail with it.
A. It wasn't someone, it was me.

Q. Yes.
A. That's what I said.

Q. You were the only other director available, were you not?
A. Yes, that's correct.

Q. So do you accept that what Mr Saunders made clear is that unless you took firm control of the project on behalf of Acorn the project was likely to fail and with it Acorn?
A. I think that's what I am saying, is it not?"

219. In my judgment this does not amount to a threat by Mr Saunders to call in the loan unless Mr Skinner took on the role of Executive Chairman. But even if it does, I would not have regarded it as amounting to more than legitimate commercial pressure from a banker the security of whose loan was beginning to be in doubt. It certainly does not suggest that the Bank itself wished to act as a director of Acorn. Quite the contrary.

220. Mr Dobbs relies on an extract from a letter that the Dutch National Bank wrote to the Bank in August 2001, following a routine audit. The extract (in translation) reads: *"You told us that you have concluded there were two big cases which had not gone well. Now they are being thoroughly analysed with the aim of learning from these cases. In Bristol your organisation perhaps became too closely involved in the management of Acorn Televillages."*

Mr Blom explained that the word "management" in Dutch does not imply that you are steering an enterprise; but that you are doing the little things that a manager should do. In the present case, the Bank's self-criticism was that Mr Hawes was too helpful to Acorn in preparing cash flows; when what was needed was a proper assessment of the loan. This extract does not, in my judgment, support Mr Dobbs' allegation.

222. Mr Dobbs also relied on instances where the Bank refused to sanction the drawdown of funds for certain purposes. But as Mr Saunders made clear in his letter of 8 November 1999, the Bank was simply concerned with the question of the release of funds. It remained Acorn's responsibility to decide how best to use them. It must also be borne in mind that the Bank had its own direct contractual liability to Countryside. The protection by the Bank of its own interests is consistent with its not having become a director of Acorn. Mr Dobbs' argument consistently overlooks the fact that the Bank had its own interests to protect, both as funder of the project; and also as guarantor of payments to Countryside under the building contract. In addition it overlooks the fact that it was on Acorn's instructions that the Bank withheld the disputed LADs from Countryside. In addition Mr Saunders repeatedly urged Acorn to get on with marketing.

223. Mr Dobbs also relied on the Bank's alleged denial of funds with which to pay conveyancing fees. However, the only instance was that in May 2000, just before Acorn's facility was reinstated. The position was that Gabb & Co

wanted to deduct fees from the proceeds of sale of plot 32 even though those fees related to a different plot; and hence were not covered by the agreement. The Bank nevertheless agreed. But Gabb & Co deducted a greater amount than that which had been agreed; so the Bank protested. I cannot see any ground on which the Bank can fairly be criticised for that; or that the Bank's protest gives any support to the allegation that it acted as a shadow director of Acorn. Mr Dobbs was at pains to say that there could be no conceivable criticism of the quality of the conveyancing services provided by Gabb & Co. Mr Saunders agreed that no such criticism was made. But that is not the point. The point is that the Bank had agreed with Gabb & Co that a certain amount of money would be remitted to the Bank out of the proceeds of sale of one particular plot; and Gabb & Co remitted less than they had promised.

224. In addition, there were many initiatives that Acorn took on its own. It was Acorn, through Mr Skinner, who proposed persuading Countryside to change the site management and who actually persuaded Countryside to do so. The Bank may have agreed to the suggestion, but they did not impose it on Acorn. It was Mr Dobbs and Mr Skinner, without the intervention of the Bank, who attempted to sell Acorn to Countryside. It was Mr Dobbs and Mr Skinner who decided to commission Mr Russell's report. It was Mr Dobbs and Mr Skinner who decided to refer the dispute with Countryside to adjudication. It was Mr Dobbs and Mr Skinner who decided to make the claim against the Bank for damages caused by economic duress.

225. There is no example of an occasion on which the Bank claimed to be a director of Acorn; or on which Acorn held out the Bank as having been a director. There is no example of a board meeting of Acorn in which the Bank participated. The Bank was not, in my judgment, part of the corporate structure of Acorn.

226. In my judgment the allegation that the Bank became a shadow director or a de facto director of Acorn fails.

227. ***The Bank failed to hand over the LADs to Acorn.*** Until the outcome of the adjudication, the Bank behaved entirely properly in placing the LADs in a separate account, and not releasing them to Acorn. There were two reasons for this. First, the sums were in dispute and, in addition, Countryside had a claim against Acorn for loss and expense. The Bank had no means of deciding the rights or wrongs of the dispute or Countryside's claims. Second, and more important, Mr Skinner had himself agreed with Countryside that the LADs would be kept in a separate account until the dispute between Acorn and Countryside had been resolved; and had given the Bank instructions to that effect. So the Bank was doing no more than complying with its customer's instructions. Mr Dobbs' complaints that the Bank should have handed over the LADs to Acorn before the adjudication are entirely misconceived. The position after the adjudication is a little different. On the face of it, the adjudicator had decided that Acorn had been entitled to deduct the LADs, and that Countryside had no claim. But an adjudication is only a provisional decision. Countryside might have challenged the decision at the end of the contract. Moreover, in economic terms the Bank did credit Acorn with the LADs. First, it accepted Mr Skinner's suggestion that the amount of the LADs should be set off against the development loan for the purposes of calculating interest. So Acorn was not being charged any interest on the LADs. In effect, therefore, the Bank had agreed not to release the money for other profitable lending at no cost to Acorn. Second, the LADs were disregarded in decisions to extend Acorn's credit, so that Acorn's overall ability to borrow from the Bank was greater than it would have been if the LADs had been released to it. Moreover, by the time that the adjudicator reached his decision, Acorn had no agreed facility and the Bank had already called in the loan. There can, therefore, be no question of the Bank having broken any contract with Acorn in not releasing the LADs.

228. Mr Dobbs seemed at one stage to be arguing that the Bank's failure to "hand over" the LADs meant that Acorn had less cash in hand than it would otherwise have done. This seems to me to be a misconception. The effect of crediting the LADs to Acorn would not have put cash into Acorn's hands; it would merely have reduced the extent of Acorn's borrowing. I think, in the end, Mr Dobbs recognised this. But he said that the Bank's refusal to credit the LADs to Acorn made it impossible to refinance. There are a number of flaws in this argument. First, until the adjudicator had adjudicated, the Bank was complying with its customer's instructions in keeping the LADs on a separate account. Second, after the adjudicator had pronounced, there was no extant facility. Third, there is no evidence that the fact that the LADs were kept in a separate account had any effect on other potential lenders. Fourth, I could not see why the existence of two accounts, one in credit and one in debit, would have presented any more of an obstacle to refinancing than one consolidated account in debit (though with a smaller debit balance).

229. This allegation fails.

230. *The Bank failed to fund the project to completion.* The argument under this head depends on implying a term into the September 1999 tripartite agreement. Mr Dobbs says that at the date of that agreement it was contemplated that the project would be completed and the houses sold by January 2000. This led to the agreement that the facility would continue until the end of February 2000, one month after the expected sale of the final house. The purpose of the loan was to enable Acorn to complete the project and sell the houses. LADs would be payable if there was any delay in completion. The very fact of the LADs shows that delays were expected. The Bank's undertaking to exercise its step in rights shows that it expected to build out the project. Performance of the obligations under the building contract was not under Acorn's direct control. From this platform Mr Dobbs argues that it was an implied term of the tripartite agreement that, if the expected dates were not met, the Bank would continue to fund the project until the building was complete and the houses sold. This argument is hopeless. It is predicated on the assumption that things would have gone wrong, otherwise the facility would not have needed to be extended. No banker in his right mind would agree to an open ended commitment

to fund a project that had gone wrong. The term is not necessary to give business efficacy to the agreement, because it would always have been open to Acorn to refinance from an alternative lending source. The term is not so obvious that it goes without saying. On the contrary it would have been an extraordinary term for the Bank to have agreed. If the officious bystander had asked the parties what would happen if the expected dates were not met, I have no doubt that they would have replied that they would review the position at the end of the facility and take stock of the changed situation. In addition the implied term would contradict an express term, namely that loan was repayable on demand and that the facility would expire at the end of February 2000. And the step in rights were rights that the Bank undertook to exercise if it terminated the finance agreement and appointed a receiver. So the exercise of the step in rights predicated that the Bank had terminated the facility and called in the loan (otherwise there would have been no occasion to appoint receivers).

231. In fact, the Bank did continue to offer facilities to Acorn after the expiry of the facility provided for by the September agreements. Its offer in February 2000 was not accepted by Acorn, despite Mr Hawes' urging. In his Statement of Case, under the headline "[Bank] deliberately starves [Acorn] of funds", Mr Dobbs complains that Mr Saunders refused to allow Acorn to draw further on the account in April 2000. This complaint is breathtaking, given that since February 2000 Acorn had been refusing to countersign the letter offering it a facility; and in consequence there was no authorised facility in place. The Bank offered a further facility in May 2000; despite the fact that Acorn was claiming that the Bank had been guilty of economic duress and was liable in damages of over £1 million; and despite the fact that Acorn had threatened to sue Mr Saunders personally for libel. In my judgment the Bank behaved with exemplary forbearance in the face of Acorn's accusations. It is astonishing that Mr Dobbs and Mr Skinner appear to believe that the Bank should have continued to fund the project in the face of their accusations. The Bank more than lived up to its claim to be an "ethical" bank.

232. This allegation fails.

233. ***The Bank knowingly overstated its demand before appointing receivers***. The first demand was made before the result of the adjudication. It included the withheld LADs in the calculation of Acorn's indebtedness. The second demand was made after the result of the adjudication. It also included the withheld LADs in the calculation of Acorn's indebtedness. I can see the argument that the second demand ought to have reduced the amount of the indebtedness by the amount of the withheld LADs. Even that argument is not straightforward, because of the provisional nature of an adjudication. In addition, since the Bank had not consolidated the LADs account and the development loan account, the amount owing on the development loan account was correctly stated in the demand. Maybe the Bank should have consolidated the two. But what I do not accept is that the Bank *knowingly* overstated its demand. Had the LADs been excluded from the demand, Acorn's debt to the Bank would still have been in the region of £2 million; and it was still facing a substantial claim from Countryside. In addition there is no evidence that the alleged overstatement in the second demand of the amount due had any effect, either on Acorn or Mr Dobbs. The first demand was the demand that was legally effective; and as at the date of that demand, the amount of the debt was correctly stated.

234. Even if I had accepted the factual allegation, an overstatement of the amount due would not have invalidated the demand: ***Bunbury Foods Pty Ltd v. National Bank of Australasia Ltd*** (1984) 51 ALR 609, followed in ***Bank of Boroda v. Panessar*** [1987] Ch. 335 at 346-7.

235. This allegation fails.

236. ***The Bank wrongfully discouraged investors from investing in Acorn***. This allegation relates to Regime. Regime's letter to the Bank of 10 October 2000 says in terms that it decided to pull out because further investigation had led it to believe that two plots were unsaleable and that the returns were not good enough. This gives no support to Mr Dobbs' allegation. Mr Dobbs did not call any witness from Regime to support his allegation. There was a meeting between Regime and the Bank before the letter was written. Mr Saunders said in evidence that at the time of the meeting he and Mr Hawes "were hopeful that they would look seriously at investing in Acorn, and I think we tried to encourage them to do so." I accept his evidence.

237. Mr Dobbs relied on the fact that an internal note revealed that Regime was on a list of persons who might be interested in acquiring the development from the Receivers. Given that Regime had once shown interest, this is not in the least surprising. In fact Regime showed no further interest, even during the Receivers' marketing campaign.

238. This allegation fails.

239. ***The Bank failed to explore refinancing and other options***. Although this allegation features as a headline in Mr Dobbs' Statement of Case, no details are given of what he says the Bank should have done. In his final address Mr Dobbs said that the Bank ought to have contacted the Bank of Wales when the latter was interested in refinancing the project. However, the fundamental misconception is the assumption that it was the Bank's job, rather than Acorn's, to explore the refinancing of the project. Moreover, there was nothing to stop Mr Dobbs from asking the Bank of Wales to contact the Bank, rather than expecting the Bank itself to take the initiative. He did not do so. In addition, as the narrative makes clear, the Bank had, for practical purposes, itself refinanced the project several times.

240. This allegation fails.

241. ***The Bank conspired with Countryside to put Acorn into receivership***. In his Statement of Case Mr Dobbs alleges that there is "a triable even if inherently implausible or scarcely credible prospect that there was a conspiracy to

defraud [Acorn] of the value of its assets made between [Mr Saunders] at the Bank, [Alan Cherry] and [Richard Cherry] at Countryside." The existence of a triable allegation may be enough to stave off summary judgment; but the trial is the time to decide whether the "inherently implausible and scarcely credible" allegation is actually true.

242. It cannot properly be suggested that the Bank acted unlawfully in appointing receivers after Acorn had failed to repay the loan following the demand. So the conspiracy must be what is called a "lawful means" conspiracy. It is an essential ingredient of such a conspiracy that the conspirators' predominant purpose is to injure the victim. The distinction here is between the object of injuring the victim, on the one hand; and the object of protecting the conspirators' own legitimate interests on the other. The former, but not the latter, is an actionable conspiracy.

243. Why, then, did the Bank appoint receivers? Mr Dobbs suggests that Mr Saunders took the decision to appoint receivers because he wanted to protect himself and the Bank against claims by Acorn that the Acorn account had been mishandled. He says that Mr Saunders wanted to protect his own reputation, and the only way of doing that was to kill off Acorn. He says that the Bank was already "cosying up" to Countryside; and they agreed that Acorn would be put into receivership so that Countryside could acquire the development on the cheap. Mr Dobbs points to Mr Hawes' letter of 6 September 2000 in which he said that it would be desirable *"to prevent any attempt by the directors to raise a phoenix from the ashes"*.

244. These allegations are fantasy. It is necessary to recap on some of the salient facts. The Bank went into the project in April 1996 on the basis of a loan of £950,000 which would reduce to £200,000 at the end of Phase I. In April 1998, when Acorn's liabilities had increased to £550,000, instead of calling in its loan the Bank increased Acorn's borrowing limit to £2.195 million. By September 1999 when Acorn had again run out of money, the Bank did not call in its loan. Instead it increased Acorn's borrowing limit to £2.6 million and undertook a direct contractual liability to Countryside; and agreed to postpone part of its secured loan to Countryside. In February 2000, when the facility expired, and the Bank thought that it was facing a shortfall, it did not call in its loan; but offered to extend the facility. When that was declined, it urged Acorn to accept. Even after Acorn had threatened the Bank with claims for damages, and threatened to sue Mr Saunders for libel, the Bank still renewed the facility. When the renewed facility expired at the end of May 2000 the Bank still did not call in its loan. It was only when the Bank was dragged into the adjudication to face a claim for £1 million damages for economic duress that it called in the loan. Even though the Bank had called in the loan in early August 2000, Acorn had no concrete proposals for repayment by 20 October when the Receivers were finally appointed. There were some vague and last minute suggestions that the Bank of Wales might refinance; but Acorn did not make strenuous efforts to pursue them. Indeed Mr Skinner played no part at all in attempting to refinance, leaving it all to Mr Dobbs.

245. Why did the Bank appoint receivers? The answer is clear. The Bank appointed receivers because Acorn had not repaid the loan; and Mr Saunders took the view that the appointment of receivers would minimise the Bank's loss. Mr Bierman, who reported to Mr Saunders, thought that Acorn was unable to service its debt and unable to complete the project. It was his judgment that Acorn's liabilities exceeded its assets. That was a reasonable judgment. I cannot place any weight on Mr Hawes' cryptic comment in his letter of 6 September (which Mr Dobbs did not ask him to explain). In my judgment the Bank did all that could reasonably have been expected of it to support the project.

246. So far as Countryside were concerned, it is true that there were discussions between the Bank and Countryside about Countryside buying the site from the Bank. Since Countryside had a charge on the land, which would have to be cleared off before any sale could take place, it was obvious that the Bank would have to talk to Countryside and do a deal with them. Otherwise any sale would be paralysed. In fact there was no agreement between the Bank and Countryside for the sale of the site, because Countryside would not come up with an acceptable offer. The decision to appoint the Receivers was that of the Bank alone. It was not a decision taken in concert with Countryside. Ultimately the settlement with Countryside was a simple cash settlement of Countryside's claims, made after taking advice. The terms of the settlement included a release by Acorn of its claims against Countryside. But that is an essential term of any settlement. Mr Dobbs also relied on clause 9 of the compromise agreement which, he said, was an attempt to stifle his claims against Countryside. What he overlooks, however, is that clause 9 only comes into effect if he and/or Mr Skinner acquired the site. Even then the Receivers only undertook an obligation to use best endeavours to procure a release of claims by Mr Dobbs and Mr Skinner.

247. Moreover, Acorn had already made its claim for damages for economic duress against the Bank; and although the Bank objected to the forum in which it was brought, it did not stifle that claim. Even when Acorn (by its receivers), the Bank and Countryside entered into the compromise agreement on 22 December 2000, the Bank did not procure a release of Acorn's claims against it. Nor did the Bank object to the late joinder of Acorn as a claimant in this action. In the result Mr Dobbs presented his and Acorn's claims against the Bank during the course of an eleven day trial. So no claims against the Bank have been stifled.

248. This allegation fails.

249. ***The Bank appointed the receivers for improper purposes and in breach of UK banking principles***. The allegation of the appointment of the Receivers for improper purposes adds nothing to the allegation of conspiracy, and fails for the same reasons. However, Mr Dobbs has another allegation under this head. He complains that the Bank appointed the Receivers without any prior consultation with the directors of Acorn and without conducting an independent business review. He says that had such a review been conducted, Acorn would have been found to have been profitable. He also complains that the Bank made no attempt to refinance Acorn.

250. It is true that Mr Dobbs and Mr Skinner were not given advance notice of the receivership. Nor did the Bank conduct an independent business review of Acorn's affairs. Was this a breach of "UK banking principles"?

251. The principles on which Mr Dobbs relies are set out in a publication issued by the British Bankers Association entitled "*Banks and Businesses Working Together*". The principles include the following:

"Where a customer does get into difficulties and acts early, its bankers will work to ensure that there is sufficient time to take the advice and have the discussions identified in the key principles. In most cases, that should enable both bank and customer to negotiate the terms of the bank's support and to return to successful operations. However, if the customer refuses to seek or to act upon advice or to have meaningful discussions, the bank may hasten moves to instigate recovery proceedings, which may include enforcement of security."

"Sometimes the existing legal entity and management structures running the business cannot be saved but a restructuring through a receivership, or a sale to a new owner, or a change of management can save the underlying business and maintain employment and community benefit."

"We will alert you when we have concerns about your business and/or our relationship with you."

"If you are unable to solve the underlying problems we may ask for additional financial information and/or seek an independent review of your business."

"Where we have requested an independent review of your business to help you solve the underlying problems, we will seek to discuss the information provided with you (and should you request, your advisers) before taking any action."

252. It is clear from the last two principles that those banks who subscribe to these principles do not promise to call for an independent review of the customer's business. The principles make it clear that it is up to the bank in question to decide. So no complaint can legitimately be levelled against the Bank for not calling for a review of Acorn's business. In fact, because of the way in which the Bank had monitored the project; and because, at that time, the project was Acorn's only business activity, the Bank already knew a lot about Acorn's business. The question of discussion with the customer before taking action arises only if a business review is requested by the bank. Since the Bank did not ask for a business review, this principle does not apply either. There were many requests by the Bank, starting in early August, for Acorn's proposals to repay the loan. There was silence until mid-September when Mr Dobbs asked for the renewal of the facility. There had previously been prolonged and increasingly combative discussion between the Bank and Acorn about the state of the business. Moreover, I am quite sure that it was never intended that the form of co-operation between bank and customer envisaged by the principles would apply in circumstances where the customer had accused the bank of economic duress and had made a claim for £1 million in damages against it.

253. It would, perhaps, have been courteous of the Bank to have told Acorn in advance that they were about to appoint receivers, but I do not think that they were in breach of any principle of UK banking in not doing so.

254. I should also say that even if I had been of a different view, a breach of UK banking principles would not, in my judgment, have given rise to any legal liability on the part of the Bank. In addition, I am quite unpersuaded that an independent review of Acorn's finances would have found it to be capable of finishing the project, selling the houses and remaining solvent.

255. This allegation fails.

256. ***The Bank damaged Mr Dobbs' reputation by issuing false press releases in October 2000***. This allegation is, in effect a claim for libel. The limitation period for such a claim is one year from the date on which the cause of action accrued. Mr Dobbs' claim, even if well-founded is statute barred. Although the court has power to extend time under section 32A of the Limitation Act 1980, Mr Dobbs has never asked for an extension of time.

257. Be that as it may, the only statements that Mr Dobbs has identified are the statements that Acorn had cashflow problems and "had run up debts of over £1 million". Both those statements were true.

258. This allegation fails.

259. ***The Bank is in breach of the rescheduling agreement by failing to market individual plots for at least one month.*** The Receivers were appointed on 20 October 2000. The sales staff on site were retained until at least 18 December 2000. Brochures were available for interested buyers, and Acorn's website remained up and running. Offers for individual plots were passed on to the Receivers. This amounts to reasonable endeavours by the Bank to market the plots.

260. This allegation fails.

261. ***The Bank is liable for breach of contract in failing to exercise its step in rights under the construction contract***. The step in rights that the Bank had promised to enforce were those contained in clause 2.2.5 of the deed of variation signed in September 1999. Those step in rights entitled the Bank to take the place of the Employer for the purpose of giving instructions to the contractor under the building contract. However, clause 2.2.5.3 made it clear that the Bank was to incur no greater liability to Countryside by exercising its step in rights than it already had under the terms of its guarantee. It is important to realise that the step in rights only extended to the building contract, and not to work outside the scope of the building contract.

262. At the date of the receivership the following works remained to be done:
    i) Remedial works to the foul drainage on Phase I;
    ii) Installation of the fibre optic cable network which was a requirement of the land transfer;

iii) Completion of the Telecentre, which was also a requirement of the land transfer;
iv) Some snagging to individual houses;
v) Completion of the wearing course to estate roads, but Countryside had been instructed by Woodeson Drury not to complete this work until after the resolution of the drainage problem.

263. There is no doubt that the remedial works to the foul drainage on the Phase I site; the installation of the fibre optic network and the completion of the Telecentre were all outside the scope of the building contract with Countryside. So the Bank's promise to exercise its step in rights did not extend to them. Thus it follows that the Bank had no contractual obligation to build out the whole of the development. In addition the way in which the step in rights were drafted made it clear that they did not impose on the Bank any financial liability greater than that which it had already. Thus the Bank could not be required to advance any further monies for the completion of the development.

264. On the face of it, however, the Bank had an obligation to exercise its step in rights as regards the snagging and the completion of the wearing course of the roads. Mr Levy argued that:
i) The Bank's promise to exercise its step in rights was a promise given for the benefit of Countryside alone. Consequently Countryside was entitled to release the Bank from its obligation; and did so by virtue of the compromise agreement of 22 December 2000;
ii) By joining in the compromise agreement, Acorn acquiesced in the Bank's belief that it had been released from its obligation; and is now estopped from asserting its continued existence;
iii) Alternatively, by releasing Countryside from its obligations under the building contract, the Bank put it out of its power to enforce the step in rights; and by joining in the compromise agreement containing that release, Acorn must be taken to have waived its right to require the Bank to exercise its step in rights.

265. The Bank's undertaking to exercise its step in rights was not expressly confined to Countryside alone. Moreover the undertaking was contained in both the deed of variation and in the debt rescheduling agreement. It is not, to my mind, self-evident that Acorn could have derived no benefit from the undertaking. On the contrary, if the works comprised in the building contract were all undertaken, it might well have been considered at the date of the contract that, at least in theory, a greater price could be obtained for the development site. I am not persuaded that the undertaking was one that Countryside alone could release. I have already noted that although both Acorn and the Bank entered into the compromise agreement, they did not mutually release claims against each other.

266. The compromise agreement contained a mutual release by Countryside and the Bank of their obligations towards each other under the building contract. I do not consider that the mere fact that Countryside released the Bank from its obligation *to Countryside* to exercise the step in rights would, by itself, have estopped Acorn from enforcing the Bank's obligation *to Acorn* to enforce those rights. However, I regard the Bank's release of Countryside as more significant. Once the Bank had released Countryside from its obligations under the building contract, there were no step in rights left for the Bank to enforce. By joining in that compromise Acorn at the very least acquiesced in that situation. In my judgment it would be unconscionable for Acorn to assert that the Bank's obligation to enforce its step in rights survived the compromise. That covers the period from 22 December 2000 onwards. What of the period between 20 October and 22 December? During that period the Bank had not exercised its step in rights, contrary to the promise that it gave. Acorn did not release accrued claims against the Bank. In order for an estoppel to arise as regards accrued claims, it would, in my judgment, be necessary to find a clear and unequivocal representation by Acorn that it would not rely on its strict legal rights. In my judgment the compromise agreement does not amount to such a representation. In principle, therefore, I conclude that the Bank was in breach of its undertaking to exercise its step in rights by failing to exercise them between 20 October 2000 and 22 December 2000.

267. However, it is necessary to consider how the Bank could have enforced its step in rights, had it decided to do so. The step in rights were simply rights to give instructions to Countryside. But by the date of the receivership Countryside had not been paid for many months. The last payment they received was in November 1999, and they had been working unpaid for about six months after that. The prospect of Countryside willingly completing the development without being paid for their past work is remote. Countryside would have been able to terminate the contract on the ground of non-payment. Had they done so the Bank's step in rights would have vanished. The step in rights, and the promise to exercise them, would not have compelled the Bank to take legal action against Countryside, even assuming that there was any effective legal action that the Bank could have taken. In my judgment it is highly unlikely that the Bank could have persuaded Countryside to carry on working without negotiating a settlement of Countryside's claims in a larger sum than the £500,000 eventually agreed. In addition it would have been of no practical benefit to have carried out the work relating to the wearing course of the estate roads, unless the drainage problems had been sorted out first. And the drainage problems were not within the scope of the Bank's undertaking. Completion of snagging would have made little difference. Moreover, the period of breach was a very limited one and Acorn released (or must be taken to have released) the Bank from future performance of its obligation on 22 December 2000.

268. Strictly speaking the question of damages for breach of the Bank's obligations is not before me. But there is no suggestion that there is further relevant evidence on the question of quantum. It may, therefore, be helpful if I indicate that, had I been assessing damages, I would not have awarded Acorn more than nominal damages. Nominal damages are conventionally fixed at £2.

269. This allegation succeeds to the extent that the Bank is liable for having failed to exercise its step in rights between 20 October and 22 December 2000. But on the evidence I have heard, I would not have awarded Acorn more than £2 nominal damages.

270. *The Bank is liable for the Receivers' conduct in refusing to accept the offer from Royalstone*. Mr Dobbs' allegation is that the Receivers deliberately decided to cut Royalstone out of any possible sale, because of Mr Dobbs' association with Royalstone. He says that the Receivers were determined that he should have no more to do with the project. This allegation is contradicted by all the documents. In fact:
    a) On 8 November 2000 Mr Morrison urged Mr Dobbs to put forward any proposals he had for buying the site as soon as possible;
    b) On 14 November the Receivers had a two and a half hour meeting with Mr Dobbs and Mr Slatter;
    c) On 23 November Mr Morrison suggested to Mr Slatter that he should put in a simple offer for the assets;
    d) Mr Morrison repeatedly urged Mr Slatter to provide better evidence of funding;
    e) Mr Morrison reported to the Bank (in a letter that was not for outside consumption) that if Mr Slatter came up with better evidence of funding a contract would be issued to Royalstone;
    f) Mr Slatter was unwilling to commission a valuation until his offer had been accepted, despite having been told by Mr Morrison that things might develop into a contract race;
    g) By early December, Mr Slatter had gone quiet;
    h) No contracts were in fact exchanged until March 2001
    i) On the day after contracts had been exchanged, Mr Slatter told Mr Lovett that he was not interested.

271. In addition, although Mr Rhodes' witness statement said that he had been told that Mr Dobbs was "persona non grata", he accepted in cross-examination that he was told no such thing.

272. Mr Dobbs also relied on clause 9 of the compromise agreement as showing that the Bank wanted to cut him out of any deal. However, clause 9 expressly recognised that he and/or Mr Skinner might be the only or the best purchaser of the site; and the Receivers' solicitors had already made it clear to Countryside in correspondence that their legal duties did not allow them to refuse to treat with Mr Dobbs.

273. Mr Dobbs also argued that the first Royalstone offer (which had a financial value of £2.7 million) remained open for acceptance even after the second offer of £2.25 million. Not only would that have been at variance with basic principles of the law of contract, it is also contradicted by what Mr Dobbs and Mr Slatter both told the Receivers. Had both offers been concurrently open for acceptance, it is astonishing that neither Mr Dobbs nor Mr Slatter ever told the Receivers that that was so. Moreover, it seems to me to have been commercially most improbable for Royalstone to have had two concurrent offers open for acceptance: one at £2.7 million and one at £2.25 million. It is also clear that even if Mr Dobbs' analysis of the position is correct, Mr Morrison thought at the time that the second Royalstone offer had superseded and replaced the first one. It cannot seriously be suggested that he was negligent in taking that view.

274. This allegation fails.

Discussion of and conclusion on the allegations against the Receivers

275. ***Sale at an undervalue***. Mr Dobbs' main complaints were these. First, he said that the Receivers were negligent in deciding to sell the development as a whole. They should have built it out and sold the houses individually. Second, he said that the asking price was too low. It is no surprise, he said, that offers were all around the £2 million mark, because that is what the Receivers (or their agents) suggested they were looking for. Implicit in this complaint is the suggestion that if the asking price had been, say £3.5 million, buyers would have been found. Third, he said, the development had not been widely enough advertised.

276. I deal first with the complaint that the Receivers did not build out the development and sell the individual houses. The first point to make about this is that the Receivers had no obligation to do so. A receiver, like a mortgagee, is entitled to sell the property as it is. He is under no obligation to improve it. Second, a build out would have required the injection of more lending by the Bank, which the Bank were unwilling to do. Third, it seems to me that it would have been highly unlikely that Countryside would have continued to work without being paid; and a build out would either have required a more generous settlement with Countryside or the engagement of a fourth building contractor. Fourth, a build out and the subsequent marketing of the individual houses would have taken time, during which interest would have been continuing to accrue on the loan. It is uncertain even now when the last of the houses was in fact sold (probably in December 2003); and whether the farm buildings have yet been sold. Fifth, the costs of a build out, in the light of the stance taken by Powys County Council, were uncertain. Sixth, individual buyers are less willing to buy from Receivers (from whom they can expect no "after-sales service") than from a properly constituted developer. Mr Dobbs suggested that Edward Symmons could have procured the issue or transfer of NHBC certificates, but there was no evidence about that; and Mr Price thought that it would have been difficult to have done so. I conclude that the Receivers were entitled both as a matter of law, and on the facts, to decide not to build out the development.

277. Mr Dobbs put in his own "report" on value, although he is not an expert valuer. Neither the Bank nor the Receivers objected to the admission of this evidence. Mr Dobbs' "report" proceeded on the basis that the Receivers should have sold the houses individually and not en bloc. The value he ascribed to the development was the aggregate of the values of the individual houses (plus the farm buildings) adjusted for inflation and the rising housing market. However, in practical terms the Receivers could not have sold the units individually without building out the

development. This was the view of Mr Stupples, the Receivers' expert, and I accept it. It was also Mr Skinner's view in June 2000 that unless all the works were completed marketing the individual units would be "a waste of money." Since I have concluded that the Receivers were entitled to decide not to build out the development, it follows that the basis on which Mr Dobbs "values" the development is inappropriate. The correct way of valuing the development is on the basis of a sale en bloc to a developer who would complete the build out and then sell the completed units.

278. I turn next to Mr Dobbs' complaint that the asking price was too low. Although it was not clear from his Statement of Case whether he alleged that the asking price was too low even on the basis of a sale en bloc, his opening address made it clear that he did make that complaint in the alternative to his complaint that the Receivers should have sold the houses individually.

279. Both the Receivers and Edward Symmons had firmly in mind their duty to obtain the best price. This is not, therefore, a case of misapprehension of the legal position. It is also a case in which the property was sold for less than the debt owing to the Bank, and the shortfall was more than the Bank could have hoped to recover from Mr Dobbs under his personal guarantee. This is not, therefore, a case where mortgaged property has been sold for just enough to cover the debt, leaving no surplus for the mortgagor. Cases like that justifiably raise suspicions that the mortgagor has been less than fair to the mortgagee.

280. The Receivers proceeded on the basis of the advice they obtained from Edward Symmons. As I have said, Edward Symmons began by considering the gross value of the completed houses and the farm buildings. Their aggregate value was the highest of all the valuations that had been produced, although it is possible to speculate that if Countrywide had valued all the units, their valuation might have been about 10 per cent higher. But the Countrywide valuation was made on the assumption that the development had been completed, which was not in fact the case. Moreover, there are reasons for supposing that the Countrywide valuation might have been on the high side. I refer in particular to the discrepancy between the Countrywide valuation of plot 7 as compared with the price that Mr Dobbs was willing to accept for it, and to the comparison between the Countrywide valuation and the eventual sale prices of plots some two years later. Mr Dobbs said that the Countrywide valuation should be increased to take account of the rise in house prices since 1999. He produced statistics from the Land Registry which, he said, showed that the rise in house prices in Crickhowell had been some 70 per cent. However, this suggestion is not borne out by the figures available for actual sales; even if one of them (plot 11) may be suspect. Moreover, Mr Dobbs' statistics cover a period of rising house prices after the date of Edward Symmons' appraisal. In addition, the sample size on which Mr Dobbs' statistics were based is too small for the extrapolations to be reliable. It is also the case that (as both Mr Dobbs and Mr Skinner said) the very fact of the receivership may well have had a depressing effect on value. Mr Dobbs also relied on Mr Rhodes' answer in cross-examination that the development "at its best … may well have been worth £4 million finished and done correctly it may well have been worth it." But Mr Rhodes was clear that he would not have paid anything approaching that sum. I am not able to place weight on Mr Rhodes' tentative and conditional opinion. I do not consider that the gross value that Edward Symmons ascribed to the development was unreasonable or negligent.

281. Having decided on the gross value of the development, Edward Symmons then made certain deductions. The deductions that Edward Symmons made for the cost of sales have not been challenged. Nor have the deductions that they made for the cost of completing the development. Mr Dobbs did suggest that the amount of developer's profit (20 per cent) was too high. Mr Rhodes, whose offer was £2.2 million (later reduced to £2.1 million), said that he was looking for a profit "in excess of £500,000"; which would have been in the region of 20 per cent. Alder King had advised in July 2000 that developers' profit might be as much as 25 per cent. The figure of 20 per cent was also supported by Mr Stupples, the Receivers' expert; and in the absence of any expert (or indeed other) evidence to the contrary, I accept that it was a proper deduction, particularly bearing in mind that Edward Symmons' appraisal allowed nothing for financing or carrying costs, which would have to have come out of the developer's profit. Edward Symmons' bottom line valuation was £2.2 million. Bearing in mind the nature of the site, I consider that it was a realistic one.

282. The starting point therefore is, in my judgment, that Edward Symmons pitched the informal asking price at about the right level. Their view was supported by Mr Stupples, who said that he had prepared a residual valuation. However, his report did not set out his detailed calculations as it should have done. So I attach little weight to his overall opinion of value. But I consider that Edward Symmons' advice is borne out by the range of offers that the Receivers obtained (not all of which I have described in the narrative). They may be tabulated as follows:

Date	Company	Price
c. 10/00	Countryside	£1,625m plus discharge of bank debt
08/11/00 23/11/00	Royalstone:	£2.1m plus discharge of bank debt; revised to £2.25m gross
09/11/00 01/02/01	Intobeige	£2.25m revised to £2.1m
10/11/00 29/11/00	Family Finance:	£2m revised to £1.725m

10/11/00	Rural Building Trust	£1.9m
10/11/00	Knole Properties Ltd:	£1.47m
17/11/00	BWB Construction:	£2m
20/12/00	Portman Investments:	£2m
30/11/00 20/12/00	Manhattan Loft:	£2.3m, revised to £2m
12/01/01	Ransome's Docks	£2m
13/02/01	Norgan Stapleford Whitegate:	£2.1m

283. As Mr Price of Edward Symmons said, and I accept, the more prospective purchasers investigated the development, the more they were put off by the difficulties. At least four bidders revised their bids downwards.

284. Lastly there is the question of advertising. Even before the Receivers advertised the development they had received expressions of interest generated by the widespread publicity occasioned by the receivership itself. Had it been paid for, publicity on that scale would have cost a lot of money. The Receivers advertised in the Financial Times. Edward Symmons sent out 600 sets of particulars to a targeted mailing list. Mr Price thought that the response to that marketing campaign was good. Mr Rhodes was one of those who had learned of the development without seeing the advertisement in the Financial Times or Edward Symmons' particulars. It is true that the development was not advertised in the Estates Gazette (as it might have been), and that Mr Price described the marketing campaign as "limited"; but in my judgment the Receivers were entitled to take the view that the response to the advertisement and the mailshot, coupled with the publicity surrounding the receivership, was enough to expose the development to the market.

285. I add that I think that it is highly significant that the Royalstone bid, with which Mr Dobbs himself was associated, was reduced from about £2.7 million to £2.25 million. Mr Dobbs pointed out that the Bank of Wales had been interested in funding the Royalstone bid (as it had been in funding Mr Dobbs' own attempts at refinancing). If Mr Dobbs had really thought that the property was being sold at an undervalue on the scale that he now alleges, it is inexplicable that he did not either increase the Royalstone bid or make one of his own; and, in either case, take more active steps to secure funding from the Bank of Wales. The cost of a valuation would have been a relatively modest outlay if the potential prize had been as great as Mr Dobbs now suggests.

286. I have already dealt with the allegation that the Receivers should have accepted the Royalstone bid.

287. This allegation fails.

288. *Acorn USA*. The starting point is that the shareholding had been valued in Acorn's accounts at £20,000 and on the day following the Receivers' appointment Mr Skinner, in Mr Dobbs' presence, had said that they were worthless. Mr Klumb, who had an option to acquire the shares for $87,500, declined to exercise his option. As a local politician, he might have been expected to know the worth of the company. Attempts by Acorn USA's lawyers to sell the shares failed. The best evidence of what the shares were worth was what Mr Corral was prepared to pay: $52,500; a price that was matched by Mr Russell.

289. Why did the Receivers not sell at that price? Because Mr Dobbs stopped them. By the time the Receivers were free to sell, the purchasers had withdrawn and the shares were valueless.

290. Mr Dobbs argued that the Receivers should have taken more interest in Acorn USA. But it was not until his final address that he was able to say what he meant by that. It turned out that he meant that the Receivers should, as majority shareholders, have instructed the board of Acorn USA to acquire the land over which Acorn USA had an option, and should have actively sought finance for funding the option on more favourable terms than Acorn USA in fact obtained. In the alternative, the Receivers should have sold the shares earlier.

291. The Receivers were not the board. Nor were they entitled to give directions to the board. In theory they could have called a meeting of the company, and voted in a new board, but Mr Dobbs' suggestion did not go as far as that. Moreover, all the Receivers' activities (or lack of them) as regards Acorn USA take as their starting point the modest valuation of the shareholding in Acorn's accounts, and Mr Skinner's statement that the shares were worthless. Moreover a sale of the shares would have been difficult because of the pre-existing share sale agreements with Mr Klumb, and the existence of complex litigation relating to the land.

292. This allegation fails.

The Bank's vicarious liability for the acts and omissions of the Receivers

293. In view of my findings on the underlying issues, this question does not arise. However, for the sake of completeness I should say something about it. The starting point is that the Receivers were the agents of the company; not the agents of the Bank. However, the Receivers clearly owed duties to the Bank as the appointing secured creditor. It is not unexpected that the Receivers kept the Bank informed about what they were doing; and reported to them either formally or informally from time to time.

294. However, I am satisfied that the Receivers were well aware of their position as agents of Acorn and well aware of their duty to obtain the best price for Acorn's assets. It was the Receivers' decision, on the advice of Edward Symmons, to reject the Countryside offer. It was the Receivers' decision where and how to advertise the property for sale. It was the Receivers' decision not to issue a contract to Royalstone. It was the Receivers' decision to issue contracts to Intobeige and Whitegate and to put them into a contract race. I am quite satisfied that the Receivers did not act on the Bank's instructions. They remained the agents of Acorn. If it had mattered, I would have held that the Bank is not vicariously liable for the acts or omissions of the Receivers.

Some concluding remarks

295. I cannot leave this case without making some more general remarks about those involved in the events I have described.

296. Mr Dobbs is clearly a man of vision. No one doubts that in terms of its conception and design, the Crickhowell development was innovative and fully deserved its award from the Royal Town Planning Institute. I do not question that it is an acclaimed development in terms of its design and concept. However, I do not think that Mr Dobbs had the financial management skills to bring this complex development to a successful financial conclusion. He sees things entirely from his own perspective. Any error by others is perceived as dishonesty; and any communication not copied to him as conspiracy. His attacks on the integrity of Mr Saunders, Mr Bierman, Mr Blom and Mr Morrison were, in my judgment, quite unjustified.

297. Mr Skinner, once he took control of Acorn, considerably increased the heat. He adopted a very confrontational approach both with Countryside and with the Bank. That kind of approach is a high risk strategy. It was not calculated to win hearts and minds. Unfortunately it had the effect of driving the Bank away.

298. Mr Saunders was able to give as good as he got. He had a robust management style, and was clearly at times exasperated with Acorn, and more particularly with Mr Dobbs. But I entirely acquit him of any dishonesty. As I have said the attack on his integrity was quite unjustified. I also reject the suggestion that he bullied or humiliated Mr Dobbs. He was doing his best to bring home to Mr Dobbs the gravity of Acorn's financial situation, which Mr Dobbs found difficult to accept. Mr Dobbs was reliant on more money being advanced by the Bank and on promises of increased house prices, even when houses failed to sell within the projected timescales. I do not find it surprising that a banker asked for more than promises.

299. The Bank behaved with sympathy and forbearance towards Acorn. When it entered into the September 1999 agreements it did more to help Acorn than Acorn had a right to expect. Mr Dobbs himself recognised that at the time. That it offered to extend Acorn's facilities in the face of Acorn's accusations is remarkable. It acknowledged that it had got too close to its customer and had become more involved with its customer's business than was wise. But that arose out of a genuine desire to see the project through to completion; and a genuine desire to help Acorn. In my judgment it is fully entitled to describe itself as an ethical bank.

300. The Receivers acted professionally throughout. They were faced with a difficult situation, and they acted in the best interests, not only of the appointing bank, but also of Acorn itself. Mr Dobbs' attack on Mr Morrison's integrity was as unjustified as his attacks on others.

301. Finally, I remind myself that I am not hearing a claim against Countryside. Countryside has had no opportunity to defend itself against the allegations made against it. I pass no judgment on where the rights and wrongs of the allegations against Countryside lie.

Result

302. All Mr Dobbs' allegations fail, save that Acorn is entitled to damages for the Bank's failure to exercise its step in rights between 20 October 2002 and 22 December 2002. It is agreed that Mr Dobbs is entitled to rely on any defence that Acorn can rely on. However, unless the damages awarded to Acorn would exceed the extent of the shortfall to the Bank (minus £50,000) the existence of the cross-claim gives Mr Dobbs no defence to his liability on the guarantee. I have indicated that, had I been assessing damages, I would not have awarded more than £2. I cannot conceive of a court awarding damages to Acorn in a sum approaching the £650,000 or so necessary to have any impact on Mr Dobbs' personal liability. At the date when proceedings were begun, Mr Dobbs' liability stood at £50,369.71 (taking interest into account). I think that it follows that the Bank is entitled to judgment for £50,369.71 on the guarantee plus interest from the date of the proceedings; that I should dismiss Mr Dobbs' counterclaim and his claim against the Receivers; and that I should also dismiss Acorn's claims (apart from the claim based on the Bank's failure to exercise its step in rights). As to that claim, I will give Acorn permission to proceed to an inquiry into damages, but I hope, in view of my indication, that that permission will not be taken up.

303. When the Receivers gave an undertaking not to sell the shares in Acorn USA on 30 July 2002, Mr Dobbs gave a cross-undertaking in damages. I have decided that the Receivers' proposed sale would not have been a breach of duty. It follows that Mr Dobbs is liable on his cross-undertaking. I must therefore give the Receivers permission to proceed to an inquiry into damages, although I hope that they do not take up that permission either.

Mr. Neil Levy (instructed by TLT Solicitors) for the Claimant in First Claim & 3rd Defendant in Second Claim
Mr. Stuart Hornett (instructed by J. Hennah) for the First and Second Defendants in the Second Claim
Mr. Ashley Charles Dobbs (acting in person) as Defendant in the First Claim and Claimant in the Second Claim