CA on appeal from High Court Chancery Bristol District Registry (His Honour Judge Weeks QC sitting as a Judge of the High Court) before Auld LJ, Jonathan Parker LJ, Scott Baker LJ. 22nd March 2004.

JUDGMENT : Lord Justice Jonathan Parker :

INTRODUCTION

1. Before the court are an appeal and a cross-appeal against an order made by His Honour Judge Weeks QC sitting as a judge of the Chancery Division in the Bristol District Registry on 23 May 2003 in an action brought by Mr Roger Michael, Ms Julia Heywood and Mr David Bates (the appellants) against Mr Douglas Miller and his wife Mrs Doris Miller (the respondents and cross-appellants).

2. In the action the appellants, as mortgagors of an agricultural property known as Brellim House Estate, near Naunton in Gloucestershire ("the Estate"), claim relief against the respondents on the footing that the respondents, in selling the Estate as mortgagees, breached their duty to the appellants to take reasonable care to obtain the best price reasonably obtainable. At the time of the sale part of the Estate had been planted by the appellants with a large quantity of lavender and other herbal plants. The respondents sold the Estate by private treaty for £1.625M. There was no separate sale of the plants: in effect, they were treated by the respondents as valueless. The estate agent and valuer who acted for the respondents on the sale was Mr Nicholas Hextall of John D. Wood & Co.

3. The appellants allege that, but for the alleged breaches of duty, the Estate would have achieved a price in the region of £3M, including a substantial sum for the lavender plants.

4. Following a two-week trial, the judge found that the market value of the Estate (excluding the plants) at the date of the sale was £1.75M, but that an acceptable bracket for valuations ranged from £1.6M to £1.9M. He went on to find that although Mr Hextall, who had valued the Estate at £1.6M, had not acted negligently, the respondents had nevertheless breached their duty as mortgagees in two respects. First, he found that they had breached their duty as mortgagees in agreeing (without reference to Mr Hextall) a last-minute reduction of £25,000 in the purchase price (reducing it from £1.65M to £1.625M). Secondly, he found that the respondents "could and should" have marketed the lavender plants separately from the land, and that Mr Henry Head, an expert in the production and marketing of lavender oil, was negligent in advising them that the lavender plants were worthless.

5. By his Order the judge directed that a sum of £25,000 be credited to the mortgage account in respect of the first breach; and he ordered an inquiry as to what further sum should be so credited in respect of the second breach. He directed that issues as to costs be adjourned to be dealt with following the inquiry or any appeal by either party.

6. The judge granted the appellants permission to appeal on the issue as to the significance of the bracket of 'non-negligent' valuations. He also granted the appellants and the respondents permission to appeal against his decision to order an inquiry as to damages in relation to the lavender plants. He refused permission for the appellants to appeal against his finding that Mr Hextall had not acted negligently in relation to the sale of the Estate. The appellants applied to the Court of Appeal for such permission. I refused permission on the papers, but permission was granted by Dyson LJ at an oral hearing.

7. By their appeal, the appellants contend that, having found that the market value of the land was £1.75M (i.e. £125,000 more than the eventual purchase price), the judge should have directed that the whole of the shortfall should be credited to the mortgage account. They further contend that Mr Hextall acted negligently in (among other things) failing properly to expose the Estate to the market.

8. By their cross-appeal, the respondents contend that the judge erred in ordering an inquiry as to damages caused by the respondents' failure to lift and sell the lavender plants separately from the land, since issues as to the duties (if any) of the respondents as mortgagees in that respect had not been raised on the pleadings nor were they adequately investigated before the judge. The respondents accordingly seek a variation of the judge's order so as to widen the scope of the inquiry to include issues of liability in respect of the lavender plants. By a Respondent's Notice on the cross-appeal, the appellants seek to uphold the order for an inquiry on the ground that the issues of liability in respect of the lavender plants were adequately pleaded and/or raised before the judge.

THE FACTUAL BACKGROUND

9. The Estate consists of two farms, James Barn Farm and Summerhill Farm. The two farms are separated by a road. The Estate comprises in total some 242 acres of arable land and includes equestrian facilities. The farmhouse on James Barn Farm has at all material times been subject to an agricultural occupancy restriction. The appellants bought the Estate from the respondents on 6 December 1993 for £1.4M. A 10 per cent deposit (£140,000) was paid, but the balance of the purchase price (£1.26M) was left outstanding secured by a Legal Charge on the whole of the Estate. The Charge provided that the loan would not be called in for three years (that is to say until 6 December 1996) provided that interest was paid promptly in the meantime.

10. The appellants' plan was to let the equestrian facilities and most of the arable land, and to cultivate the remainder of the land by planting lavender and other herbs. Unfortunately, for various reasons which are not material for present purposes the venture proved a commercial failure, and the appellants were not in a position to repay the loan on 6 December 1996.

11. In March 1997 Mr Miller (the first-named respondent) asked Mr Hextall to advise as to the current market value of the Estate. Mr Hextall had acted for the respondents on the sale of the Estate to the appellants in 1993. By letter dated 19 March 1997 Mr Hextall provided a 'desk top' valuation of £1.638M.

12. In May 1997 the respondents commenced proceedings for possession. After a number of adjournments a possession order was made by consent on 22 August 1997, providing for possession to be given on 27 November 1997 if the appellants were still in arrears on that date. The respondents instructed Mr Hextall to act for them on the sale of the Estate.

13. In June 1997 Bruton Knowles provided the appellants with an estimate of the sale value of the growing crops, including the lavender and other plants. On the assumption that there would be "a managed sale with plants lifted and prepared for the seasonal market", Bruton Knowles estimated the market value of the plants to be around £320,000.

14. In September 1997 Mr Michael (the first-named appellant) asked Savills to value the Estate for loan purposes. After inspecting the Estate informally, Savills advised that if the Estate were to be placed on the market that Autumn (that is to say Autumn 1997) they would recommend a guide price for the whole Estate in the region of £1.85M, with a possibility of a price in excess of £2M being obtained if the agricultural occupancy restriction on the farmhouse at James Barn Farm were lifted. However, in their formal valuation dated 15 September 1997 they valued the Estate at £1.675M.

15. On 21 November 1997 Mr Hextall, having inspected the Estate, reported to the respondents. His report included the following:

"VALUATION AND ASKING PRICE

A bank valuation for the Brellim Estate today would probably come out in the region of £1.5M whereas a marketing exercise such as the one we have in mind should produce a figure around the £1.6M mark and with a fair wind, £1.75M. Our advice would be to come to the market at offers in excess of £1.6M and allow the market to take its course.

METHOD OF SALE

As this is a forced sale which must have a finite result our advice would be to go for a relatively long campaign (to 1st February 1998) on the basis that we might be able to sell by Private Treaty beforehand. It should be borne in mind that the property would sell far better in the Spring with leaf on the trees but it is assumed that the place should be sold as soon as possible in order to recoup monies outstanding.

LOTTING

We would advise coming to the market in two lots as per the last marketing campaign [a reference to the sale in 1993]. We can always sell as [a] whole should that be required."

….

MARKETING CAMPAIGN

It would be our aim to present Brellim – as usual – to the market in the widest possible sense, thereby utilising all the various tools at our disposal. We would recommend:

1. Photography

We have excellent photographs in our archives but we may need to take further photographs. The costs are shown on the Estimate of Marketing Costs.

2. Advertising
You are aware of the importance of advertising in a marketing campaign. ….

CONCLUSION
…. In any repossession and mortgagor sale there is much to discuss between the parties and I suspect that some form of compromise will be reached in due course but my advice must be to instruct agents and press on as soon as you gain possession.

There will be a debate about the lavender crop – which I have avoided at the present time – which will probably end up as a battle between lawyers in the usual way.

I have arranged for Mr Butler of Butler Sherborn to look round Brellim on Tuesday as a second agent giving his opinion as to value as instructed. …."

16. The Estimate of Marketing Costs enclosed with Mr Hextall's valuation report allowed for a full page advertisement in Country Life and a quarter page advertisement in Farmers Weekly, together with advertisements in the national press.

17. On 25 November 1997 Mr Richard Anstis of Butler Sherborn inspected the Estate, at Mr Hextall's request. After discussing the question of valuation with his senior partner, Mr Butler, Mr Anstis reported to the respondents as follows*: "In the current market we would recommend you think in terms of selling the whole property in the region of £1.5M to £1.6M. In marketing, due to the physical separation of the two farms, we would recommend* offering the property for sale as a whole or in two lots."

18. On 27 November 1997 the appellants applied to the court to postpone the date for the giving of possession until January 1998. In support of their application they relied on an offer which they had received from a Mr Desmond Phillips (who was, it appears, acting as a financial adviser to the appellants) to buy the Estate for £2.15M, of which £1.475M was to be payable on completion and the balance of £675,000 was to be left outstanding. The offer also provided for the appellants to have an option to buy the Estate back in May 1998 for £2.4M, and, if the option were not exercised, for the Estate to be sold and any excess over £1.725M to be split 50/50 between Mr Phillips and the appellants. It would appear that Mr Phillips' offer was designed to provide the appellants with a degree of financial assistance. At all events, on the strength of Mr Phillips' offer Mr Recorder Newbold postponed the date for giving possession until 14 January 1998.

19. Mr Phillips asked Mr Jasper Feilding of Strutt & Parker to value the Estate. On 7 January 1998 Mr Feilding reported that in his opinion the estimated realisation price of the Estate at that date was £1.663M.

20. On 15 January 1998 contracts were exchanged for the sale of the Estate by the appellants to Mr Phillips. The terms of the contract followed the terms of Mr Phillip's offer, save that completion was postponed to 13 April 1998 and that the appellants' option to repurchase expired on that date. Also on 15 January 1998, DDJ Brown granted a further postponement of the date for giving possession until 13 April 1998. Following exchange of contracts, Mr Phillips instructed Strutt & Parker (Mr Feilding) to market the Estate with a view to a resale being effected as soon as possible after completion.

21. On 27 January 1998 Mr Feilding wrote to Mr Phillips recommending a sale of the Estate on the open market as a whole or in two lots (one lot being James Barn Farm, and the other Summerhill Farm), with a guide price of around £1.75M for both lots. Mr Feilding's letter continued: *"The precise figures will be reviewed and agreed with you prior to the commencement of the marketing. Obviously, the sale price depends on the amount of interest that is shown, but with proper marketing and careful negotiation we would be disappointed if we did not achieve a figure in line with the guide price."*

22. Mr Phillips suggested to Mr Feilding that the guide price should be increased to £1.875M, but Mr Feilding demurred and sent out particulars with a guide price of £1.75M, apportioned as to £1.1M to James Barn Farm and as to £650,000 to Summerhill Farm. Mr Feilding also placed advertisements in Farmers Weekly on 24 April 1998 and in Country Life on 30 April 1998.

23. In the event Mr Phillips did not complete on 13 April 1998, and the appellants did not press him to do so. Rather, they applied to court for a yet further postponement of the date for giving possession. DJ Wade granted a postponement until 15 May 1998 in order to enable Mr Phillips to complete.

24. On 1 May 1998 a Mrs Duncan offered £1.1M for Lot 1 (James Barn Farm) subject to contract and survey. On 8 May 1998 a Mr and Mrs Sweeting made a similar offer. On 14 May 1998 Mrs Duncan increased her offer for Lot 1 to £1.15M. She also told Mr Michael that she would be willing to grant the appellants a right of holdover in respect of the current year's crop.

25. Mr Phillips still had no purchaser for Lot 2 (Summerhill Farm) but he obtained a mortgage offer on Lot 2 of £450,000. He proposed to Burges Salmon, the appellants' solicitors, that his contract should be varied by releasing Lot 1 from the sale and providing for completion of the sale of Lot 2 by 5 June 1998. That led Burges Salmon to apply for a further postponement of the date for giving possession. The application was, however, refused by HHJ Wade on 27 May 1998, and on the following day HHJ Hutton dismissed the appellants' appeal against that refusal.

26. The respondents thereupon instructed Mr Hextall to arrange for possession of the Estate to be taken on 1 June 1998, and possession was duly taken by the respondents on that day. On the same day, Mr Williams of Burges Salmon faxed the respondents' solicitor, Mr Kearsley of Bretherton Price Elgoods, expressing concern about the harvesting and nurturing of the plants and stating that the appellants considered that the plants had considerable value. The fax continued: *"…. our clients are prepared to undertake the necessary acts of husbandry on a contractual basis without any rights in respect of the property to ensure that the value of the assets are maximised. Our clients are also prepared to engage in the sale of plants on your clients' behalf and liaise with your clients' agents and/or accountants in order to account for the full proceeds of sale from any disposals and in respect of an agreed strategy for such sale.*

Your clients are already on notice that our clients would hold your clients responsible for any diminution in the value occurring through the absence of the requisite husbandry and strategy in relation to the disposal of the plants. …."

27. Also on 1 June 1998 a Mr Egan contacted Mr Hextall and offered £1.5M for both lots. Mr Egan had previously been in touch with Strutt & Parker to express interest in buying the Estate. Mr Hextall immediately faxed Mr Miller (who was at that time in Australia) to tell him of Mr Egan's offer. In the course of his fax, Mr Hextall said this:

"We must not allow those interested through the Strutt & Parker campaign to [waver]. I have to say that I am more than irritated by the fact that they put in hand a campaign at a time when there was absolutely no chance of attracting a potential purchaser prior the mortgagees taking possession. My plan is:

1. To put up sale boards to make sure everybody is clear who is selling what.

2. To place an advertisement in this week's Farmers Weekly (lineage only) indicating that all those who have shown interested [sic] in the past should now contact ourselves.

Once I have had a chance to find out how the land lies with the likes of Mr Egan (an American who bid me on the telephone today £1.5M for the whole) or Mrs Duncan, and how Strutt and Parker are to react, we can then take a view as to whether we take fancy photographs and produce some particulars or, indeed, take further advertising in the glossy magazine[s]."

28. It is to be noted that Mr Hextall did not propose to place a further advertisement in Country Life, and in the event he did not do so. The appellants contend that ought to have done.

29. At the same time Mr Hextall faxed Mr Kearsley informing them that his advice to Mr Miller was that vacant possession of the Estate be taken as soon as possible, and asking (among other things): *"Could you let me know the position with regard to crops? Whose are they, can the lavender be ploughed in, when can a potential purchaser have vacant possession of the land?"*

30. In a subsequent telephone conversation with Mr Kearsley, Mr Hextall agreed to obtain an expert valuation of the lavender crop. Mr Kearsley's note of the conversation includes the following: *"Apparently, there will be no market for lavender in this bulk. It can either be grubbed up and burnt or ploughed under."*

31. Mr Kearsley noted a further telephone conversation with Mr Hextall on the same day, as follows: *"Further telephone conversation with Nick Hextall. He has now got the American [i.e. Mr Egan] to offer £1.6M. He wanted to know that would cause no problem. I warned that the defendants [i.e. the appellants] would argue that the sale was at an insufficient price. I recommended that he gets in contact with Phillips."*

32. On 2 June 1998 Mr Kearsley replied to Mr Williams' fax of 1 June 1998 noting, but not accepting, his comments about the plants, and stating that, for reasons which are not material for present purposes, the respondents did not wish to enter into any contractual relationship with the appellants.

33. Also on 2 June Mr Miller faxed Mr Hextall noting his comments about Strutt & Parker's marketing campaign and saying: *"Please proceed with items re sale boards, but I would prefer placing a new advertisement in Farmers Weekly rather than correct the earlier position.*

Mr Egan and Mrs Duncan could be contenders for the Estate, but because of the vexed nature of the sale we will have to liaise with Mr Kearsley on how to finally progress matters. Above all, we must be seen to have extended every opportunity to make the best money from the sale."

34. In a further fax on that day Mr Hextall informed Mr Miller that Mr Egan had increased his offer to £1.6M for the whole Estate, on the basis that contracts would be exchanged as soon as possible. Mr Hextall went on to say that he had spoken to Mr Egan's lawyer, and that funds were readily available. The fax continues: *"Given the blight created by the last four weeks marketing operation, the general history behind the property and the very proper nervousness that any potential purchaser might have in acquiring [it] as a consequence of that history, I believe that the figure of £1.6M is a true market value and one which is defendable if challenged.*

My advice and recommendations must therefore by to accept Mr Egan's offer and instruct solicitors forthwith and I await your instructions."

35. Mr Miller replied to Mr Hextall on the following day, 3 June 1998, as follows: *"I will call you later today, following a discussion with David Kearsley, on the matter. It may well be that another professional opinion will be needed to corroborate your £1.6M acceptance recommendation. However, it certainly looks okay to me, and after eighteen months of problems I am certainly ready to go."*

36. Accordingly, Mr Egan's offer of £1.6M was accepted, subject to contract, on 3 June 1998.

37. In the meantime, Mr Phillips was informed by Mr Feilding that an offer of £500,000 had been received for Lot 2 (Summerhill Farm) from a Mr Twyston Davis but that he (Mr Feilding) thought that the offer was too low, and that it represented the "vulture syndrome of a company in trouble". Mr Feilding also reported to Mr Phillips that a Mrs Rowley, from Singapore, was interested in Summerhill Farm as a base for polo ponies (although no price had been mentioned). Mr Phillips passed this information on to Mr Hextall, together with such further information as he (Mr Phillips) had as to the responses to Strutt & Parker's marketing campaign.

38. Mr Hextall drafted heads of terms for a sale of the whole Estate to Mr Egan at a price of £1.6M, but at the same time he informed Mr Kearsley that he had just heard of someone else who might be interested and that in the circumstances he would hold back from sending out the heads of terms.

39. Also on 3 June 1998 Mr Williams faxed Mr Kearsley stressing the need to protect his clients' equity, and suggesting that Strutt & Parker be jointly instructed with John D. Wood to market the Estate. The fax continued: *"In that connection we have spoken to …. the solicitors acting for Mrs Duncan, who we understand are already in touch with you confirming their clients' continued interest in purchasing Lot 1 for £1.15M, which sale previously agreed, subject to contract. …. We also understand that Mr Phillips remains in a position to proceed to purchase Lot 2 and that the combination of the monies receivable from Mrs Duncan and Mr Phillips will be more than sufficient to redeem the indebtedness to your clients. …. Please confirm that having regard to the above points your clients will seek to advance the disposal to Mrs Duncan and Mr Phillips without delay unless your clients are able to achieve a better price through alternative opportunities."*

40. Later in the course of the fax, Mr Williams returned to the subject of the plants, pointing out that they needed to be maintained and, "forming part of the charged property", to be disposed of to best advantage. He asked Mr Kearsley what the respondents' plans were in that regard.

41. After speaking to Mr Kearsley on the telephone, Mr Williams faxed him again on the following day, 4 June 1998. In that fax, Mr Williams asked that his clients be given two clear working days' notice of the terms of any contract which the respondents might be proposing to enter into for the disposal of the Estate or any part of it, and that Strutt & Parker should be engaged "to liaise fully with your clients' agents in order to maximise the opportunities to achieve the best price".

42. Mr Kearsley responded to Mr Williams by fax the same day, describing the marketing of the Estate in two lots as "an artificial construct". He continued: *"In any event, there is no purchaser ready, willing and able to proceed with Lot 1. We have spoken to Mrs Duncan's solicitors. Her offer to purchase was dependent upon lifting the agricultural restrictions and securing planning consent for an equestrian centre. There was never any question of her exchanging and completing within the time scales indicated in your letters."*

43. Later in his fax, Mr Kearsley said that the respondents were having the plants valued, but that they had never accepted what he described as "the inflated figure" put upon them by the appellants.

44. On receipt of this fax Mr Williams spoke to Mr Kearsley on the telephone, and it was agreed that the appellants would be given 48 hours' notice of any proposed exchange of contracts.

45. Mr Hextall asked Mr Feilding for a list of all interested parties with whom Strutt & Parker had been in discussion in relation to the Estate. Mr Feilding agreed to supply such a list but on terms that Strutt & Parker's commission was paid if the eventual purchaser was someone whom they had introduced. The respondents were not prepared to agree to that.

46. Mr Hextall also faxed Mr Butler of Butler Sherborn asking for a further desk-top valuation confirming the current market value of the Estate. Mr Butler responded the same day with a figure of £1.6M.

47. At this point Mr Hextall sent out the draft heads of terms to Mr Egan's solicitors. The heads of terms provided for a purchase price of £1.6M, exchange and completion as soon as possible, a 10 per cent deposit, vacant possession on completion and a right to holdover of crops until 29 September 1998 and storage at Summerhill Farm until 1 March 1999. The provision for holdover was included by Mr Hextall not in respect of the lavender plants but in respect of the crops of linseed and sunflower seeds.

48. Mr Hextall's evidence was that the heads of terms were sent out on the basis that the Estate would continue to be marketed until contracts were exchanged, and that that in fact occurred. He stated that had any third party wished to bid a higher substantiated figure than Mr Egan, it would have been seriously considered. However, a Mr Robert Douglas, a financial adviser who had been advising the appellants, gave evidence that some time during the first week in June he telephoned Mr Hextall to find out what the situation was with regard to a sale of the Estate and was told that the Estate was sold, with completion within a week, and that he would have to come up with an offer in excess of £1.65M within 24 hours to stand a chance. According to Mr Douglas, he was not in a position to do that.

49. A further complaint made by the appellants on this appeal is that the respondents ought not to have accepted Mr Egan's increased offer of £1.625M (albeit subject to contract) at such an early stage in the marketing process being carried out by Mr Hextall, since the effect of doing so was to discourage other potential purchasers. In support of this complaint the appellants rely on the evidence of Mr Douglas.

50. Also on 4 June 1998 an advertisement appeared in the Farmers Weekly, placed by Mr Hextall. The advertisement did not include a photograph; it merely described the Estate in the barest detail, and gave the telephone number of John D. Wood & Co's Oxford office. On the following day, 5 June 1998, sale boards were put up at three points on the Estate. The sale boards stated that the Estate had been 'Sold', with, in much smaller letters, the words 'subject to contract'.

51. During the three-day period 3 to 5 June 1998 Mr Hextall had a number of telephone conversations with Mr Kearsley. Mr Kearsley summarised them in a note, which included the following*: "….*

3. Egan has heard that there is a dummy purchaser coming forward at a price of £1.7M. Egan will match any offer put forward.

4. Hextall is having the lavender valued by an expert. ….

6. Hextall is putting up sign boards and placing an advert in the same periodical as Strutt & Parker, so that any leads that Strutt & Parker had will be transferred. …."

52. On 8 June 1998 Mr Hextall met Mr Henry Head and his mother (co-directors of Norfolk Lavender Ltd, which carries on a substantial business producing and marketing lavender oil). At this stage, it was thought that Norfolk Lavender might be interested in purchasing the lavender crop. Mr Hextall showed them round the Estate. Following their visit, Mr Hextall reported to Mr Miller that Mr Head's overall thoughts were (among other things) that the crop was immature, and thinly spaced in places; that it had no

great weight of lavender; and that it had a significant weed problem. He had concluded that it would be difficult to harvest, and that since his own processing plant was situated in Norfolk, harvesting it was of no interest to him. However, his company might be interested in buying the lavender crop once it had been harvested and dried, provided it was of a satisfactory standard. He indicated that the company might be prepared to pay about £100 per acre for the finished product. Mr Hextall's report concludes*: "All in all he bore out my view that there was very little value in the lavender crop."*

53. Also on 8 June 1998 Mr Hextall spoke to an agent, Charles Carter-Lewis of Martin Elliott Partnership, whose client Mr Twyston Davis had expressed interest in Lot 2. Mr Hextall noted: *"Spoke to Martin Elliott Partnership. They have shown an interest in Lot 2 … They indicated that Strutt & Parker had indicated that they had [had] absolutely no interest whatsoever in Lot 2, although they had a good offer for Lot 1. I presume that offer was Mrs Duncan at £1.15M."*

54. Mr Hextall also spoke to Mr Kearsley, who noted: *"Nick Hextall telephoned. He has had long conversations now with Phillips, who is confirming that he will offer £450,000 for Summerhill on the basis that there was an offer of £1.15M for James Barn Farm. I told him that we would have to look at these offers to show that we were getting the best price. He has told Phillips to release details of an offer Strutt & Parker are alleged to have received for Summerhill at £650,000. He has had the lavender valued. The expert will do a report saying it is worth £100 per acre in the ground, but that it will cost that much to crop it."*

55. In his witness statement, Mr Kearsley said that he did not receive any authorisation by Mr Phillips to release details of the offer referred to.

56. On 9 June 1998 Mr Hextall noted the names and bids of parties currently interested as supplied to him by Mr Phillips, and continued as follows*: "…. Spoke to Mrs Duncan's agent …. who suggested that by 10th June they would know whether the offer of £1.15M was unconditional. …. Spoke to Carter-Lewis today and advised that the offer 450 [sic] was not enough and that there might be something we could do at £500,000. He is to come back to us. …. Spoke to Mr Egan, advised him of the situation and received instructions from him to go to an overall bid of £1.65M. …. Spoke to Doug Miller, who agreed to accept that offer immediately and was surprised that a contract had not been sent out by [Brethertons]."*

57. Mr Egan's solicitors faxed Brethertons saying that they were instructed to proceed with a purchase at £1.6M. At about the same time Brethertons faxed Mr Egan's solicitors saying that they were instructed to proceed at a price of £1.65M.

58. On 10 June 1998 Brethertons sent out a contract at a price of £1.65M. On the same day Mr Hextall spoke to three possible purchasers, who showed some interest in either Lot 1 or Lot 2. He also informed Mr Phillips that a contract had been sent out for the sale of the whole Estate.

59. On 11 June 1998 Mr Hextall faxed Mr Miller saying: *"Egan still on line at £1.65M. Very keen to do quick deal. In hands of lawyers. I will push it from our end. …. Twyston Davis has bid £500,000 for Lot 2, which, with Lot 1 at £1.15M, still only equals Egan. The £1.15m is now unconditional."*

60. In the meantime, Mr Hextall asked Mr Anstis of Butler Sherborn for a further valuation of the Estate. On 16 June 1998 Mr Anstis provided a valuation of £1.6M.

61. On 17 June 1998 Mr Hextall faxed Mr Miller, describing Burges Salmon's suggestion of joint instructions with Strutt and Parker as 'hogwash'. He continued: *"We have an offer from Egan which we have accepted. It is the best offer on the table at the moment and better than anything that Strutt & Parker had in place."*

62. On 17 June 1998 Mr Williams wrote a chasing letter to Mr Kearsley inquiring as to the position in relation to the sale of the Estate and the protection of the plants.

63. On 22 June 1998 Mrs Duncan's solicitors wrote to Mr Williams making it clear that Mrs Duncan was not prepared to increase her offer for Lot 1 and that she was not prepared to become involved in relation to Lot 2.

64. On 25 June 1998 Mr Williams asked Mr Kearsley if the Estate had been sold. Mr Kearsley gave what the judge described as a slightly disingenuous reply, as follows*: "Our clients' agents are satisfied that they have considered all genuine inquiries and offers. The best available offer presently on the table is for £1.65M by way of a*

cash purchase. Whilst our clients' agents have advised that this offer is the highest on the market at the present time, they are continuing to invite offers."

65. At this stage, Mr Hextall was instructed to obtain a valuation of the lavender crop. He accordingly wrote to Mr Head as follows: *"I would be most grateful if you could let us have your valuation and expert opinion on the lavender and other herbal crops at James Barn Farm and Summerhill. In particular:*
1. valuation of this year's crop.
2. value of plants after harvest. …."

66. In his report, which is dated 29 June 1998 and which can have come as no surprise to Mr Hextall, Mr Head said that he did not believe that the crop was of commercial quality, and he commented adversely on the state of the fields. He concluded that it would not be commercially viable to proceed to oil distillation and that harvesting and drying the lavender was not a viable proposition either. He continued*: "The value of the plantation at Summerhill: As a matter of accounting practice we do not capitalise the lavender in our fields. Once a field is more than two years old the lavender reaches a size which means that it is impossible, on a large scale, to lift and realise. Therefore, it is an expense which should be written off. The lavender bushes at Summerhill are too large to move, and have no inherent value."*

67. Mr Hextall sent copies of Mr Head's report to Mr Miller and to Mr Kearsley. In a covering note to Mr Kearsley, Mr Hextall said that *"the report should certainly suit our requirements".*

68. In the meantime, according to an attendance note by Mr Kearsley, Mr Hextall had informed him of a possibility of an offer of £1.75M for the whole estate. No such offer in fact materialised, and Mr Hextall could remember nothing about this incident, but Mr Kearsley's note records as follows: *"Hextall then told me that there was an offer expected of £1.75M. I told him that that could not be ignored and that if necessary Egan must be asked to match it. He could not proceed at the lower price, as he was not acting simply for the vendor in normal circumstances."*

69. On 30 June 1998 Mr Kearsley wrote to Mr Willliams. As to Mr Egan's offer, Mr Kearsley said this: *"We are advised that the offer of £1.65 million is the best available. Despite an exhaustive marketing campaign, no higher offers have [been] received. Accordingly, you may accept this letter as notice that we intend to proceed, if possible, with an exchange of contracts at a sale price of £1.65 million. We are prepared to give you 48 hours notice should, for any reason, we be instructed to exchange contracts for a lesser sum."*

70. On 2 July 1998 Mr Phillips, whose role in the matter the judge described as almost perverse, made an offer to purchase Lot 2 for £450,000. Before the judge he disclosed a mortgage offer of £450,000 which indicated that he had told the proposed mortgagee that the purchase price was £650,000. "Not surprisingly", as the judge put it, the respondents turned this offer down on 8 July 1998.

71. On 2 July 1998 Mr Williams faxed Mr Kearsley. Under the heading 'Plants', Mr Williams said this: *"We note that the proposal to sell the estate for £1.65 million does not include the plants. We also note that a valuation is being sought from a recognised lavender expert. We should be grateful if you would confirm that you will let us know when a decision has been taken by your clients as to how to deal with the plants in order to maximise their value."*

72. Later in the fax, under the heading "Sale of the estate", Mr Williams said this: *"Our clients are disappointed that your clients have decided not to involve Strutt & Parker. Our clients do not accept that £1.65 million is the best price for the estate. The advice of Strutt & Parker was, as you are aware, to separate the estate into two lots. The estate had an overall guide price of £1.75 million with an individual price for lot 1 of £1.1 million. The best offer received for lot 1 during the very short marketing period was £1.15 million which, if lot 2 was to achieve its guide price, would give an overall value of £1.8 million. …. Further, we understand from Mrs Duncan's solicitors that her offer of £1.15 million remains available and is now no longer conditional upon planning issues."*

73. Mr Kearsley responded by fax on the same day. In relation to the lavender plants, he repeated the respondents' position as set out in earlier correspondence (to the effect that the plants were valueless) and informed Mr Williams that a valuation report had been obtained (a reference to Mr Head's report) which was currently with his clients.

74. On the following day (3 July 1998) Mr Williams faxed Mr Kearsley noting the position in relation to the sale of the Estate and making it clear that the appellants considered the price of £1.65M to be below market value.

75. On 28 July 1998 Lane Fox reported to Mr and Mrs Egan that in their opinion the open market value of the Estate was £1.5M, apportioned as to £975,000 to Lot 1 and £525,000 to Lot 2.

76. At about this time, Mr Miller came to England and met Mr Egan. Mr Egan attempted to negotiate a reduction in the price, relying on a schedule of supposed defects identified by Land Fox. Mr Miller was sympathetic. On 5 August 1998 Mr Egan's solicitor wrote to Brethertons asking if the respondents would agree to the price being reduced by £25,000. Without consulting Mr Hextall, Mr Miller instructed Brethertons to reduce the price by that amount.

77. On 20 August 1998 Mrs Duncan told Strutt & Parker that over the last few weeks she had lost interest and that she did not wish to proceed with a purchase of Lot 1.

78. On 4 September 1998 contracts were exchanged for the sale of the Estate by the appellants to Lavender Hill Stud LLC, an American company controlled by Mr and Mrs Egan, at a price of £1.625M.

79. During the period between acceptance of Mr Egan's offer of £1.65M subject to contract and exchange of contracts seven more people were shown round the Estate, but no higher offer was forthcoming.

80. On 8 September 1998 Mr Williams faxed Mr Kearsley asking what was happening about the lavender plants. Mr Kearsley replied on 22 September 1998 saying that his clients had obtained an expert's report (a reference to Mr Head's report) which stated that neither the crop nor the plants had any significant value, but inviting the appellants to remove the plants at their own cost if they wished to do so. This invitation was taken up by the appellants, who in turn invited members of the public to take the plants away, leaving a donation of whatever they thought the plants were worth. In the event, some 2,450 plants were removed, and £9,406 was paid. The process of lifting lavender plants continued right up until 30 October 1998, when the purchase of the Estate by Mr Egan was completed. Mr Egan had previously indicated that he wished to retain plants which had not been lifted by the completion date.

81. On completion, the purchase price was, at Mr Egan's request, paid into a dollar account.

82. According to the first completion statement which was prepared, after deducting the amount due to the respondents under their Charge, and costs, there remained a surplus of £4,292. A further £50 was paid by a Mr Spoors, who had lifted some 3,050 plants. However, it subsequently transpired that due to an adverse movement of the exchange rate between the pound and the dollar the net proceeds of the sale, when converted into sterling, amounted to less than had been expected. A revised completion statement was prepared which showed a deficit to the appellants of some £9,000.

83. In May 2002 Mrs Duncan bought Summerhill Farmhouse and some 35 surrounding acres from Mr Egan's company for £1.1M.

84. The claim form in the present action was issued on 20 November 2000.

85. The trial of the action began on 30 September 2002 and lasted some ten court days.

THE EXPERT EVIDENCE

86. The judge heard expert valuation evidence from Mr Michael Taylor FRICS on behalf of the appellants and from Mr Richard Liddiard FRICS on behalf of the respondents.

87. Mr Taylor considered that the Estate should have been marketed in four lots in order to attract the widest possible interest, and that Mr Hextall should have undertaken a more extensive marketing campaign. Had that been done, he believed that a total price in the region of £1.810M could have been achieved, excluding growing crops.

88. Mr Liddiard took the view that the marketing campaign undertaken by Mr Hextall would not have been sufficient on its own, but that when considered in conjunction with the marketing already undertaken by Strutt & Parker the Estate was sufficiently exposed to the market. He took the view that £1.65M was the best price achievable for the Estate in September 1998.

89. The judge also heard expert evidence about the plants. On behalf of the appellants, Mr Michael Greetham, a farm management consultant, was instructed to quantify the loss to the appellants as a result of the actions of the respondents, with particular reference to the value of the plants and the alternative ways in which they could have been sold in order to realise their true value. He concluded that the plants were merchantable on 1 June 1998 and had significant value. He took the view that a purchaser of the estate could have derived financial benefit from the plants by granting a farm business tenancy of the 80 acres or thereabouts on which the plants stood at an annual rent of up to £60,000. He would have recommended that the Estate be marketed on that basis. On the alternative basis that the plants were sold with the Estate, he valued them at around £1.4M. He considered that a further possibility would have been to exclude the 80 acres or thereabouts from the sale.

90. On behalf of the respondents, Mr David Whalley, a horticultural consultant, was instructed to value the plants, with particular reference to lifting, advertising, and selling them in the market. He concluded that the plants had little or no commercial value.

91. The judge also heard evidence from a Mr Simon Lucas, whose company supplied lavender plants to the appellants. His evidence was that the plants on the Estate (some 170,000 of them) could have been lifted and sold separately over a 5 to 6-month period. He considered that he could have sold them on the market at a profit of at least £1.75 per plant.

THE JUDGE'S JUDGMENT

92. After setting out the facts the judge dealt first with a number of peripheral issues, none of which is material to the present appeal. It is relevant to note, however, that in so doing the judge, after referring to Mr Greetham's suggestion that a farm business tenancy might be granted over the area on which the plants stood, alternatively that that area might have been excluded from the sale, continued as follows (at p.64D-G*): "Mr Whalley, the defendants' horticultural consultant, regards both these proposals as 'unrealistic and pie in the sky'. There was an expert surveyor on each side; neither of them supported Mr Greetham's proposals for marketing, nor did any of the other surveyors called to give evidence. I have no hesitation in preferring Mr Whalley's evidence that the most appropriate course at the time in this area of England was to attempt to market the land as one unit in a conventional manner. Accordingly the defendants did not act …. unreasonably in this respect."*

93. The judge then turned (at p.64H of his judgment) to the main issue, viz. whether the respondents took reasonable steps to obtain the best price reasonably obtainable at the time for the Estate (including the plants).

94. Addressing that issue, the judge referred to ***Cuckmere Brick Co v. Mutual Finance Ltd*** [1971] Ch 949, ***Downsview Nominees Ltd v. First City Corporation*** [1993] AC 295 and ***Yorkshire Bank plc v. Hall*** [1999] 1 WLR 1713. The judge concluded (at p.68A-B) that the respondents were liable to the appellants for any negligence of their advisers, including Mr Hextall and Mr Head. There is no cross-appeal in relation to that part of the judge's decision.

95. The judge continued (at p.64B*): "Mr Clayton [counsel for the defendants/respondents] also submitted, and I accept, that the facts are to be looked at broadly and a mortgagee is not to be adjudged in default unless he is plainly on the wrong side of the line (see Salmon LJ in **Cuckmere Brick** at p.969); that best price and proper price mean the market value at the time; that the fact that a different agent would have advised differently is not enough, per Jacob J in [**Routestone Ltd v. Minories Finance** [1997] 1 EGLR 123] at p.126; and that one must be cautious of expert evidence given with the benefit of hindsight."*

96. The judge then referred to ***Skipton Building Society v. Stott*** [2001] QB 201, on which Mr Jourdan (appearing for the claimants/appellants, as he does before us) had relied, concluding that that case was not authority for the existence of any higher duty on a mortgagee than that expressed in ***Cuckmere Brick.*** He then turned to a passage in Fisher and Lightwood's Law of Mortgages, 11th edition, on which Mr Jourdan had relied for the proposition that the sale should be properly advertised. The judge took the view that there was no absolute duty to advertise widely. He continued (at p.69A): *"What is proper advertisement will depend on the circumstances of the case. The present case is unusual in that there had been an extensive advertising campaign undertaken immediately before the mortgagee took possession."*

97. The judge then turned to the question of the plants, saying this (at p.69B-F*): "I have already found that it was sensible to market the estate as a conventional agricultural unit. It follows that the proper way to dispose of the plants, if they had any significant value, was to sell them separately to the purchaser, if he was interested, or to exclude them from the contract and either delay completion or negotiate a holdover so that the plants could be lifted and sold elsewhere. I therefore propose to deal separately with the land and buildings on the one hand and the plants on the other …."*

98. The judge accordingly turned to the claim in relation to the sale of the land, posing the question whether the respondents took reasonable steps to obtain the market price for the Estate, excluding the plants. He continued (at p.69G): *"I have hesitated as to whether I should make a finding as to the market price first and then decide whether it was negligent not to achieve that price, or whether to decide whether reasonable steps were taken to obtain the market price in the abstract. It may not matter at the end of the day, but I propose to take the former course."*

99. The judge went on to refer to the various valuations obtained during the marketing process initiated by Mr Feilding and carried on by Mr Hextall. He then considered the expert evidence of Mr Taylor and Mr Liddiard. At p.72F he concluded that Mr Feilding's guide price of £1.75M was "the market value of the estate, excluding the plants, in September 1998." He continued (at p.72G): *"I should add that in my judgment this property was exceptionally difficult to value because of the shortage of comparables and its unusual features, apart from the plants. The surveyors who gave evidence agreed that there is an acceptable bracket for valuations, which is not an exact science. In my judgment the acceptable bracket in the present case ranges from £1.6M too £1.9M, and I would not regard a valuation at either end of that scale as being negligent."*

100. The judge then turned to the question whether the respondents or their agents were negligent in not achieving a price of £1.75M. He found that Mr Miller was negligent in deciding, without the benefit of professional advice, to accept a reduction of £25,000 in the purchase price (reducing it from £1.65M to £1.625M). There is no cross-appeal against that finding.

101. The judge then turned to Mr Hextall, saying this (at p.74B*): "The substance of Mr Jourdan's criticism of his conduct is that: 1. he failed to market the property at the outset and advised acceptance of the bid on 2nd June; 2. he advised acceptance of the bid of £1.65M on 9th June; and, 3. he failed to market the property properly thereafter. In my judgment, Mr Hextall was in a difficult position where he was instructed to sell the property after a five to six weeks campaign from another agent. In my judgment it was not negligent to decide to continue the previous campaign and try to capitalise on the interest shown to Strutt & Parker.*

Mr Taylor would have acted differently if his firm had handled the sale. However I do not think that the decision to continue to offering in two lots, as Strutt & Parker had done, or the decision to do minimal re-advertising or the decision to recommend a bid of £1.6M (supported by [Butler and Sherborn], for what is was worth) were decisions which no competent surveyor could have made.

A fortiori, the decision to recommend acceptance of the £1.65M was not negligent. Mr Hextall did advertise in Farmers Weekly; he did have sale boards put up; he did send out some 70 sets of particulars in June, July and August, and he did show interested people around until contracts were exchanged. He obtained via Mr Phillips information as to the interest achieved by Strutt & Parker. Other agents might well have done more, but [Mr Liddiard] says, and I agree, that the overall marketing of the property was sufficient to expose the property to a wide cross-section of applicants. The fact that the property did not achieve what I regard as the market price is not attributable to any act or omission on Mr Hextall's part which I would regard as negligent."

102. The judge then turned once again to the lavender plants. He began by noting that the pleaded claim in relation to the lavender plants was that they should either have been sold with the Estate or excluded from the sale altogether and left in the hands of the appellants, and that the market value of the Estate including the lavender plants was in the region of £3M. As to the figure of £3M, the judge said that he had no hesitation in preferring the evidence of Mr Whalley to that of Mr Greetham: that is to say, as I understand it, that he concluded that the presence of the lavender plants did not add significantly to the market value of the Estate as a whole. He went on to note that he had already rejected Mr Greetham's alternative proposal that the area of land on which the lavender plants stood should have been excluded from the sale. He also noted (at p.76A) that there was no pleaded claim that the respondents were in breach of duty in

failing to lift the lavender plants and to sell them separately, and (at p.77D) that no application had been made by Mr Jourdan to amend the pleadings to include such a claim.

103. However, notwithstanding the absence of any such pleaded claim, the judge turned to the evidence of Mr Lucas, and to Mr Jourdan's submission, based on Mr Lucas' evidence, to the effect that if the respondents had sold the lavender plants separately they could have realised at least £191,250. At p.77D-E the judge said this: *"He [i.e. Mr Lucas] was not significantly cross-examined, a course which Mr Clayton was entitled to take on the pleadings as they stood."*

104. The judge nevertheless considered Mr Lucas' evidence as to the value of the lavender plants if sold separately. Having done so, the judge continued (at p.78F): *"On the limited evidence before me, I do not think that I can reach any firm conclusion as to the exact value of the lavender in September 1998, and if I had to do so I would fall into the same trap as Mr Justice Plowman in* ***Cuckmere Brick****, who was criticised for assessing damages on inadequate evidence. I am, however, satisfied on the evidence before me that the lavender did have some commercial value and if a marketing campaign had been instituted in the Summer of 1998 significantly more than the [appellants] themselves realised could have been obtained."*

105. The judge then turned to the question whether the respondents had taken reasonable steps to achieve a proper price for the lavender plants. As to that, the judge concluded that Mr Head's opinion that the lavender plants were valueless was one which he should not have expressed, and one which was negligent. The judge continued: *"Mr Miller and Mr Hextall, knowing no better, relied on that opinion and took very little effective action thereafter to realise the lavender. Given that completion did not take place until 28 October [1998] and could have been delayed until 4 December [1998] (at the cost of some loss of interest), the defendants could have and should have, in my judgment, taken steps to market the lavender on the basis that lifting would begin in September when either the harvest had been taken or the plants had ceased to flower. I will direct an inquiry as to what sum could have been realised by that course."*

THE ISSUES ON THIS APPEAL

106. As noted earlier:

1. the judge granted the appellants permission to appeal on the question of the significance of his bracket of 'non-negligent' valuations ("the bracket issue");
2. Dyson LJ granted the appellants permission to appeal against the judge's finding that the respondents had not breached their duty as mortgagees in the manner in which they marketed the Estate ("the marketing issue"); and
3. the judge granted the respondents permission to cross-appeal as to the scope of the inquiry which the judge ordered in relation to the lavender plants ("the inquiry issue").

THE ARGUMENTS ON THIS APPEAL

The bracket issue

107. For the appellants, Mr Jourdan submits that the concept of a bracket is relevant only in the context of claims of negligent valuation. Thus, where a valuation falls within a reasonable margin of error, the valuer will not be found to have been negligent; whereas if the valuation falls outside a reasonable margin of error, then *prima facie* the valuer has acted negligently. As examples of this approach, he cites ***Merivale Moore v. Strutt & Parker*** [1999] 2 EGLR 171 and ***Arab Bank plc v. John D. Wood Commercial Ltd*** [2000] 1 WLR 857. In such cases, he submits, the damages will represent the difference between the valuation figure and the mid-point of the bracket (see ***South Australia Asset Management Corp. v. York Montague Ltd*** ("*SAAMCO*") [1997] AC 191 at 221-2).

108. However, he submits that the concept of a bracket, or margin or error, is entirely inappropriate in the context of a claim against a mortgagee for breach of his duty to take reasonable steps to obtain the best price reasonably obtainable for the mortgaged property. He submits that the mortgagee's duty is not to estimate the value of the mortgaged property; he must ensure proper marketing and allow sufficient time for the property to be adequately exposed to the market. He relies on *Skipton Building Society v. Stott* for the proposition that the fact that the sale price may be the same as the valuer's estimate of the market value of the property will not protect the mortgagee if in fact the market value is higher.

109. Mr Jourdan refers us to a passage in Fisher and Lightwood's Law of Mortgage 11th edition at para 20.27, dealing with the manner in which mortgaged property is sold. Relying on this passage, he submits that whatever mode of sale is adopted, the sale must be properly advertised.

110. Mr Jourdan cites ***Predeth v. Castle Phillips Finance Co Ltd*** [1986] 2 EGLR 144 as an example of a case where a mortgagee who sold by private treaty at a discount in order to achieve a quick sale, instead of offering the property at market value, was held to have breached his duty.

111. Accordingly, Mr Jourdan submits, the judge, having found that the true market value of the Estate was £1.75M, ought to have found that the respondents were in breach of duty in selling for £125,000 less than that figure, and he ought to have awarded damages in that sum.

112. For the respondents, Mr Clayton submits that the concept of a bracket of *'non-negligent'* valuations is no more than an evidential tool which is available to be used, most commonly in cases of professional negligence involving valuers, to assist in resolving the issue of liability for negligence. In support of this submission he relies on Lord Hoffmann's observation in *SAAMCO* at p.221G that "within a band of figures valuers may differ without one of them being negligent".

113. He submits, however, that the question remains in every case whether the defendant has fallen foul of the principle established by ***Bolam v. Friern Hospital Management Committee*** [1957] 1 WLR 582 ("the ***Bolam*** principle"). In other words, it is not enough to show that a different expert would have given a different answer; the issue is whether the defendant has acted in accordance with practices which are regarded as acceptable by a respectable body of opinion in his profession.

114. Turning to the instant case, Mr Clayton submits that in the context of a claim against a mortgagee for breach of duty to take reasonable steps to obtain the best price reasonably obtainable the 'bracket' approach can provide a useful evidential tool in resolving the issue of liability.

115. He submits that the valuer's task as agent for the mortgagee is, amongst other things, to advise whether or not a market price has been achieved for the mortgaged property. He submits that the valuer will discharge this duty if his advice as to the best price reasonably obtainable falls within an acceptable margin of error, and that if the mortgagee acts on that advice he in turn will not be liable for breach of his duty to the mortgagor. It would be a bizarre situation, he submits, if a mortgagee could be held liable for breach of duty where his agent has recommended acceptance of an offer which falls within an acceptable range. He stresses that there is no absolute duty on a mortgagee to achieve the best price reasonably obtainable; the mortgagee's duty is to take reasonable steps to that end.

116. Relying on the well-known dictum of Salmon LJ in ***Cuckmere Brick*** (at 969A), he submits that a mortgagee should not be held liable for breach of duty unless he is *"plainly on the wrong side of the line"*. Accordingly, he submits, in the instant case the judge was entitled to assess Mr Hextall's advice that £1.65 M represented the market value of the Estate by reference to a bracket of acceptable, i.e. 'non-negligent', valuations.

The marketing issue

117. Mr Jourdan accepts the judge's finding that the respondents were entitled to adopt the marketing campaign begun by Strutt & Parker, but he submits that the five-week period of the Strutt & Parker campaign was not long enough to expose the Estate properly to the market, and that a further period of marketing was essential. He makes two specific criticisms of the respondents' conduct in that respect.

118. First, he submits that Mr Hextall was negligent in conducting no more than what the judge described as a 'minimal' advertising campaign. He submits that no good reason was advanced by Mr Hextall in evidence as to why a further advertisement was not placed in Country Life. He also points out that, due to the respondents' unwillingness to agree to pay Strutt & Parker's commission in the event that the Estate was sold to a purchaser whom Strutt & Parker had introduced, information as to the names of interested parties was not in the event passed by Mr Feilding to Mr Hextall. He further submits that the marketing material prepared by Mr Hextall was not of a standard properly commensurate with the property to be sold, pointing out that the advertisement in Farmers Weekly gave only the barest details of the Estate, did not include a photograph, and did not indicate any link with the Strutt & Parker campaign; and that the brochures which Mr Hextall sent out were black-and-white copies of the brochures prepared when the Estate was marketed in 1993.

119. Secondly, Mr Jourdan submits that the respondents were negligent in accepting (subject to contract) Mr Egan's initial offer of £1.6M on 3 June 1998, only two days after Mr Hextall had taken over the marketing of the Estate. By that time, he submits, there clearly had not been sufficient time to expose the Estate properly to the market, and the fact that an offer had been accepted, albeit subject to contract, would inevitably discourage potential buyers. In support of this submission, Mr Jourdan relies in particular on the evidence of Mr Douglas (referred to in paragraph 8 above). He submits that the decision to accept Mr Egan's increased offer of £1.65M was also negligent, for the same reason. He submits that, for reasons given earlier, the fact that these offers fell within the 'bracket' which the judge identified does not absolve the respondents.

120. Mr Clayton submits that the judge's finding that Mr Hextall had not acted negligently was essentially a finding of fact, based upon his assessment of the evidence before him including Mr Hextall's oral evidence. Mr Clayton points out that Mr Hextall was cross-examined for approximately a day and a half.

121. Mr Clayton points out that Mr Feilding had himself concluded that the Estate was a difficult and unusual property to market, and that he had also recommended that the Estate should be marketed as a whole or in two lots, taking the view that Mr Taylor's suggestion that it be marketed in four lots was commercially unrealistic. He submits that the judge was right to recognise that Mr Hextall was placed in a difficult position by the fact that he was taking over from Strutt & Parker in the middle of their marketing campaign. He submits that, applying the ***Bolam*** principle, the conclusion follows that Mr Hextall was not negligent.

122. Turning to the specific criticisms made by Mr Jourdan, Mr Clayton submits that the judge was fully entitled to find that the limited marketing campaign undertaken by Mr Hextall was, in the circumstances, appropriate and reasonable. As to the acceptance of Mr Egan's offers, Mr Clayton reminds us of the evidence that the Estate continued to be marketed thereafter. He submits that there is no reason to think that any party seriously considering making a higher offer would have been put off by the fact that Mr Egan's offer had been accepted subject to contract.

The inquiry issue

123. Mr Clayton points out that, as the judge expressly recognised, there was no pleaded claim that the respondents ought to have lifted and sold the lavender plants separately from the land; and that in the absence of any application by Mr Jourdan to amend the pleadings he did not undertake a detailed cross-examination of Mr Lucas, nor did he address the judge properly on the evidence or on the law.

124. As to the law, Mr Clayton submits that there is an issue whether the respondents, as mortgagees, had power either under the Charge or under the general law to sever the plants from the land and sell them separately, let alone that they had a duty to do so. He submits that, even assuming the existence of such a duty, the judge did not consider whether it would have been reasonable for the respondents to embark upon a process of lifting and selling the lavender plants separately from the land, as Mr Lucas had suggested. In particular, he submits, the judge should have considered (among other things) whether there was an available market for the plants when lifted, and whether selling the plants separately from the land would be likely to produce a large enough yield to render the exercise commercially viable. Had the matter been properly pleaded, he submits, these issues could have been dealt with fully and properly.

125. Mr Clayton further submits that Mr Jourdan was in error in stating, in the passage in his written skeleton argument quoted with approval by the judge at p.76C-D of his judgment, that Mr Taylor and Mr Liddiard had agreed that the plants should have been dealt with by way of a holdover or reservation provision "*with the defendants having the right to remove them and sell them separately*". He submits that neither Mr Taylor nor Mr Liddiard envisaged that the respondents would themselves carry out a lift and sell operation during the currency of any holdover or reservation provision. The first time such a suggestion was raised, he submits, was when the judge raised it in the course of his judgment.

126. Mr Clayton submits that rather than remitting the issue of liability in relation to the plants to the judge, the more efficient way of enabling that issue to be fully addressed would be to widen the terms of the inquiry appropriately. If that course is taken, he submits that the costs of the widened inquiry should be costs in

the inquiry, and that (as already provided by the judge's order) consideration of all other questions of costs should be adjourned pending the determination of the inquiry.

127. Mr Jourdan submits that the allegation that the respondents ought to have lifted and sold the lavender plants separately was sufficiently raised on the pleadings. He points out that the Amended Particulars of Claim pleads the Bruton Knowles valuation in June 1997, and that one of the pleaded particulars of breach of duty was that the respondents had failed to achieve a price which reflected "the effect on the value of the Estate of the plants". He also referred us to other passages in the pleadings where the plants are mentioned.

128. As to the evidence, he points out that among the witness statements exchanged by the appellants was the statement by Mr Lucas, and that the respondents for their part relied on a statement by Mr Head in which he stated that the lavender plants were too large to lift. He also points out that Mr Greetham's expert report referred to the plants being sold separately (albeit he accepts that Mr Greetham did not develop this possibility in his report), and that Mr Whalley, the respondents' expert horticulturalist, had taken the view that selling the plants separately was not a feasible alternative.

129. As to the course of the trial, Mr Jourdan points out that skeleton arguments were exchanged a week before the commencement of the trial He submits that it was clear from his own skeleton argument that it would be contended that the respondents ought to have undertaken a 'lift and sell' operation, and that the contention was indeed made in the course of his opening speech. At the end of the second day of the trial, before Mr Lucas had been called, the appellants applied for permission to adduce additional evidence from Mr Greetham by way of comments on Mr Lucas' witness statement. The judge refused this application on the basis that Mr Lucas' evidence could be treated as expert evidence and that any further expert evidence on that aspect of the case would be superfluous. Accordingly, submits Mr Jourdan, by the time Mr Lucas came to give oral evidence the respondents could have been in no doubt as to the way in which the appellants' case in relation to the plants was being put.

130. In all the circumstances, Mr Jourdan submits that there are no grounds for disturbing the judge's order as to the terms of the inquiry.

CONCLUSIONS

The bracket issue

131. It is well settled that in exercising his power of sale over mortgaged property a mortgagee is under a general duty to take reasonable care to obtain the best price reasonably obtainable at the time (see Fisher and Lightwood's Law of Mortgage 11th edn. para 20.23). In this context, 'the best price reasonably obtainable' is synonymous with 'a proper price' (the expression used by Lord Templeman in ***Downsview Nominees*** at p.315 and by Robert Walker LJ in the ***Yorkshire Bank*** case at p.1728F) and with 'the true market value of the mortgaged property' (the expression used by Salmon LJ in ***Cuckmere Brick*** at p.966).

132. It is a matter for the mortgagee how that general duty is to be discharged in the circumstances of any given case. Subject to any restrictions in the mortgage deed, it is for the mortgagee to decide whether the sale should be by public auction or private treaty, just as it is for him to decide how the sale should be advertised and how long the property should be left on the market. Such decisions inevitably involve an exercise of informed judgment on the part of the mortgagee, in respect of which there can, almost by definition, be no absolute requirements. Thus (as the judge recognised at p.68F of his judgment) there is no absolute duty to advertise widely. As he correctly put it (at p.69A*): "What is proper advertisement will depend on the circumstances of the case."*

133. Similarly, in some cases the appropriate mode of sale may be sale by public auction (in the instant case, no one has suggested that); in others, for example where there is a falling market, it may not. Moreover, a mortgagee who receives an offer in advance of an auction may have to make a judgment as to whether to accept it or whether to proceed to the auction.

134. The need for the mortgagee to exercise informed judgment in exercising his power of sale in turn means that a prudent mortgagee will take advice, including (where appropriate) valuation advice, from a duly qualified agent.

135. I turn, then, to the position of a mortgagee's agent such as Mr Hextall, whose duties included the giving of valuation advice. In my judgment, just as, applying the ***Bolam*** principle, a valuer will not breach his duty

of care if his valuation falls within an acceptable margin of error (see, e.g., ***Merivale Moore*** and the ***Arab Bank*** case), so a mortgagee will not breach his duty to the mortgagor if in the exercise of his power to sell the mortgaged property he exercises his judgment reasonably; and to the extent that that judgment involves assessing the market value of the mortgaged property the mortgagee will have acted reasonably if his assessment falls within an acceptable margin of error.

136. As Salmon LJ said in ***Cuckmere Brick*** at p.968H: *"I …. conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it.* ***No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.***" (Emphasis supplied)

137. To the same effect is the observation of Lord Templeman in *Downsview Nominees* at p.315 that*: "[i]f a mortgagee exercises power of sale in good faith and for the purpose of protecting his security, he is not liable to the mortgagor* ***even though he might have obtained a higher price*** *…."* (Emphasis supplied)

138. I accordingly reject Mr Jourdan's submission that as a matter of principle a 'bracket' approach is inappropriate in the context of the exercise of a mortgagee's power of sale. In so far as the exercise of the mortgagee's power of sale calls for the exercise of informed judgment by the mortgagee, whether as to market conditions, or as to market value, or as to some other matter affecting the sale, the use of a bracket – or a margin of error – must in my judgment be available to the court as a means of assessing whether the mortgagee has failed to exercise that judgment reasonably.

139. It seems to me that Mr Jourdan's submissions on the bracket issue confuse the issue of breach of duty with the measure of damages should breach of duty be established. As Lord Hoffmann said in *SAAMCO* at p.221F: *"Before I come to the facts of the individual cases, I must notice an argument advanced by the defendants concerning the calculation of damages. They say that the damage falling within the scope of the duty should not be the loss which flows from the valuation having been in excess of the true value but should be limited to the excess over the highest valuation which would not have been negligent. This seems to me to confuse the standard of care with the question of the damage which falls within the scope of the duty. The valuer is not liable unless he is negligent. In deciding whether or not he has been negligent, the court must bear in mind that valuation is seldom an exact science and that within a band of figures valuers may differ without one of them being negligent. But once the valuer has been found to have been negligent, the loss for which he is responsible is that which has been caused by the valuation being wrong. For this purpose the court must form a view as to what a correct valuation would have been. This means the figure which it considers most likely that a reasonable valuer, using the information available at the relevant date, would have put forward as the amount which the property was most likely to fetch if sold upon the open market. While it is true that there would have been a range of figures which the reasonable valuer might have put forward, the figure most likely to have been put forward would have been the mean figure of that range. There is no basis for calculating damages upon the basis that it would have been a figure at one or other extreme of the range. Either of these would have been less likely than the mean …."*

140. In the ***Skipton Building Society*** case, relied on by Mr Jourdan, the judge at first instance had found that the plaintiff had negligently failed to take reasonable care to ensure that the premises were sold at the best price that could reasonably be obtained: the issue before the Court of Appeal was as to the measure of damage. As explained by Lord Hoffmann in *SAAMCO* (see the preceding paragraph) in calculating damages the task of the court is to determine the true market value of the property, and where there is a bracket of acceptable valuations the court will take the mean figure within that bracket as being the market value. In the instant case, by contrast, the issue is as to liability. Accordingly, I derive no assistance from the ***Skipton Building Society*** case.

141. In the instant case the judge took the, to my mind, somewhat unsatisfactory course of deciding first what was the market value of the Estate at the relevant time (concluding that it was £1.75M) and then asking himself whether the respondents, through Mr Hextall, were negligent in achieving a price substantially less than that. The judge's approach might perhaps be appropriate in a case where the mortgagee accepts the first offer that he receives, without the property having been exposed to the market at all. In such a case, the likelihood is that the only evidence of 'market value' will be expert valuation evidence. But where, as in the instant case, the property has been exposed to the market and a number of genuine offers have been

received, the more logical approach (to my mind) is to start by considering the steps which the mortgagee took to sell the property and then to consider whether, in all the circumstances, the mortgagee acted reasonably in accepting the purchaser's offer and contracting to sell the property at that price.

142. As it is, in the context of the issue of breach of duty the judge's finding that the market value of the Estate at the relevant time was £1.75M – a finding which would have been directly relevant to the assessment of damages should a breach of duty be established (see the passage in Lord Hoffmann's speech in SAAMCO, quoted in paragraph 139 above) – seems to me to have an aura of unreality about it, given that there is no evidence of an offer in that sum being received during the entire period from the start of Strutt & Parker's marketing campaign in April 1998 until exchange of contracts in September 1998.

143. By contrast, the judge's finding that a price of £1.65M was within an acceptable bracket of estimates of the market value of the Estate at the time is, in my judgment, of direct relevance to the issue of breach of duty. Although it is not clear on the face of the judgment to what extent the judge relied on this factor in reaching his conclusions, the clear inference is that he took it into account when assessing whether Mr Hextall had acted negligently. For reasons given earlier, he was in my judgment plainly entitled to do so.

144. I accordingly reject Mr Jourdan's submissions on the bracket issue.

The marketing issue

145. I can take this issue very much more shortly.

146. In the first place I accept Mr Clayton's submission that the judge's finding that Mr Hextall was not negligent was to a material extent a finding of fact, based upon his assessment of the evidence (including the oral evidence) available to him; and that this court should be slow to interfere with that finding.

147. For my part, far from entertaining doubts as to whether the judge's finding can stand, I am satisfied that it was plainly right. As the judge recognised, Mr Hextall was placed in a difficult position in having, in effect, to take over the marketing campaign initiated by Strutt & Parker. He had to exercise his professional judgment in difficult circumstances which were not of his, or the respondents', making. I can see no basis for concluding that he failed to exercise that judgment reasonably. In particular, his decision not to advertise for a second time in Country Life is not one which could possibly be characterised as unreasonable, in my judgment. The same applies, in my judgment, to his decision to accept Mr Egan's offer of £1.6M (subsequently increased to £1.65M) subject to contract, given that the Estate continued to be marketed thereafter.

148. I accordingly reject Mr Jourdan's submissions on the marketing issue.

The inquiry issue

149. I accept Mr Clayton's submissions. In my judgment in directing an inquiry as to damages the judge failed to attach proper weight to the fact, which he expressly recognised, that there was no pleaded claim that the respondents ought to have lifted and sold the lavender plants separately from the land, and that in consequence issues as to the respondents' liability in that respect had not been adequately investigated at trial. In the circumstances, the judge's finding on liability in relation to the lavender plants ought in my judgment to be set aside.

150. I agree with Mr Clayton that, rather than remitting issues of liability to the judge, the more appropriate course is to widen the scope of the inquiry in the manner he proposes. I would therefore vary the judge's order in the manner set out in section 8 of his Respondent's Notice.

151. However, I cannot leave the inquiry issue without observing that if ever there was an issue which invited mediation, this would seem to be it. In my judgment, it would be wholly disproportionate for the parties to proceed to a full-scale inquiry involving issues of liability relating to the lavender plants. I strongly urge them to have recourse to mediation in the hope of disposing of the issue speedily and economically, without the need for further, possibly substantial, litigation.

RESULT

152. I would dismiss the appeal, and allow the cross-appeal.

Lord Justice Scott Baker:

153. I agree.

Lord Justice Auld:

154. I too would dismiss the appeal and allow the cross-appeal, for all the reasons given by Jonathan Parker LJ.

Order:

1. The Appeal dismissed and the Cross-Appeal allowed.
2. There be substituted for paragraphs 14-21 of the order of His Honour Judge Weeks QC dated 23rd May 2003 the following:

Directions for the Inquiry

14. There is to be an Inquiry to consider the following points:-

(1) Whether and upon what basis the Defendants had the power to sever the plants and sell them separately from the property. In particular:

(a) whether there was a power at law; alternatively

(b) whether there was a power in the mortgage deed; alternatively

(c) whether in the particular circumstances of the case and upon what basis, the Defendants would reasonably have obtained power from the Claimants and/or the Agricultural Receivers and/or the buyer, Egan.

(2) If the Defendants had the power to sever the plants and sell them separately from the property, whether and upon what basis the Defendants were under a duty to market the plants themselves and arrange for them to be lifted and sold separately. In particular, whether, as a matter of law, the duty to take reasonable steps to obtain the best price reasonably obtainable for the mortgaged property could include marketing the lavender and other herbal plants at James Barn Farm and Summerhill Farm from 1st June 1998 with a view to them being lifted and taken away by prospective purchasers between the beginning of September 1998 and 4 December 1998 (" the Marketing Exercise"). If it could, whether in the particular circumstances of this case it was reasonable to expect the Defendants to embark upon the Marketing Exercise having regard to such things as;

(a) whether there was an available market to lift and take the plants;

(b) whether the Defendants could reasonably have been expected to take expert advice at the time which would have led them to ascertain the existence of the market and which would in all the circumstances have recommended that they carried out Marketing Exercise;

(c) if so, whether the prospects of making a profit were reasonably certain and realistic as to justify them carrying out the Marketing Exercise.

(3) If the Defendants had the power to sever the plants separately from the property and were under a duty to carry out Marketing Exercise, there be an Inquiry as to what net sum could have been realised by the Marketing Exercise

15. All consequential and further directions in the Inquiry be adjourned to His Honour Judge Weeks QC upon the joint application of the parties the first available date after 21st June 2004

Costs

16. The costs of the claim and counterclaim (being the costs down to and including 23rd May 2003) be adjourned to be dealt with following the Inquiry

17. There be detailed assessments of the Claiments' costs of the claim and counterclaim (Being costs down to and including 23rd May 2003) for the purposes of public funding

18. The costs of the Inquiry be costs in the Inquiry

3. The Appellants do pay the Respondents' costs of the appeal and cross-appeal to be determined pursuant to section 11 Access to Justice At 1999 and in accordance with section 23 Costs Practice Direction CPR PD 44.

4. There be detailed assessment of the Appellants' costs of the appeal and cross-appeal for the purposes of public funding

5. The Respondents be at liberty to set-off the costs which the Appellants have been ordered to pay against any costs or damages which they may be ordered to pay the Appellants.

(Order does not form part of the approved judgment)

Stephen Jourdan (instructed by Burges Salmon) for the Appellants

Nigel Clayton instructed by BPE Solicitors) for the Respondents