The purpose of this paper is to provide attendees with a little more detail than can be covered in the talk in relation to the issues that may arise in the sorts of claims discussed. Neither this paper, nor the talk that it accompanies, constitute legal advice and no liability is accepted for any reliance thereon.
1. Mortgage debts are assets that can be traded – and are, on an enormous scale. This talk and accompanying paper seek to identify some of the issues that arise in relation to the assignment, syndication and securitisation of loans in lenders' claims against, primarily, valuers – although the issues may also be relevant in claims against other professionals, such as solicitors.

2. This paper addresses three main areas:
   - The effect of assignment – essentially, assignment alone is unlikely to provide a defence to the professional;
   - Syndication – where the courts have been more willing to find the party who has sued has not suffered the loss, but decisions are very fact-sensitive;
   - Securitisation – where the recent decision in *Titan v Colliers* establishes that the “non-recourse” nature of an issue of commercial mortgage-backed securities does not preclude the Issuer from showing that it has suffered a loss.

**Contractual claims**

**The common law position**

3. At common law the doctrine of privity of contract entailed that as a general rule a contract cannot confer rights or impose obligations on any person except the parties to it, even when the contract was directed at conferring a benefit on a third party: see *Beswick v Beswick* [1968] AC 58.

4. Also at common law the general rule was that a claimant in a breach of contract case could not recover more than his own actual loss.

5. Thus, where Bank A makes a loan (relying for example on a valuation which it had commissioned) and sells the loan to Bank B and after the sale it is discovered that the valuation was, in breach of contract, carelessly carried out with result that loan is less valuable than thought:
   - Bank A would have no claim on the basis that it could not claim for Bank B’s loss and
   - Bank B would have no claim on the basis that it had no contract with the valuer.
6. This strict rule of privity of contract was eroded by the approach of the courts in a series of cases commencing with *The Albazero* [1977] AC 774 in which it was accepted that it was possible for a shipper of goods to be held liable for breach of his contract with the shipowner in respect of the loss of the goods even though that loss was in fact suffered by a person to whom the shipowner had sold the goods and to whom the risk had passed but who had acquired no rights under the shipping contract. The way it was expressed by Lord Diplock was:

“that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into”

7. The so-called “Albazero exception” was extended to other than shipping cases in, for example, *Linden Gardens v Lenesta Sludge* [1994] 1 AC 85 and *Darlington BC v Wiltshier Northern* [1995] 1 WLR 68, which were building cases. The latter case was approved in *Alfred McAlpine v Panatown* [2001] 1 AC 518 – in which, however, it was held that the fact that the third party which had suffered the loss had acquired its own rights under a duty of care deed against the contract breaker entailed a limitation on the exception. (Essentially this was on the basis that there is no “black hole” which the exception was required to fill, because the third party could sue on the deed).

8. Thus the availability of the exception depended on two essential points:
   - That it was within the contemplation of the parties that the property which might be affected by the contract breaker’s breach would be transferred;
   - That the transferee had no separate remedy against the contract breaker.

9. It remains the case, of course, that if the claimant has suffered no loss, he can recover only nominal damages. In *Linden Gardens Trust v Lenesta Sludge* Staughton LJ said this:
When a [claimant’s] loss has subsequently been made good by someone other than himself the general rule is that he can only recover nominal damages

10. This general principle is subject to the impact of the res inter alios acta rule, described by Philips J in Banque Bruxelles Lambert v Eagle Star [1995] 2 AER 769 as “circumstances in which a third party or an extraneous event intervenes to provide a [claimant] with some from of indemnity in whole or in part for the loss which the defendant has caused. The law ignores the intervention so that the [claimant] remains entitled to recover from the defendant the full amount of the loss or damage initially suffered.” The most typical example of the operation of this rule is where a claimant’s loss is made good by an insurer and nevertheless the right to recover in full against a defendant is unaffected.

11. It should also be remembered that the terms of the original contract between Bank A and the valuer may be such that they purport to confer a benefit on Bank B as a third party identified as “a member of a class or answering a particular description” and that Bank B is therefore able to take advantage of the provisions of the Contracts (Rights of Third Parties) Act 1999. The practice of excluding the application of the Act has, however, become more common in the standard terms upon which some professionals provide their services. In contrast, where a valuation is provided on the standard form of the bank, rights of action are often explicitly extended to potential assignees.

Assignment

12. Commonly, in the case of a loan, Bank A sells the loan to Bank B together with an assignment of the rights that accompany it, including related causes of action. The assignment may be equitable (generally so no notice is given to the borrower) or legal.

13. Indeed in Linden Gardens the property that formed the subject matter of the claim had been sold to a third party together with a purported assignment of the defendant's obligations under a building contract; however, the assignment was held to be prohibited by the contract and therefore ineffective.
14. A valid assignment ought, on the face of it, to avoid the need to invoke the Albazer exception: Bank B will sue in its own name (subject to what is said below in relation to an equitable assignment).

15. Can it be argued, however, that if Bank A has received the whole value of the loan (by way of consideration for the assignment) it has suffered no loss, any deficiency in the security having been “cured” by that payment, so that the assignment of the cause of action is empty of content? Or, in an alternative scenario, that at the time of the assignment Bank A had suffered no substantial loss on the test set out in Nykredit [1997] 1 WLR 1627, with the same effect?

16. Perhaps unsurprisingly, these sorts of arguments have found little favour with the courts.

17. In Offer–Hoar & Ors v Larkstore & Ors [2006] 1 WLR 2926 (CA), the owner of a building site for residential development which was on a slope, having obtained planning permission for the site subject to a soil inspection report, received a report in December 1998 from a company providing site investigation and engineering services, which found that the site was suitable for a proposed development of two-storey houses. The report contained no prohibition on assignment. The owner sold the site with the benefit of full planning and building control consents including all soil investigations to a developer. Relying on the report, (but without the consent of the engineering company), the developer began to carry out the works, but while they were being carried out a landslip occurred causing damage to properties uphill from the site. It was not until after the landslip occurred that the original owner/assignor assigned the soil report and related causes of action to the developer/assignee.

18. When the owners of the uphill properties claimed damages for losses suffered against the assignee, the assignee relying on the assignment claimed over against the engineering company. On preliminary issues, as between the assignee and the engineering company on the assumption that the engineering company was in breach of contract in respect of its report, the judge held that the assignee was entitled to recover substantial damages even
though the assignor had not suffered substantial damage when the cause of action arose and even though the landslip causing the damage occurred before the assignment.

19. In the Court of Appeal the legal point was formulated in these terms:

"whether a ... contract-breaker can avoid an otherwise inescapable liability in damages as a result of the accident of the transfer of the property and assignment of the relevant ... contract to a third party, either by arguing that the original contracting party or assignor, having parted with the property at full value, has suffered no loss and that the assignee cannot be in a better position, or conversely that an assignee, in a case where he alone can sue, has paid a reduced price, equally suffering no loss. In other words, does the accident of transfer and assignment create a 'legal black hole' into which the right to damages disappears, leaving the contract-breaker with an un canvanted immunity?"

20. Rix LJ discussing the cases which had sought to fill the black hole said this:

“Underlying all these cases can be heard the drumbeat of a constant theme, which could possibly be described as ubi ius ibi remedium, the maxim that where there is a right there is a remedy; but it could also be said that the courts are anxious to see, if possible, that where a real loss has been caused by a real breach of contract, then there should if at all possible be a real remedy which directs recovery from the defendant towards the party which has suffered the loss. In the case of property development, where it is readily contemplated that a party which prepares the development will transfer the fruits of his work to one or more partners or successors, there is a particular need for some such solution. The courts have to work with the analytical tools which are to hand. But the essence of the matter is that the general principles which have been developed to ensure that claims are confined to victims (the rule that a party may only claim in respect of his own loss; the rule in favour of privity of contract) and that a wrongdoer should not be made to pay compensation which goes beyond his breach (the rule that an assignee may not recover more than his assignor could have recovered), rules which as far as they go are necessary and fundamental to good order and fairness in the litigation of claims, are not, if at all possible, to be allowed to become instruments of maladjustment and injustice.”
21. For what loss, then, in an ordinary lender’s claim can the assignee of the loan and of the related cause of action in contract sue?

22. On the basis of Rix LJ’s observation: “the courts are anxious to see, if possible, that where a real loss has been caused by a real breach of contract, then there should if at all possible be a real remedy which directs recovery from the defendant towards the party which has suffered the loss” one might be tempted to think that the focus of any inquiry as to what damages can be recovered in the case of the assignee of a loan should be on what loss has been suffered by the assignee; and as a first step one might want to look at what it cost the assignee to acquire and realise the value of all its interests in the loan including the costs to it of the finance involved and then set against that the figure achieved on the realisation of its security.

23. However, one part of the answer which the Court of Appeal provided in Offer Hoar was derived from a dictum of Staughton LJ in the Court of Appeal in Linden Gardens reported at 57 BLR 57 where he said:

“But it is said that in such a case the assignee can recover no more as damages than the assignor could have recovered. That proposition seems to me well founded. It stems from the principle already discussed, that the debtor is not to be put in any worse position by reason of the assignment. ...But in a case such as the present one must elucidate the proposition slightly: the assignee can recover no more damages than the assignor could have recovered if there had been no assignment, and if the building had not been transferred to the assignee”.

24. This suggests that where the loss to the assignee exceeds that which would have been recoverable by the bank had it not sold the loan, the assignee’s recovery will be limited. This is arguably rather unsatisfactory, since it presumably means that the court must assess Bank B’s losses on the basis of the wholly fictitious scenario that Bank A hypothetically continued
to fund the cost of the loan so as to give rise to a loss including the cost of funding per
*Swingcastle v Alastair Gibson 1991 2 AC 223*.

25. In a case where a measurable loss per *Nykredit* can be shown to have arisen before the date
of the assignment, it is arguable that what is in point is the diminution in value of Bank A’s
asset at the moment of assignment: the assessment should be directed at compensating a
real loss, not a fictional one.

**Who should claim?**

26. As a point of practice it should be noted that if the assignment is legal, Bank A is no longer
entitled to sue, having parted with the cause of action, so it is worth checking that the
claimant does retain title to sue, particularly of course if there will be potential limitation
problems if the wrong party has issued proceedings.

27. In practice, though, and particularly in the case of a securitised loan (see below) the
assignment is often equitable (e.g. because notice of it has not been given to the borrower,
or because it is effected by way of an uncompleted agreement to assign). In that case Bank
B is entitled to sue, but as a matter of procedure, judgment should not normally be given
unless Bank A has been joined to the action so as to be bound by the result. This is to avoid
“double jeopardy” for the defendant. An action brought by Bank B alone, however, is not a
nullity, and can be cured at any time by the appropriate application for joinder. Bank A is
entitled to sue only as a trustee for Bank B. Since assignor and assignee have the same cause
of action, the fact that a limitation period has expired should not prevent Bank A from being
subsequently joined to the proceedings even after the expiry of limitation.

28. The Court of Appeal case of *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376 also suggests that
it is risky for an equitable assignor to bring a claim without joining the equitable assignee. In
that case it was held that the assignor’s possession claim failed because it had not joined the

---

1. It is worth mentioning that at p239 Lord Lowry observed that “It was for the lenders to furnish
the evidence by which to prove their case on the correct basis”.

assignee (although the earlier Court of Appeal case of *Paragon v. Pender* [2005] EWCA Civ 760; [2005] 1 W.L.R. 3412 which concluded that an equitable assignor could sue for possession without joining the assignee was not apparently cited).

**Syndication**

29. Syndication involves a group of lenders collaborating to fund a loan. It is sometimes arranged in advance of the loan, in which case it is generally arranged by a lead lender on behalf of the participants; sometimes a lender makes a loan and then transfers parts of it to other lenders. There will often be a direct contractual arrangement between the borrower and all the participants in the syndicate, either from the outset or by way of novation agreements; but sometimes the borrower will know nothing of the syndication at all.

30. The question is whether and in what circumstances the leading bank can sue to recover the losses of the syndicate.

*Bande Bruxelles Lambert v Eagle Star (BBL)*³

31. BBL had entered into loan agreements that provided for the assignment or transfer of all or part of the loans to other banks. Upon a transfer, BBL's rights and benefits were assigned to the substitute bank.

32. Under Loan A, BBL was the only lender named in the original loan and advanced the whole sum of £39.915m. Subsequent syndication left BBL with a retention of £7.915m. In the case of Loan B, Sanwa Bank Ltd was a participant with BBL from the outset, lending £45m out of the total of £92m, though the actual advance was made by BBL.

33. Philips J rejected (at p.802) BBL's first argument that the syndication arrangements were *res inter alios acta*, applying the analysis of the rule set out earlier in this paper to the particular facts of the two loans. Under Loan B, BBL had never been at risk in relation to £45m of the overall loan and suffered no loss in relation to it. The loss had been borne directly by Sanwa

---

³ [1995] 2 All ER 769; the judgment of Philips J on this issue was not the subject of the SAAMCo appeal
Bank Limited. Accordingly, Philips J concluded that there was no basis upon which it could be argued that participation by Sanwa Bank Limited was *res inter alios acta*.

34. Under Loan A, the banks which subsequently joined in the syndicated loan transactions had reimbursed BBL in respect of part of the loans previously advanced by BBL. They had become parties to the loan transaction by novation and had acquired by transfer a pro rata share of BBL’s rights under those transactions including BBL’s interest in the property securing the transactions. In respect of this loan Philips J said this: “The principle of *res inter alios acta* requires the court to disregard an indemnity received by the [claimant] from a third party in respect of the loss caused by the defendant. It does not require or permit the court to assess damages on the basis of a fiction: to treat losses sustained by third parties as if they had been sustained by the [claimant]”. On this basis he held that the effect of the intervention of the syndicate banks was not to indemnify BBL in respect of consequences of entering into the loan transaction but resulted in the syndicate banks suffering those consequences in place of BBL. He found that the loss claimed by BBL was not loss suffered by BBL prior to syndication, but loss suffered by all the syndicate banks after syndication.

35. He also rejected the “transferred loss” (*Albazero* exception) argument. *Linden Gardens* was distinguished on the basis that in that case the breach of the contractual duty owed to the plaintiff was the clear and direct cause of the loss to the third party. In *BBL* the valuers’ breach of duty to BBL had not been shown to have been causative of loss to any of the other participants. It was necessary to establish that the valuation was one of the factors that induced each bank to join the syndicate; insofar as they were able to do so, they were likely to have their own cause of action in tort against the valuer. Accordingly, on the facts of *BBL* there was no “black hole” that needed to be filled.

*Helmsley Acceptances v Lambert Smith Hampton Group Ltd*4

36. Helmsley was the lead bank which instructed LSH to prepare a valuation. There was a dispute as to whether LSH knew that the loan would be syndicated. The report contained a limitation of liability clause purporting to prohibit reliance upon it by anyone other than “the named

---

4 [2010] EWCA Civ 356
client” (Helmsley). The property was (it was presumed for the purpose of the interlocutory hearing) significantly undervalued. The loan was subsequently syndicated.

37. Following the borrower's default and a substantial shortfall on sale, Helmsley brought proceedings against LSH, which argued that Helmsley's losses were limited to the £10,000 it had retained following syndication. Helmsley argued that it was entitled to sue because
   a) in retaining LSH it had acted as agent on behalf of the syndicate participants;
   b) it was trustee of the cause of action against LSH for the benefit of the participants;
   c) it could rely on the Albazero exception.

38. HHJ Langan at first instance granted LSH's application for summary judgment on the basis that following BBL, Helmsley could only sue for its own loss. Helmsley appealed on points (b) and (c). By this stage the syndicate banks had been joined as co-claimants, but the points remained relevant because LSH denied the existence of any duty of care to them.

39. The Court of Appeal determined that the points were arguable per Longmore LJ in these terms:

   “Helmsley acquired the defective asset in that they became mortgagees of a property worth about one quarter of a million which had been professionally valued for £2.5 million. At the time they acquired that asset in March 2007 it was defective, and they, at any rate arguably, suffered the relevant loss. The fact that, at about the time they invited investors to participate, they made an assignment of part of the loan to those who participated in that loan, and constituted themselves trustees of the loan and the securities for the loan, should not, again arguably, make any difference to the proposition that they suffered that loss any more than to the proposition that a trustee of a family settlement suffers a loss to the trust estate and can sue for that loss, although the loss is ultimately suffered by the beneficiaries… it seems to me also to be arguable that, even if the investors who are now joined in the action fail for any reason to recover damages in respect of what I now assume to be their loss, the loss can nevertheless be recoverable, either because Helmsley constituted themselves trustees of the securities and, by implication, the rights associated with the securities, as Rix
LJ thought when giving permission to appeal, or because Helmsley can rely on the so-called Albazer exception “

40. What Philips J said in BBL was not disapproved but was distinguished on the basis that because of novation and other features in that case, the lenders other than BBL might have their own remedy. Whilst acknowledging that the position was far from straightforward, the Court of Appeal held that the arguments relating to the Albazer exception were not suitable for summary judgment.

41. If Helmsley succeeded, though, how would damages be quantified? Lenders' claims in this sort of scenario are commonly formulated on the same basis as if Bank A had not parted with the loan and thus “Swingcastle interest” is claimed seamlessly on the whole of the monies originally used to provide the loan and continuing on the shortfall after realisation.

42. However if, to paraphrase what Philips J said in BBL, the court is not to assess damages on the basis of a fiction – namely that Bank A is to be treated as being continued to be deprived of all the monies originally used to fund the loan when in fact it has received at least some on the sale to Bank B – then strictly speaking, it is necessary to separate the interest which Bank A may be entitled as the cost to it of providing the money for the loan up to sale and the cost to Bank B of providing the money for the purchase of the loan.

43. The question is unlikely to arise, though, where (as is increasingly the case) the valuers are engaged on terms which expressly provide for the valuation to be relied upon by Bank A's assignees. It also appears, as discussed above, that the effect of Larkstore will be that if there is an assignment of the cause of action, Bank B will be able to bring a contractual claim as assignee.

Securitisation

44. What about the more complicated scenario of securitisation? Here, too, the courts are showing little sympathy for “no loss” arguments invoked by defendants.
45. Securitisation is, in short, a means by which debts are pooled and the risk spread among a number of investors. A basic transaction might be structured as follows:

45.1. The original lender (known as the Originator) assembles a portfolio of debts;

45.2. The Originator transfers the debts to a Special Purpose Vehicle (SPV), a company or trust usually formed (often in a low taxation jurisdiction) for the sole purpose of funding the assets. The SPV is known as the Issuer. The SPV is “insolvency remote” from the Originator.

45.3. The Issuer issues notes or bonds to the Investors. The proceeds of the notes or bonds are used to pay the Originator for the portfolio. The Originator assigns the loans making up the portfolio to the Issuer.

45.4. The Issuer is paid principal and interest on the underlying loans by the Originator (or a servicer, often connected to the Originator), which continues to collect those payments from the borrowers. The Originator or servicer charges fees for servicing the loan. It agrees that it will enforce the security if necessary.\(^5\)

45.5. The Issuer agrees to pay the Investors an income stream or interest. Very often there is a hierarchy of notes, with the most senior notes being paid first. There is thus a cashflow “cascade” or “waterfall” to investors according to the order in which they take credit risk. The notes/bonds are listed, tradable securities rated by credit rating agencies, and the levels of interest paid usually correspond with the risk.

46. The notable features of the arrangement are:

- the bonds/notes are transactions between the Issuer and Investors only. The Investors have no recourse against the Originator (or the borrower) for default under the loan;
- Likewise, the securitised assets are no longer the assets of the Originator and are not available to its creditors in the event of liquidation of the Originator;
- The Issuer’s obligation is to pay the income stream from the repayments or the proceeds of the security. It has no independent assets, and it is usually provided that if the mortgage assets prove insufficient to meet the obligations, the issuer has no further obligation to the noteholders: the notes/bonds are themselves “non-recourse”.

---

\(^5\) Usually the assignment to the SPV is equitable, made by way of an agreement to assign. The Originator retains the legal title to the mortgage and is entitled to bring proceedings for possession: Paragon Finance v Pender [2005] 1 WLR 3412, but cf Bexhill UK Ltd v. Razzaq [2012] EWCA Civ 1376
Scenario:

47. A property is negligently overvalued a valuer. Loans are made against the properties and securitised. In due course the borrowers default, so that junior tranche note holders are not paid the full amount due under the notes. The Originator/Issuer enforces the security but the proceeds of sale are insufficient to clear the note arrears or make future payments under the note in respect of those loans. Who, if anyone, can sue the valuer?

48. Assuming there has been a valid assignment, it may be argued that the original lender (Originator) has itself sustained no loss, having recovered the full value of the loans from the SPV. Can the Albazer exception be applied in circumstances where securitisation may not even have been contemplated at the time of the valuer's engagement? The SPV is similarly unlikely to be able to rely on agency/undisclosed principal arguments: often, it will not even have been formed until after the portfolio has been assembled. However, assuming there has been a valid assignment, recoverability of loss is unlikely to be an issue in a case where both Originator and Issuer have been joined to the action as co-claimants, either because the Issuer will be considered to have suffered a loss when it acquired the deficient security, or relying as a last resort on Albazer.

49. There was an early indication in the judgment of HHJ Keyser QC in Paratus AMC Ltd v Countrywide Surveyors [2011] EWHC 3307 (Ch) that the court was unlikely to be sympathetic to arguments that the party bringing the claim had suffered no loss and could not sue. This was a case in which both Originator and Issuer were joined as claimants.

50. A feature of the case was that it was in fact the Originator (Paratus, though at the relevant time GMAC), that had suffered the eventual loss – albeit in its capacity as junior tranche investor (it was entitled to the residue of payments after all the notes were paid). Having exonerated the valuers of breach of duty, the judge dealt with Countrywide's securitisation arguments relatively briefly, at [59]-[62]. He agreed with the submission that there had been no loss, per Nykredit, at the date of the assignment. However:

1. The assignment from GMAC, in its capacity as Originator, to its SPV, RMAC, was equitable only. GMAC as Originator held the right to sue on trust for RMAC;
2. The person entitled to the benefit of the mortgage pool had received less value than it ought to have received, so a real loss had been suffered;

3. *Larkstore* showed that the courts were anxious that a contract-breaker should not avoid liability for the consequences of his breach of contract.

51. Accordingly, had he had to deal with the point, he would have held that GMAC was entitled to sue for substantial damages.

52. With respect to the judge, the reasoning is not entirely clear. The statement in point 2 above appears to conflate the rights under the mortgage with the rights acquired by investors in the mortgage pool: the whole point of securitisation is that they are not the same thing. Is it right, therefore, to call this loss “a loss legally attributable to the valuer’s breach of duty”? And by the same token, is it right in these circumstances to suggest that there is a potential “black hole” into which the valuer’s liability may fall? The Noteholders who have acquired the debt have acquired it in a wholly different form and at a price and rate of return that reflects its assumed riskiness. This presumably could include an allowance for the risk (hardly unheard-of) that the security had been overvalued at the outset; indeed, what is to stop the Investors from obtaining their own valuations of the assets in the pool? If they do not, that may be a calculated risk on their part.

53. As for whether the Issuer has its own cause of action against the valuer, irrespective of any assignment, a regular argument put forward on behalf of defendants has been that the Issuer itself has suffered no loss precisely because it is a “no recourse” vehicle. In other words the investors have no recourse against it if the borrower payments/security turns out to be insufficient to meet their note payments. It has received payment for the notes/bonds, thus recouping its outlay on acquiring the portfolio, and has no further obligation to the noteholders if the security proves insufficient. Arguments of this type were rejected in *Titan v Colliers* [2014] EWHC 3106 (see especially at paragraphs 119-123) in which it was held that the Issuer did have its own cause of action against the valuer. It had suffered a loss in its own right, in that when it purchased the senior tranche of the loan from the Originator, it had acquired a chose in action that was worth less than it paid for it. It was irrelevant that from an economic perspective, the actual loss had been suffered by the noteholders, and that they
had no recourse against the Titan in the event the security was insufficient: this was held to be res inter alios acta.

54. It was, however, considered “essential” to Titan’s right to bring the claim that it was contractually obliged to distribute the proceeds of any such proceedings to the investors. This is an interesting gloss on the concept of what constitutes loss in the securitisation scenario, but insofar as it creates an additional “hurdle” for claimants, that hurdle is likely to be cleared in most cases, as the contractual arrangements governing the securitisation in Titan were unremarkable.

55. The judge also held that the note holders were not the proper claimants. As discussed above, the assets acquired by the investors were not the assets valued by the valuers: it would be difficult as a matter of practicality to identify which element of their loss was attributable to any overvaluation, and it suggested, too, that as a matter of principle it is difficult to see why a valuer should be held directly liable for his negligence to the purchaser of a quite different type of asset.

56. Concluding that Titan was the correct claimant, the judge said (at 124):

“A securitisation like this one is neither a conventional loan, nor a conventional issue of securities in which investors look to the issuer (corporate or sovereign) to repay the debt. In complex structured financial transactions of this kind, the developing case law shows that the courts are reluctant to accept "no loss" arguments. As this case shows, the distribution of loss can be difficult to pin down, and depends on when investments were acquired, market movements, and the performance of the rest of the transaction. The important points are that (1) where the contractual structure allocates the bringing of a type of claim to a particular party, that party brings the claim, complying with any conditions for doing so, and (2) that the proceeds are dealt with according to the contractual requirements. Provided this happens, all parties will get what they bargained for.”

57. Essentially, allowing Titan to bring the claim was the solution that did least violence to the carefully worked out securitisation structure. This decision, then, is a further illustration of the courts’ preference for compensating genuine losses in a way that both reflects the
commercial realities of the situation and gives precedence to conscious contractual bargaining over court-imposed technical solutions.

Contributory negligence
58. Often considerable criticism can be made of the original lending decision which can give rise to an allegation of contributory negligence against the original lender. An assignee of Bank A’s cause of action cannot be in a better position than Bank A: the defendant must be able to avail itself of any defence that might have been afforded by Bank A’s negligence.⁶

59. However, in so far as Bank B depends on its own cause of action in tort against the valuer and it is in effect saying: “I relied upon the valuation in determining whether I would buy this mortgage” it is not obvious that fault in the original lending decision can be laid at Bank B’s door. It seems plain that in Titian, the claimant assumed that any negligence by the original lender, Credit Suisse, would not affect Titan’s recovery: it actively sought findings of negligence on the part of Credit Suisse (which was not a party to the action).

60. However, we may see defendants arguing that the decision to purchase the loan was itself negligent: the Issuer may well carry out none of its own checks or enquire into the circumstances of the original lending decision. Could this constitute contributory negligence on its part, particularly given its contractual obligation to the investors to realise the security?

Conclusion
61. As ever, the facts of each case need to be analysed. Not only the terms of the valuation but also the particular terms of the agreement by which the assignee has acquired a right to sue, or the circumstances in which the claimant is said to be entitled to rely on the valuation, may have an impact on what proceedings can be brought by whom and for what.

Hailsham Chambers
January 2015

---

⁶ And bearing in mind the decision in Platform Homes v Oyston Shipways [2000]AC 190 that unless the bank’s negligence contributed to the overvaluation, the deduction for contributory negligence is applied before the SAAMCo “cap”.