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PROPERTY INVESTMENT AND DEVELOPMENT FINANCE IN THE NETHERLANDS

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Introduction:

In this short series of articles, we will examine points of law and practice in relation to a lender wishing to undertake a property investment or development finance transaction in the relevant local jurisdiction.

The specific jurisdictions which will be dealt with are the Netherlands, France, Germany, Spain and Italy.

This article deals with the position in the Netherlands, but looks at a Netherlands property finance deal from the perspective of a UK bank used to operating within the law and practice parameters applicable in the UK. This article will compare and contrast the conventional UK position with the position in the local jurisdiction.

The paper necessarily deals with selected issues only and is intended as an introductory guide. It will focus on the nature of due diligence on property assets, transaction mechanics, types of security and security enforcement. Naturally, detailed specialist local advice should be sought in each case.

In this, and ensuing articles, the expression "Mortgagor" means the person or legal entity interested in purchasing or developing the relevant property, who will provide security to a lender for its or a third party's obligations in relation to the transaction. "Mortgagee" means the lender, in whose favour the relevant security will be granted.

It is worth bearing in mind some general propositions in relation to continental European jurisdictions, by way of contrast to law and practice in the UK:-

(i) documents are (thankfully, most would say!) shorter than their UK counterparts. Apart from any differences in custom and practice, this stems in no small measure from widespread codification of law in continental European jurisdictions which render unnecessary extensive narrative in the legal documents themselves. It is worth bearing in mind also that, whereas attempts may be made to incorporate express contractual provisions which would be conventional in a transaction governed by English law, some of those provisions, if they conflict with the relevant Code, or per-emptory laws of the relevant jurisdiction, would not in any event be upheld. In that regard specialist legal advice is always required;

(ii) in the UK, the conveyancing process, and in particular title investigation, would usually be undertaken/ overseen by a solicitor and a lender would conventionally expect a report on title from its own solicitor or a certificate of title from the borrower's solicitor, in an agreed format. In the Netherlands, as for other continental European jurisdictions, responsibility for title investigation, and for the conveyancing process generally, rests substantially upon the shoulders of a Notary, who is a public officer holding office by virtue of a civil law appointment. Hence, external lawyers, whilst they might to some extent oversee or complement the work of a Notary, will not assume full responsibility in relation to this process. Notarisation is an essential pre-requisite to the legality of core documents in a property transaction, including transfer of title documents and mortgages;

(iii) in relation to the taking of security, it is possible under English law to take fixed and floating charges over a specified class of asset both present and future, e.g. all properties for the time being owned/all book debts for the time being of the relevant company/all rental income under all leases from time to time derived from the property etc. In contrast, the general rule in continental European jurisdictions is that specific security must be taken over specifically named existing assets. Hence, in an investment property transaction, if further leases are granted and security thereover, and/or rental income derived therefrom, is required, generally additional security must be taken in relation to those assets as they arise. N.B. floating charges are not recognised;

(iv) "all monies" security (i.e. a mortgage securing all indebtedness owed from time to time by the borrower to the lender) is not a familiar concept in such jurisdictions. Generally, duty is payable in relation to the grant of a mortgage by reference to the maximum amount secured by the mortgage and the law itself usually prescribes that a maximum amount must be cited in the mortgage as the maximum amount secured by it;

(v) cross-collateralisation can be problematic. This is discussed further below;

(vi) continental European jurisdictions do not recognise the English law concept of holding assets on trust. This has particular consequences in relation to syndication of secured loans. Under English law, the relevant security would be held on trust by a lead for all of the lenders from time to time. In continental Europe, syndicated security must be approached in a different way (see below);

(vii) in relation to development loans, whilst the basic framework for construction finance is similar, items such as collateral warranties, widely-recognised in the UK, are not standard in continental Europe. The reasons for this are explained in the section on development finance below;

(viii) the English law concept of "subject to contract" is less prevalent, take care, therefore to avoid unintentional issue of a binding commitment at term sheet stage where a commitment "subject to contract" was intended!

(ix) enforcement procedures in relation to security are rather more prescribed than under English law, where, as the adage goes, demand can be made in the morning and a receiver appointed in the afternoon! This is considered further below.

Note that this article does not deal with technical insolvency-related issues which might have a bearing on the validity of creation of security (preference periods, transactions designed to prejudice certain creditors etc).

This article does not go into specific detail concerning typical terms of leases and criteria for institutional acceptability thereof, nor regarding standard form construction documentation for development loans. Certain aspects of the differences between UK and continental European leases will be highlighted in subsequent articles. Suffice it to say that leases are generally shorter and are not necessarily "FRI" in the full UK sense!

Note also that specific tax aspects of property investment and development are not intended to be covered (other than certain stamp and other duties which are relevant).

Specific Matters - Dutch law and practice:

1. Title to the property:

The Dutch Civil Code recognises the concept of ownership in perpetuity i.e. freehold, out of which title derivative interests, notably leases, can be granted. There is a Land Register where all registerable interests must be registered. The Land Register is not, as in England and Wales, a State guarantee of title, but does constitute evidence of title as against third parties and the general concept of first on the Register prevails. Hence, if "A" validly acquires title from "B", who is registered as proprietor at the Land Registry, then registers itself as proprietor, "A's" title will prevail where a third party, "C", may have previously acquired title from "B" but did not register its title, or failed to register before "B". First on the Register prevails.

A mortgage is a substantial interest in land which is also registerable, as are long leaseholds (*erfpacht*). These are rights in rem i.e. proprietary rights, which may be made subject to a legal mortgage (*hypotheek*). Note that rack rent agreements, in contrast to "long leaseholds" are merely rights in personam i.e. contractual rights for the use and occupation of land provided that the relevant contracted rent is paid. As they are not proprietary rights, they are not registerable. Contrast the English law position whereby leases over twenty one years (soon to reduce to seven) are registerable. Rental agreements (e.g. rack rent leases as aforesaid) can be the subject of a pledge but not a *hypotheek*. The same is true of rental income derived from the relevant property. Items such as negative pledges in relation to the mortgaged property may also be cited on the Register at the Land Registry, but registration of such interests is not mandatory in order for the mortgage to be enforceable.

The Land Register will contain the relevant description of the land and will be the starting point for title investigation, which, as noted above, is primarily the responsibility of the relevant Notary. Care must be taken to compare the title (cadestral) plan with the property which is understood by the lender and its valuer as the extent of the interest(s) to be mortgaged as security for the prospective loan. The valuer should take care to correlate the cadestral plan with other available documentation (e.g. the *bestemmingspaln*, a public plan relating to zoning and use requirements) in relation to the property and his own site inspection.

2. The Notary:

As we have seen, the Notary will take responsibility for title investigation and for accuracy of the (notarised) documentation conferring ownership on the Mortgagor, and valid security in favour of the lender by way of the relevant mortgage thereover. The Notary will peruse the registered title documents at the Land Registry and other documents submitted to him for inspection and/or notarisation. He will be responsible for drawing up the transfer of ownership documentation and the mortgage deed. These documents will contain recitals as to ownership and as to any other encumbrances (financial or otherwise) affecting the relevant property.

On the designated completion date, the parties to the transaction will attend at the Notary's office where the contents of the relevant documents will be recited and the parties will execute before the Notary. Attendance by the Mortgagee is not critical provided that an appropriate proxy is granted by the Mortgagee (which can be oral, in contrast to a Mortgagor's proxy which must itself be effected by way of notarised deed of proxy).

Registration at the Land Registry is necessary to ensure that the relevant mortgage is fully effective. This involves the filing by the Notary of an authentic copy of the mortgage deed and priority for the mortgage will run from submission (but, strictly speaking, the Mortgagee's security will not take effect as a fully perfected security until registration at the Land Registry has been completed, at which time the security becomes a legally enforceable security). Hence, it is essential that the lender does not make the relevant loan until the Notary has confirmed that it is in order to disburse. As a matter of good practice, funds might be disbursed through a designated account (kwaliteitsrekening) held by the Notary on behalf of both Mortgagor and Mortgagee, which funds are released at such time as the Notary is satisfied that the mortgage is in order and arrangements for the discharge of any intervening encumbrances has been arranged.

It can be seen from the above that external lawyers' involvement in the process is, certainly in straightforward transactions, more limited than the role of solicitors in an English law transaction. Indeed, large banks or other financial institutions operating in the real estate finance market may have an in-house legal capacity which would be capable of undertaking such diligence as the lender considered necessary, perhaps looking at the terms of leases in a large investment portfolio transaction.

In the case of larger, perhaps syndicated, transactions, the use of an external lawyer may be more appropriate. The lawyers would cover general due diligence, raise such enquiries of the vendor and its advisers as is considered appropriate, consider e.g. planning issues (particularly for development transactions), collate management information (rent arrears, service charges etc). Environmental issues would probably be dealt with by separate specialist reports as appropriate for the transaction. In that regard a lender would probably be guided by its valuer in terms of recommendations.

3. The mortgage and other security:

As for an English law transaction, a legal mortgage over the relevant property would constitute the lender's primary security, but not untypically, the lender might also expect security over rental income, ancillary contracts and possibly over the issued shares in the borrower. Such security would generally be effected by way of pledges over the relevant interests and rights of the Mortgagor. However, security by way of pledges over property-related assets (in particular rental income) might be dealt with by way of including pledges in the notarised mortgage deed itself.

Under Dutch law, it is necessary to limit (by way of citation in the notarised mortgage deed itself) the amount secured by the mortgage. Generally this amount (on which duty is paid) is expressed to be the total principal amount of the loan together with an amount of interest (in particular default interest) thereon, but up to a maximum of three years, together also with potential enforcement expenses. Upon enforcement, the Mortgagee will not be able to recover from realisation proceeds beyond such maximum amount expressed to be secured by the mortgage, although any residual liabilities can be claimed direct from the Mortgagor itself as an additional unsecured claim.

The notarised mortgage deed would also contain certain core terms of the transaction, including covenants and undertakings regarding the mortgaged property (repair, insurance etc) and stipulated default events. It could also contain provisions regarding the principal amount of the loan secured, the applicable interest rate, repayment and prepayment provisions, required amortisation and default interest etc, although this is more usually contained in the relevant loan agreement or facility letter.

Negative pledge and other covenants, undertakings, representations and warranties as one would expect in an English law transaction would typically be included. It is perhaps fair to say that typical practice hitherto for lenders (particularly in the case of long standing relationships between lender and borrower) not to include extensive reporting requirements or even restrictions in terms of the granting of leases, accepting surrenders, negotiating rent reviews etc in relation to the relevant property or portfolio.

The reporting requirements might be limited to annual accounts and an annual property management report in the case of a portfolio. Loan to value ratios, debt service cover requirements and other undertakings could all be included. As is often the case in the UK, a Mortgagor, or its managing agents and/or solicitors, might expect to hold the occupational lease documentation (to the order of the lender) where there are ongoing management requirements.

Cross-collateralisation is problematic. Under English law, it is possible to lend to a group where different properties are held in different subsidiaries, on the basis that each issues a cross-guarantee for the obligations of each other, or a collection of upstream guarantees to the holding company borrower, the obligations under which are secured by legal mortgages over the properties owned by the subsidiaries. Under Dutch law, where different properties are owned by different subsidiaries in a group, remember that each subsidiary will have granted a mortgage to secure a maximum amount, upon which duty will have been paid. If two separate loans are made to separate subsidiaries, the Mortgagor would not be able to use the excess realisation proceeds from the sale of one property to go towards repayment of the secured loan made to the other (which would typically be achieved under English law by each subsidiary cross-guaranteeing the other). Cross-guarantees and upstream guarantees are problematic unless it can be demonstrated that there is sufficient commercial benefit for the giving of the relevant guarantees either as between two companies (i.e. the two subsidiaries in the above example) or by the subsidiaries for their parent.

A word on heads of terms. As for the UK, heads of terms might be issued governing the basic terms of the proposed secured loan, which terms might run to a few pages. However, as stated above, there is no general "subject to contract" rule under Dutch law. Moreover, contracts for the acquisition or financing of land could, under Dutch law, be concluded even verbally (contrast the English law rule that all terms in relation to the creation of an interest in land must be in writing signed by both parties).

Heads of terms should at least be clear as to conditionality in relation to the making of the loan in order to avoid, from the prospective lender's point of view, the heads of terms being considered to be a binding offer of finance.

4. Rental income and insurance monies:

Security over rental income can be effected by way of a pledge (see above). Note that, in the case of a multi-tenanted property or portfolio of properties, whilst security can be taken over rights and remedies of the Mortgagor in relation to leases, the security will only cover then subsisting leases. If further leases are granted, the lender will need to have included in the documentation a further assurance covenant obliging the Mortgagor to create further security over leases (and rental income derived therefrom) as they are granted.

As stated above, a pledge over rental income may be included in the notarised mortgage deed itself, with the result that such pledge will be registered at the Land Registry.

The Mortgagee will, certainly in an enforcement situation, be concerned to receive into an account designated by it, all rental income from the relevant tenants. Usually notice is only served on the tenant in a default situation (as would be not untypical in the UK). The Notary, for example, would not expect to notify tenants of the existence of pledges over rental income, certainly not unless specifically requested to do so by the Mortgagee.

Note in particular, in contrast to English law, that a Mortgagee will no longer be entitled to collect and retain rental income pledged to it that becomes due on or after the date of bankruptcy of the Mortgagor, or the institution of a moratorium on payments affecting the Mortgagor. This is an obvious potential downside to a lender who would otherwise expect to be in a first-preferred secured position, which would certainly be the case under English law, notwithstanding intervening insolvency of the Mortgagor.

Regarding insurance proceeds, English law-governed security documents would contain, probably in the mortgage document itself or debenture, a specific assignment by way of security over the Mortgagor's interests in insurance proceeds arising from time to time in relation to the mortgaged property. The provisions would probably then go on to stipulate that insurance proceeds could be used by the Mortgagee in or towards repayment of the loan, or at its option, in or towards reinstatement of the mortgaged property.

Under Dutch law, insurance proceeds are, by operation of law, automatically pledged to the Mortgagee. As a matter of law, there appears to be no specific rule as to the manner in which insurance proceeds can be appropriated (whether to repay the loan or reinstate the relevant property). Under English law it is generally unlikely that the Mortgagee could appropriate proceeds in or towards repayment of the loan as the mortgage document will probably subject that right to any rights (notably of tenants) taking effect in priority, and in any event section 108(4) of the Law of Property Act 1925 provides similar protection for other parties.

Under Dutch law, the relevant security documents would not generally go into detail regarding application of insurance proceeds but remember that, under Dutch law, a lease is not a right in rem (i.e. a proprietary interest in land) but takes effect more as a contractual right. If the relevant demised premises are damaged or destroyed so as to be unfit for use and enjoyment by the tenant, the tenant might have personal rights as against its landlord in relation to putting the property into its former state (by application of insurance monies) but the tenant's rights in that instance would, being contractual rights and in the absence of other statutory protection, not be binding against a Mortgagee with specific security over the insurance proceeds. Overall, therefore it might be said that the Mortgagee is in a better position, legally, under Dutch law. However, there are practical realities which might determine that the proceeds are used in or towards reinstatement in order to preserve the value of the security and the rental income derived therefrom. Moreover, upon destruction of the premises, the tenants' leases would terminate in any event. Also bear in mind that there is an overriding general Dutch legal principle of "reasonableness" which could be brought to bear by a tenant in the event that a Mortgagee vexatiously appropriated funds in or towards repayment of the mortgage debt. A Dutch court might rule that it was more reasonable that the proceeds be used in or towards reinstatement.

As regards perfection of and practical protection for the Mortgagee in relation to insurance proceeds, the insurer would usually be notified of the interest of the Mortgagee (and its pledge over proceeds) and mortgagee protection provisions could be included in the policy document obliging the relevant insurer to notify the Mortgagee upon the occurrence of any event which might vitiate the policy or restrict or reduce the cover provided and/or allowing the Mortgagee to pay the premium, or an additional premium, in the case of act or default on the part of the Mortgagor as insured. Market practice does not generally extend, as in the UK, to inclusion of non-invalidation wording whereby the policy would not be vitiated as against a third party (e.g. a freeholder or mortgagee) in the case of non-disclosure, mis-representation, act or omission on the part of the insured which would otherwise have entitled the insurer to avoid liability on the policy.

5. Enforcement of security:

As stated above, mortgage enforcement procedure is rather more prescribed under Dutch law than under UK law. In particular, there is a specific sale process, involving an auction process, which is required to be adhered to, and conducted before a Notary. (However, that of itself does not preclude the entertainment of private offers to purchase the property, provided that the specific sanction of the court is obtained).

The public auction procedure commences with the notification by a bailiff (*aanzegging bij deurwaarders exploit*) selected by the Mortgagee for that purpose. Such notification is served on the Mortgagor and other parties having actual or prospective interests in the property.

The relevant Notary sets the date, time and place of the auction (and the auction conditions) and notifies all relevant parties.

The auction cannot be held within the thirty days following the announcement that it is to be held. It is advertised in appropriate publications. The advertisement must mention that private bids may be lodged with the relevant Notary up to fourteen days before the auction date. In the event of receipt of such a bid, the Notary is required to provide immediately details of the bid to the Mortgagee and Mortgagor.

Up to a week prior to the date set for the auction, the Mortgagee or the Mortgagor may make an application to the court for permission to sell the property by private treaty. The sale agreement has to be submitted to the court and subsequently approved by the court. If the Mortgagee, the Mortgagor or other interested party submits a higher bid before the court has issued such sanction, the court may order the property to be sold to the higher bidder. If the property is not privately sold in response to a court-sanctioned bid, the auction will proceed.

The auction is conducted as a "Dutch auction" (*verkoop bij opbod en afmijning*). The proceeds of the auction are distributed according to the order of priority of security (as in English law), as to which see paragraph 2 above.

6. Syndicated loans:

In the case of syndicated (multi-bank) loans where security is required such that each syndicate member is, as a matter of law, a secured creditor of the borrower, an English law trust mechanism is adopted. Hence, the lead or agent bank, or designated security trustee, will have vested in it the relevant mortgage and other security and will hold the same on trust for all syndicate members from time to time. Each syndicate member, being a beneficiary under such trust, will be classed as a secured creditor (albeit that the proof is submitted by the lead bank/security trustee) in the insolvency of the Mortgagor.

Dutch law does not recognise the concept of trusts, in the English law sense. Such a trust could of course be included in a set of Dutch security documents and the mortgage registered in the sole name of the lead bank/security trustee at the Dutch Land Registry. However, even if the document was made subject to English law, and even assuming the Dutch courts recognise such choice of law, the court may well rule that, as the relevant property assets are located in the Netherlands, Dutch law rules should be applied in relation to the security, or at any rate, concepts which are alien to Dutch law should not be recognised. Hence, the court may refuse to accept the trust mechanism as being effective in enforcement proceedings instituted in the Netherlands (see further article 13 of the Hague Trust Convention).

An alternative mechanism is therefore commonly adopted, known as the "parallel debt" structure. Under such structure, the syndicated nature of the loan is acknowledged, in particular, as for all syndicated loans, that each lender's participation constitutes a several debt owed to it by the borrower. Rather than have separate mortgages registered at the Dutch Land Registry in the name of each lender, or all the lenders joined into a single mortgage as co-proprietors, the mortgage will be taken in the name of an agent Mortgagee and the borrower will covenant to pay the whole of the mortgage debt (as a matter of mechanics) to such agent bank, for distribution to the syndicate, pro rata to their respective entitlements. Pro rata allocation in relation to enforcement proceeds pursuant to enforcement of the mortgage would apply in the same way. The syndicate members would not, in the English law sense, be beneficiaries of a trust declared in relation to such proceeds, but they would certainly have rights against the agent bank/security holder, at least as a matter of contract. This would suggest that, in the absence of a trust, the syndicate members would effectively be taking an insolvency risk in relation to the lead/agent bank.

This raises interesting issues in particular for German hypotheken (mortgage) banks. The regulations applicable to such banks, which in particular provide that the bank must enjoy the protection of a mortgage vested in it in relation to secured property loans, could well mean that such banks would not simply be able to accept a pure contractual right in relation to security vested in a third party. In such cases, perhaps the relevant mortgage must be granted to all such banks as co-proprietors. Where it is intended that prospective syndicate members might include such banks (after closing i.e. by assignment/novation), a covenant would need to be imposed on the Mortgagor to grant further security documentation as required to secure such syndication. Moreover, a security power of attorney might be recommended in such circumstances to ensure that such further security could be procured by the original Mortgagee as necessary. Conceivably, where security is vested in more than one bank in relation to the same property, it might be necessary to put in place intercreditor (pari passu) documentation in relation to such security.

As stated at the outset, this article does not discuss insolvency-related matters, which might have a bearing on the legality of later-created security (within certain periods prior to the onset of insolvency of the Mortgagor). Furthermore, there may be issues as to extra costs, both legal, notarial and registration, in relation to the creation of any such further security.

7. Development Finance:

Law and practice in relation to property development finance does not differ vastly as between the UK and the Netherlands in a straightforward case whereby a borrower buys a freehold, builds on it and then lets/sells it in order to repay the loan.

Different issues may arise, however, where, instead of a freehold, the borrower/developer negotiates a licence to develop, to be followed, as at practical completion, by the grant of a long leasehold interest, or sale, after construction, of a freehold interest in the site. Such development agreement structures are less usual in the Netherlands, save where land might be owned by a local authority (municipality). In such cases, the Mortgagor might be granted a long leasehold (*erfpacht*), as to which see paragraph 1 above, including a right to build thereon (*opstalrecht*). Such long leasehold rights are, as we have seen, rights in rem (see paragraph 1 above) rather than contractual rights. Registered mortgages can be taken over such proprietary interests, as for freeholds, rather than mere pledges over a contractual right under a development agreement as English law would recognise it. Instead, the long leasehold interest is itself a form of title. It might be perpetual or granted for a term of years. In relation to long leaseholds for a stipulated term, they might be likened to English law long leases at a peppercorn i.e. valuable interests in land, and therefore mortgaged accordingly. Distinguish such long leasehold interests from mere contractual rights under a development agreement.

An important consequence of the above is that, so-called "step-in" rights which would be an essential mortgagee protection in relation to a development agreement would not be necessary under Dutch law as, instead of a development agreement, the Mortgagor would already have vested in it a proprietary interest by virtue of the *erfpacht*. In a default situation the Mortgagee would simply be enforcing its mortgage. It would not require to step-in as against a landowner under a development agreement to take over the contractual rights which the Mortgagor originally had.

Nevertheless, there will inevitably be other development documentation to take into account, notably pre-sale and/or pre-letting agreements, building contracts, architects' appointments etc (for the grant of leases following practical completion). These are of course documents which give rise to merely contractual obligations, but can nevertheless be the subject of pledges. The Mortgagee will of course wish to be able to enforce the Mortgagor's rights in a default situation and will be concerned to ensure that those very default circumstances do not entitle the other contracting parties (e.g. tenants, contractors, architects etc) to walk away from their obligations.

Note that pledges (as well as mortgages) can only seek to secure monetary obligations. That means that the Mortgagee, in enforcing such pledges, would be enforcing in relation to any monetary claims against contractors etc arising in favour of the Mortgagor, but it does not automatically mean that the Mortgagee would be entitled to exercise all other contractual rights and obligations of the Mortgagor (e.g. to act as employer under a building contract and give instructions accordingly). Moreover, whilst damages, liquidated or otherwise (i.e. monetary claims), might be claimable against a defaulting party (building contractor etc), it is unlikely that a court order can be obtained compelling the defaulting party to perform the contract (much as in English law i.e. damages in lieu of specific performance).

Hence, step-in rights are relevant to those documents. Commonly, in the UK, so-called collateral warranties are entered into to deal with both step-in rights and duties of care, particularly in relation to building contractors and architects and other professionals involved in the development. These commonly take effect as tripartite documents between e.g. the relevant contractor, Mortgagor and Mortgagee as funder. This document would safeguard the Mortgagee's desired step-in rights. However, it is not conventional practice in the Netherlands for such tripartite agreements to be entered into, although there is no reason in principle why they could not be entered into. Alternatively, it is possible to insert e.g. in the building contract, provisions in favour of a third party (i.e. a funder) entitling such third party to "adopt" the contract in specified circumstances. Furthermore, a Mortgagee could be given an irrevocable power of attorney by the Mortgagor to act in its name in a default situation in relation to instructions etc to building contractors/architects and other professionals. However, such power would not remain effective from the onset of an insolvency of the Mortgagor (although it is irrevocable prior to such time). Note also in relation to construction generally that design and build is the norm, therefore separate rights against architects etc, would not normally be an issue.

Other reasons why the concept of collateral warranties is less relevant in the Netherlands are:-

(i) as a matter of practice, the concept of limited recourse project finance, where there is any recourse to the asset and the bank's ability to step-in etc is critical, often a full recourse parent guarantee in relation to development obligations and repayment of the loan will in any event have been taken, or at least a guarantee where a substantial company guarantees completion of the project;

(ii) a lender might also take a share pledge over the whole of the issued share capital in the development company, with a view to being able to take control in a default situation and act in the name of the Mortgagor. Nevertheless, the Mortgagee should still be wary of the ability of building contractors/tenants under pre-let agreements etc to walk away from their obligations in a default situation.

Another aspect of English law collateral warranties is to impose a so-called "duty of care" on the part of the relevant contractor/professional whereby it holds itself out, contractually, as having a direct duty of care in favour of a funder in relation to the proper performance of its obligations under the relevant contract/terms of engagement. The object of these documents is to enhance the ability of such funder to claim for loss incurred in the event of breach of such obligations. Such issues are largely irrelevant in the Netherlands as, by law, parties suffering loss e.g. as a result of construction or design defects, may claim at any time within ten years from completion of the relevant works.

Regarding project insurance, this is usually taken out by the contractor under the terms of the building contract. CAR policies (i.e. carry all risk) are commonly taken out by the contractor, in an amount and for cover approved by the Mortgagee and its advisers.

A lender might finance the VAT element of payments in relation to project costs, in which case it would expect to take a pledge in respect of the Mortgagor's entitlement to VAT credit and money subsequently reclaimed. As in the UK, VAT accounting in the Netherlands is undertaken monthly or quarterly.

Finally, a word on general diligence concerning development transactions. There is nothing unusual here, compared to the UK. A Mortgagee would expect its advisers to conduct appropriate diligence in relation to pre-let agreements (including "drop dead dates" and other provisions exonerating the prospective tenant from taking the relevant lease). Institutional acceptability of prospective leases would need to be established. Planning diligence would need to establish the extent of conditionality of planning and the extent to which prospective use is e.g. personal to a particular party. Diligence should also comment on the extent to which the applicable planning permission is subject to third party challenge, whether by judicial or other review process.