

News flash

Claims, Planes and Automobiles *Malmesbury & Ors v Strutt & Parker (a partnership) & Anor [2007] EWHC 999 (QB)*

Another nine figure professional negligence claim took off in November 2005 but flew into some turbulence in the High Court earlier this year. Judgment was handed down in *Seventh Earl of Malmesbury v Strutt & Parker* on 11 May 2007.

*“If a surveyor advises his client to sell land for a sum of money which is too low, no one would doubt that the damage was the difference between the price which should have been obtained and the actual price. Likewise if a lease is granted for too small a premium. As to rent, suppose the rent is £1,000 per annum over 20 years when the surveyor should have advised and obtained a rent of £1,200, is the measure of loss 20 times £200, £4,000, discounted for early receipt of part and compensated by interest for late receipt of part, or is it the difference in market value of the two leases, prima facie to be assessed as at the date of the lease, plus interest?” (per Jack J. in *Seventh Earl of Malmesbury v Strutt & Parker*).*

The answer is the latter according to Mr Justice Jack.

The Claim

The main allegation against Strutt & Parker was that they should have negotiated leases of land for car parking at Bournemouth International Airport with rents that permitted the Claimant landlord to receive 80% of the earnings from the car park (“a turnover rental”). On the Claimant’s case, the lost rental over a 24 year lease amounted to more than £100,000,000.

On the evidence, the Court decided:

- Strutt & Parker could and should have sought to negotiate a turnover rental on behalf of the Claimant for two out of three leases.
- A turnover rental based upon 80% of the earnings from the car parks was wholly unrealistic.
- Applying loss of chance principles and on the evidence, a rental based upon 10% of turnover was most likely to have been achieved and if it had, Strutt & Parker would have fulfilled their duty to the Claimant. In the event, they had not.

Loss of Chance

In assessing the loss of chance Mr Justice Jack concluded that there was a significant chance of the Claimant negotiating a rental with a turnover element with Bournemouth International Airport. He then carried out a detailed appraisal of the strengths and weaknesses of both parties’ negotiating positions to arrive at the most likely figure – a 10% turnover rental. Based on the evidence, he formed the view that a turnover rental would definitely have been agreed and placed no percentage value on the chance of this happening.

Measure of Damages: Loss of Earnings v Diminution in Value

The dispute then centred around the correct measure of



► damage. Jack J. categorised it as the difference between a “loss of earnings assessment” and a “valuation basis”.

The Claimant’s approach was based upon a claim for loss of rental income. It was characterised as being equivalent to a claim for loss of earnings in a personal injury action where likely future earnings are compared with the actual earnings to assess the loss.

Strutt & Parker’s approach, labelled the “valuation basis”, involved a comparison between the value of the leases based upon the terms that could and should have been negotiated with the value of the leases that were actually negotiated.

Mr Justice Jack observed that where property is acquired as a result of negligent advice, whether the advice comes from a surveyor, solicitor or other professional, the usual method of measure of loss is the difference in value between the purchase price paid and the value as properly described at the date of the purchase. He considered the granting or acquisition of a long lease involving the payment of a premium also fell within the scope of the diminution in value measure of loss.

However, where the emphasis was going to be upon the rent payable over the term of the lease (rather than its capital value), he raised the possibility that the position may be different and the valuation basis of assessment might be inappropriate. His view was that the claimant should be entitled to be compensated for loss of income, as applying diminution in value would be artificial. However, he was bound by the majority decision of the Court of Appeal in *County Personnel v Pulver* [1987] 1 WLR 916, which held that unless another method of assessment is more appropriate, the diminution in value rule should be applied. In the event, the Judge considered himself bound by authority to decide that damages were to be assessed

on the basis of the comparative valuations of the leases as at the date they were entered into.

This leaves the actual assessment of damages on the valuation basis to be carried out and either agreed between the parties or brought back to Court.

On any view, it seems the Claimant stands to recover substantially less than he set out to recover. This is in part a reflection of the assessment of a turnover rental of 10%. It is also a reflection of the Judge’s view that a purchaser of these leases would be buying an income stream based upon a turnover rent and forecasts of passengers and parking fees based upon information available as at the date of the leases. In those circumstances, the Judge indicated that any such purchaser “*would want a substantial discount for the uncertainties involved.*”

The Solicitors’ Role

A further point of interest was the dismissal of a claim against the solicitors who were instructed to draw up the leases. The solicitors’ defence was that they were retained as solicitors to give legal advice and not as a surveyor or commercial advisor to give commercial or business advice. On the evidence, the Court was of the clear view that whilst it fell within the expertise of Strutt & Parker to know that a turnover rent was appropriate, the same was not within the expertise of the solicitors.

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We can put together a seminar/talk or panel discussion on the issue above, or any of the issues featured in our publications to be held at any of our offices, or yours. If you are interested, please contact any one of our lawyers or **David Simon at david.simon@robinsimonllp.com.**

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