

EARL OF MALMESBURY –V- STRUTT & PARKER & WILSONS (11 May 2007)

SURVEYORS' LIABILITY FOR DAMAGES FOR NEGLIGENT ADVICE

The Judgment of the High Court in Seventh Earl of Malmesbury –v- Strutt & Parker and Wilsons (11 May 2007) is of particular interest as it makes clear the following:-

1. The level of duty owed by a Surveyor employed by a major national firm;
2. The lack of duty of a solicitor to advise on matters of business;
3. The basis on which damages will be calculated where a property transaction is entered into on disadvantageous terms.
4. The date on which damages will be assessed.

THE FACTS AND RESULT

The Claimants, the Earl of Malmesbury and the Trustees of the Hurn Estate, are the tenant and freehold owners respectively of land adjoining Bournemouth Airport. Mr Ashworth of Strutt & Parker advised the Claimants in relation to new Leases for 24 years they entered into with Bournemouth International Airport Limited for car parking in 2002 and 2003.

The Claimants' main allegation was that Strutt & Parker were negligent in not requiring the rent under the Leases to be based on a percentage of the earnings from the car park. The earnings of the Airport from car parking totalled £1.8 million in 2006, most of it relating to the Claimants' land, whereas the fixed rent it was liable to pay under the main lease during that year was only £30,000.

Strutt & Parker joined the Claimants' solicitors, Wilsons, to the proceedings on the basis that, if liability was established, they were also negligent in not advising on the inclusion of a turnover rent.

The Court held that Strutt & Parker were negligent as they did not properly put their mind as to what the rent should be. They agreed that the rent should be based on £9,000 per annum with 5 yearly rent reviews from 2005 with the rent increases tied to the increase in the season ticket prices charged by the Claimants for parking. As the Airport controlled the season ticket prices, the terms gave the Airport control over the increase in the rent payable on review.

The Court was critical of Strutt & Parker for agreeing far too readily to the terms proposed by the Airport. It held that they concluded these terms without appreciating that the importance of car parking to the Airport was far more significant and valuable than it had been before. If they had considered what the Airport was likely to earn from car parking, and taken account of the fact that airport car parks were commonly leased on turnover terms, they should have pressed for a turnover rent rather than agreeing to a fixed rent.

The Claimants argued that, if a turnover rent had been pursued, the Airport would have agreed that the Claimants should receive 80% of the earnings from the car parking. However, the Court considered that this was not realistic at all and that a percentage of only 10% was the most likely

figure that would have been agreed at that time. The Claimants had, therefore, lost out on 10% of car park earnings for 24 years.

The claim against Wilsons, the solicitors, failed on the basis they had no duty to advise that a turnover rent should have been pursued or that the terms agreed were otherwise unacceptable.

STRUTT & PARKER'S LEVEL OF DUTY

The Court made the following findings:-

1. The duty of Strutt & Parker is the duty of their Mr Ashworth but this duty included a duty on Mr Ashworth to seek assistance within the firm if he needed it.
2. The standard of care owed was that to be expected of a major national firm. It was the competence to be expected from a firm holding itself out as having the competence to act in relation to land development adjacent to an airport.
3. Accordingly, the standard to be expected from Mr Ashworth was more akin to a specialist Queen's Counsel than a junior barrister.

THE SOLICITORS' DUTY TO ADVISE ON COMMERCIAL MATTERS

The Court held as follows:-

1. That it was Strutt & Parker who were retained to give commercial advice and Wilsons were only retained to give legal advice.
2. It was not within the expertise of the solicitor to advise on the appropriateness of a turnover rent.
3. There was no duty on a solicitor to query a surveyor's advice unless it was obviously wrong.
4. Wilsons had not stepped outside the ordinary role of a solicitor and assumed any role in the commercial negotiation of the Leases.

THE MEASURE OF DAMAGES

The Claimants argued that they should receive damages based on the difference between the rents they would have received if correctly advised and the rents they actually received. The Defendants argued that damages should not be based on lost income but on loss of capital value. They said the correct measure was the difference between the valuation of the reversion to the Leases based on Leases with turnover rents and the actual Leases entered into.

The Court held as follows:-

1. The normal basis for valuing the damages when a party purchases a property it would not otherwise have purchased is the diminution in value of the reversion and not, for example, the cost of repairs or any other costs incurred in remedying any defect.

2. In some exceptional cases, particularly where the diminution in value rule would involve a somewhat unreal or speculative valuation exercise or would fail to take account of a particularly relevant subsequent event, damages can be based on the actual loss suffered.
3. The diminution in value rule should generally apply to the entering into of a Lease as well as the acquisition of property.
4. Accordingly, the damages payable by Strutt & Parker should be based on the diminution in value and not the actual income lost.
5. As neither party had actually put forward valuation evidence, the damages are to be assessed at a later date.

THE DATE FOR VALUING THE LOSS

The Claimants argued that damages should be assessed in the light of all that was now known but the Court applied the normal rule that the loss should be based as at the transaction date. It held there was nothing that had happened subsequently to justify departing from the normal rule and declined to assess the damages either at the date of the trial or when the Claimants first became aware of the negligence of Strutt & Parker.

CONCLUSION.

Strutt & Parker will, subject to any Appeal, be liable to pay the Claimants damages based upon the difference in capital value as at 2002/3 of leases providing for a 10% turnover rent and the actual Leases entered into.