**(1) James Carleton Seventh Earl of Malmesbury (1) William John Maltby (2) Kathleen Hobbs (3) Wilsco 283 Limited (4) v Strutt & Parker (a partnership) Defendant**

**JUDGMENT : MR JUSTICE JACK**: QBD. 18th March 2008

1. On 11 May 2007 I handed down my judgment on liability in this action, and on 10 December 2007 I handed down my judgment on damages. This judgment is concerned with three matters: interest, costs and permissions to appeal. The claim was brought by the trustees of the Malmesbury Estate and the life tenant, Lord Malmesbury, against Strutt & Parker alleging negligence in connection with leases entered into with Bournemouth International Airport of land used by the Airport to provide the main car park for users of the Airport. The individual who had handled the leases was Mr Ashworth, first a partner in Strutt & Parker and later a consultant. I shall not set out again the matters covered in my earlier judgments save as is necessary to explain this judgment, but will take them as read.

2. In my judgment on liability I held that Strutt & Parker had been negligent in respect of the 2002 and 2003 leases, but not in respect of the 2000 lease. I held that Mr Ashworth should have negotiated leases in 2002 and 2003 which contained 'turnover' rent provisions with a split of net car park income of 10 per cent to the Estate. I held that damages were to be assessed on a loss of capital value basis rather than on a loss of income basis.

3. The outcome of my judgment on damages was that the damages in respect of the 2002 lease were £773,479, and in respect of the 2003 lease were £141,660, total £915,139. That does not include interest. Those were assessed on the loss of capital value basis. I held that on a loss of income basis the damages would have been £6,972,569. The sum which was claimed by the claimants at the trial on liability had been up to £87.8 million (Mr Taub's report of 19 January 2007, paragraph 4.20). The main reason why the claimants recovered so much less than that was in large part my finding that the income split should have been 10 per cent. £87.8 million was based on 93.4%. A further significant contributor was my holding that the proper measure of damage was the loss of capital value rather than the loss of income. Lastly I held that the car parks would not in due course have been built over with either one or two levels of decking, thus effectively doubling or tripling their capacity from the time it was done, and that no claim could be made for loss on this basis.

4. I must also mention that in my judgment on liability I dismissed claims against Wilsons. Wilsons, the claimants' solicitors who acted in connection with the leases, were brought into the action as Part 20 defendants by the defendants, and were later made defendants by the claimants. Following the dismissal of the claims I awarded Wilsons indemnity costs against the defendants in respect of their costs incurred against the defendants, and indemnity costs against the claimants in respect of their costs incurred against the claimants. Mr Fitzgerald, a partner in Wilsons, was also made a Part 20 defendant with the firm, but was not made a defendant by the claimants. He had been a trustee. For simplicity I will simply refer to Wilsons.

**A. Costs**

5. Claims which are straightforward are almost invariably settled, and the cost of litigation usually ensures that even complex claims are mostly settled. This litigation has been very hard fought on both sides, and, as I will relate, it has features which make it unusual.

6. The costs are very large. The claimants' costs are put at £ 1.84 million including costs incurred in respect of claims against Wilsons. The defendants' costs are put at £2.4 million including costs incurred in proceeding against Wilsons. The defendants have paid Wilsons £1.1 million on account of their costs. The claimants are still negotiating with Wilsons, but expect to pay them about £40,000. These sums total £5.38 million. That is a horrendous figure. It is wholly disproportionate to the sum actually recovered by the claimants.

7. The position of the claimants is that they say that they stand in the position of winners, and should accordingly have the costs of the action subject possibly to an order to reflect their losing on various discrete issues.

8. The defendants submit that the claimants are not to be treated as winners because they were awarded damages which were but a small proportion of their claim. They rely on the claimants' exaggeration of their claim, which the defendants say, made mediation impossible. They refer to a number of discrete issues on which the claimants lost and say that they should have the costs of those, which I should assess as a proportion of their total costs. They say that there should be no order as to the balance. They also make submissions based on the claimants' alleged failure to comply with the Professional Negligence Pre-Action Protocol, and on offers which they made to the claimants by letters dated 20 August and 26 October 2007.

9. In order to provide the basis for my decisions on costs I must set out the history of the proceedings at some length. The sums at stake and the submissions which I heard over more than three days merit the exercise.

10. The 2000 lease is dated 20 January 2000. The 2002 lease is dated 14 August 2002. The 2003 lease is dated 28 November 2003. The most important by far was the 2002 lease. It runs for 24 years from its date. The 2003 lease relates to an adjacent field, and follows the terms of the 2002 lease. The 2000 lease ran until 8 July 2005, and was superseded by the 2002 lease. There was an earlier lease, the 1997 lease, which had been negotiated by the defendants. It was not alleged in the action that there had been negligence in respect of this lease.

11. Lord Malmesbury first learnt that the defendants might have been negligent in late 2004 through the advice of a property developer, Mr Paul Sutton, who told him what income Bournemouth International Airport – 'BIA', were getting from the car park. On 27 January 2005 Mr Fitzgerald wrote to Mr Ashworth stating that the claimants had decided to appoint a new development adviser. Lord Malmesbury consulted solicitors recommended by Mr

Sutton, Stockler Brunton. Stockler Brunton obtained a statement from Mr Rippon-Swaine who had been head of BIA's Property Services from 1997 to 2004. He had negotiated the 2002 and 2003 leases with Mr Ashworth. He said, by an amendment which it is asserted he made to the draft statement, that, if BIA had been pressed, BIA would have agreed to pay rents based on a 'significant percentage of the [car park] revenue.' That statement was not included in the witness statement from Mr Rippon-Swaine which was relied on at the trial, though he did there say that BIA would have been forced to concede a turnover rent.

12. Mr Sutton also approached Britannia Parking Limited with the object of obtaining expert evidence as to liability and quantum. They advised that it was usual for a landlord to obtain the vast majority of the proceeds of a car park. Stockler Brunton were told that a landlord usually took between 85 and 95 per cent of the net proceeds by way of turnover rent. On 3 June 2005 Britannia calculated the current open market rental as £770,457 per annum. The figures showed an overall split of 87.47 per cent going to the claimants. The claimants were in fact receiving £9,000.

13. It is as well to say at this early stage that it has always been accepted that typically car parks such as those used in connection with airports are leased on turnover terms whereby the airport-landlord obtains the great majority of the net earnings and the operator gets but a comparatively small percentage. Thus such terms would have been appropriate if BIA had owned the land and had been leasing it to a car park operator. The claimants' difficulties have arisen from the fact that it is here BIA who are the lessees, and from the particular features of BIA's position. A very important feature is that an airport such as BIA, whose clients are largely low cost airlines, must fund the running of the airport not so much from the hard negotiated landing charges but from subsidiary activities, of which car parking is one of the more important, if not the most important. So BIA needed the money. BIA owned land within the Airport which it could use for car parking – although it was not as convenient as the claimants' land and it did not have planning permission. BIA also controlled the access to the Airport Terminal by means of a private road. The advice from Britannia took no account of these matters.

14. The letter of claim headed as being written pursuant to the Protocol is dated 17 June 2005. It is plain that the writer had the provisions of the Protocol in mind in the structure of the letter. It asserted that the advice in respect of the 1997 lease had been negligent but accepted that any claim was time-barred. It asserted that the 2002 and 2003 leases should have been negotiated to provide that the claimants got around 80 per cent of the net receipts. It asserted that the current market rent under the 2002 lease should be £770,457 and enclosed a schedule showing the calculation in comprehensible terms. Under the heading of financial loss it was stated that Stockler Brunton were trying to calculate the proper rents for past years. As to future years it was said that they would try to obtain figures for the increases in passenger numbers for the next 21 years in order to calculate the rents. It was not stated, but did not need to be stated, that passenger numbers are related to car park use, which is related to car park profit, which is related to turnover rent. The letter referred to a possible limitation problem in respect of the 2002 lease claim, which was later dealt with by a standstill agreement. It may fairly represent the position to say that the claimants saw Mr Ashworth as having failed to recognise a goose that laid golden eggs and as having sold it as an ordinary goose, causing them a massive loss.

15. The defendants, or rather their insurers, instructed WHCG to act on the defendants' behalf. WHCG acknowledged the letter on 8 July 2005 and asked a number of questions. On 11 July Stockler Brunton responded to the points raised. On 18 July WHCG wrote concerning the standstill agreement, and asked for a chronology in addition to that which had been set out in the letter of claim. That was sent on 19 July. There were other letters. WHCG wrote with their Protocol letter of response on 7 October. The letter complained that in breach of the Protocol Stockler Brunton had not set out the claim with sufficient clarity. Under the heading of 'the Big Picture' it was asserted that it had been the claimants' aim to optimise the development of the Hurn Estate in the broadest context, seeing their relationship with BIA as 'a partnership'. It was said that the car park leases were an integral part of this process, and that 'it was implicit in this understanding and development strategy that the land would be leased by your clients on terms which were independent of terms which may have been concluded on an open market basis.' It was said that it was recognized that BIA was reluctant to pay a full economic rent, and that 'the rental may or may not have amounted to the best rental obtainable in open market terms.' It was stated that Wilsons and Mr Fitzgerald would be joined in any proceedings. The 'bigger picture' featured more at the start of the liability trial than at its end. I refer to it in the liability judgment in paragraphs 21 and 129(f) in particular. I have to consider how the letter of 7 October would have been received by the claimants and their advisers. The answer that it appears to provide is that Mr Ashworth did not press for turnover rents because of the advantages to be gained elsewhere from cooperation with the Airport, and that the claimants knew that the rents were low for that reason. They would rightly have regarded this as a defence of no substance. The letter complained about the absence of quantification of loss, saying that it was 'obscure'. In a letter of 24 October Stockler Brunton accepted that quantum was still at large and said that it would have to be dealt with separately once experts had been appointed. They said that there was not a single letter which suggested that the claimants did not intend to get a commercial rent.

16. The claim form was issued on 9 November 2005 and particulars of claim were served with it. The claim was made on the basis that typically landlords received 80 per cent of net revenue. It was made in various ways but the essence was that Mr Ashworth had failed to pursue turnover rents or other provisions whereby equivalent rents could have been obtained. It was said that the claimants had been deprived of a commercial turnover rent and would supply a schedule after disclosure from BIA of its parking receipts. It asserted that the claimants had lost the future estimated rent discounted for early receipt or the capital value at today's value. Particulars were to be

provided after the disclosure referred to. That disclosure could not help with a major problem in estimating the future losses, namely car park usage and income to be derived from forecast passenger numbers up to 2026. Although these particulars of claim refer to the two alternative measures of damage which I have previously mentioned, from here on the claimants proceeded on the basis of the first – loss of earnings, and, so far as I recollect, the appearance of the second in the particulars of claim has never been commented on. However, when in October 2006 the claimants served their final schedule of loss, they in effect equated the capital loss to the loss of earnings loss by taking the capital lost as the earnings loss, as will be seen below.

17. The defence was served on 17 January 2006. It was asserted in respect of the 2002 lease that among other matters it was part of 'the bigger picture' and was not a typical commercial arrangement and that BIA had refused to pay a turnover rent.

18. The claimants' allocation questionnaire dated 24 January 2006 put the value of the claim as 'over £100,000,000'. On 20 February orders were made that statements of witnesses of fact be exchanged by 9 May, and for a case management conference on 23 March. On 23 March it was ordered that the defendants' application to join Wilsons as Part 20 defendants should be heard on 10 May. The claimants had resisted the joinder of Wilsons and Mr Fitzgerald saying that there was no case against them and that their joinder would add to the costs. So the Master ordered that he would hear submissions on behalf of Wilsons before they were joined. On 20 February it was also ordered that the claimants serve a preliminary schedule of loss by 9 May, and that there be permission for one expert surveyor/valuer each, reports to be exchanged by 23 June, and permission to the claimants for a passenger forecasting expert, the report to be served by 23 June. If the claimants wanted to rely on an expert in car park lease negotiations, the report was to be served by 23 June. There was to be a further hearing on 29 June. On 27 April Stockler Brunton asked for a 2 month delay in serving the preliminary schedule of costs because BIA was to produce its forecast of future passengers within 4 weeks. On 28 April WHCG refused saying that it prejudiced the preparation of their defence and their consideration of settlement or mediation. On 2 May Stockler Brunton responded enlarging on their difficulty in obtaining figures for the future loss, and saying that there was no prejudice and in many actions it was unclear at the outset what the damages were. On 10 May an order was made extending the time to 23 June 2006, and other time limits were extended to the hearing on 29 June. On 10 May permission was also given to the defendants to join Wilsons and Mr Fitzgerald. On 17 May 2006 the defendants joined Wilsons and Mr Fitzgerald as Part 20 defendants. Mr Fitzgerald had been one of the claimant trustees. He had to be replaced.

19. On 22 June 2006 the claimants served their preliminary schedule of loss. It put the loss at £80,255,327. A report from Mr Stuart of Britannia was served which put the loss of rent over the full period of the leases at £141,264,393.

20. On 29 June 2006 WHCG advised that the defendants should retain leading counsel. That was the day of the further case management conference. It was ordered that statements of witnesses of fact be served by 28 July, and that there be permission for experts in the fields of valuation and surveying, passenger forecasting, planning and car park lease negotiations. Instructions and questions to experts were to be notified by 28 July. Reports were to be served by 27 October. The defendants were to serve a preliminary counter-schedule of loss by 6 October, the claimants their final schedule by 8 December, and the defendants their final counter-schedule by 15 December.

21. At some point during the latter part of the summer the trial was fixed for 5 February 2007. The trial did commence on that day. It was 15 months after the commencement of the proceedings. Given the complexities of the case, particularly the issues for the experts, this was a short period.

22. On 6 October 2006, following much complaint by WHCG, the claimants provided a final schedule of loss. The claim for loss of rent discounted for early receipt was £100,555,373. The capital value loss was put at the same figure on the basis that the capital value consisted of the rental value plus the reversionary value on expiry of the leases (which was the same with and without negligence). The claim was put an alternative basis that, if BIA had refused to pay the rents claimed, the claimants would have achieved the same result by letting the car park to an independent operator.

23. On the same day the defendants and Wilsons served preliminary counter-schedules of losses. The defendants did not make any quantification of the loss if negligence was established. The schedule said nothing as to the likely split if BIA had agreed a turnover rent. In contrast Wilsons set out, as their primary calculation of loss, a range of £337,000 to £447,000 based on a 90/10 turnover rent in favour of BIA. Wilsons had also calculated the loss on the basis of an 80 per cent split in favour of the claimants as £1.224m. This difference of approach between the defendants and Wilsons was to continue. For at the conclusion of the trial the defendants' case was simply that the claimants would never have obtained a turnover rent, whereas Wilsons said alternatively that, if there would have been a turnover rent, the split would have been 10 per cent, or at the most 20 per cent.

24. On 16 October 2006 Simmons & Simmons, representing Wilsons, wrote to Stockler Brunton suggesting mediation. The outcome was a 'without prejudice' meeting between the three firms of solicitors on 7 November, and then further correspondence. Nothing came of it. I will have to revert to what happened in greater detail. I record here that it has been agreed that privilege shall be waived in respect of all 'without prejudice' matters.

25. On 2 November 2006 Butterfield J gave the claimants permission to add Wilsons as defendants. The application had been issued on 5 October. The claimants adopted the claims made by the defendants and added some of

their own. Time for service of expert reports not yet served was extended to 24 November. Further permissions were given for civil engineering experts as to decking and access, and for quantity surveyors. The defendants' application to vacate the trial date was refused.

26. On 13 November the defendants served an amended defence and counterclaim. Among other matters it was pleaded that the idea of a third party operating the car parks was not viable by reason of BIA's ability to provide its own car parking and BIA's control of the access road to the terminal.

27. On 22 December 2006 the defendants served a final counter-schedule of loss. It raised a number of points but did not say anything about the split that might have been achieved if BIA had agreed to a turnover rent. Wilsons served their final counter-schedule on 22 December. It stated 'On the Claimants' own evidence, the normal relationship between an airport and a car park operator involves the airport retaining the bulk of the car park income.' It went on to refer to BIA's ownership of the business which generated the car par income and control of the access road, that BIA could develop its own car park as its Masterplan showed, and that the only alternative use of the claimants' land was agricultural. It concluded that, if BIA had been prepared to agree a turnover rent, the probability was it would have insisted on retaining 90 per cent of the net revenue. Neither counter-schedule took any point that the claimants were not entitled to claim damages on the basis of loss of rent rather than capital value.

28. I first came into the case when I heard the pre-trial revue on 15 December 2006. The first matter which I had to deal with was an application made by the defendants and Wilsons for third party disclosure from BIA. BIA were concerned at being asked to produce commercially sensitive information. I adjourned this to enable discussions to take place. The outcome was the disclosure of limited information as to car park income. The application should have been made much sooner, perhaps by the claimants. On 24 November the claimants had served the report of their surveyor expert, Mr Chitty. He had signed it on 27 July. I was asked to give the claimants permission to rely on a new expert instead, Mr Joseph, as it was considered that Mr Chitty's expertise was inappropriate. The claimants should have appreciated this long before because WHCG had pointed out in a letter dated 14 July 2006 that Mr Chitty was not being asked to consider the facts relating to the Airport. I gave the defendants permission to rely on the expert evidence as to highways, already served, and for the claimants to answer this. Likewise for Wilsons to rely on the evidence of a solicitor as expert.

29. On 20 December Mr Joseph's report was served. He considered that the claimants should been able to obtain an 80 per cent split in their favour. He included calculations done on a basis of 90 per cent. He had been specifically asked to deal with the issues raised by the defendants' experts, Mr Theophilus and Mr West, served in late November, as to the bargaining strengths of the claimants and BIA. In effect he dismissed them. He considered that the claimants were in a position to dictate terms, save that he stated that it was a matter of dispute as to whether the claimants had a right to use the road leading to the terminal, and that, if it were found that BIA could prevent access, instead of a 90/10 split, a 75/25 split in the claimants' favour would have been appropriate. This view took no account of the fact that, at the times the leases were under negotiation, nobody thought that the claimants did have a right of access. Mr Joseph's qualifications and experience made him an appropriate person to be providing the report. The report included a 22 page chronology extracted from the correspondence and running from 1992 to 2005.

30. The claimants' expert accountant was Mr Taub. His report was only served on 19 January 2007. In paragraphs 4.19 to 4.25 he summarised his calculations based on a number of variables. He considered 4 variables for the split: 93.4, 80, 50 and 14 per cent. This was the only reference on the claimants' side at any time to a figure close to that awarded.

31. On 30 January 2007 WHCG wrote to Stockler Brunton “without prejudice save as to costs”. They offered to settle the litigation on terms that both sides dropped their claims (the defendants had a counterclaim for £41,360 for fees) and the claimants paid the defendants £250,000 on account of costs.

32. The trial ran from 5 February to 2 March 2007. In his opening written submissions Mr Anthony Speaight QC for the claimants submitted that it made no difference that the claimant car park owners were not the airport operator, and that an 80 per cent split was appropriate. In his opening written submissions Mr Timothy Lamb QC put considerable emphasis on 'the bigger picture'. He wrote: 'If there has been any loss then it was “of a chance” reflected in the diminished value of the reversions at the time of letting.' In support of that he simply cited the decision in *Inter-Leisure v Lamberts* [1997] NPC 49. He did not expressly state that the basis on which the claimants were putting their loss was wrong in law, but that was what was now for the first time being said. One consequence was that there was no evidence on which to assess the loss if he was right, as in due course I have held that he was. It was later agreed that the greater part of the issues relating to damages should be adjourned.

33. I can leave the history there for the moment. It may however be helpful to record the various judgments and rulings which have been subsequently made:

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| 11 May 2007 | Judgment on liability<br>Order including indemnity costs orders between defendants and Wilsons, and between claimants and Wilsons. |
| 15 May | Ruling that damages should be assessed on both bases. |

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| 22 May | Order that the claimants' application for an interim payment should be heard by another judge as I was not available being on circuit. |
| | Claimants granted permission to appeal on measure of damages, refused permission as to percentage split, and as to effect of Stopping Up Order in relation to the Airport Road. |
| 22 June | Order of Langstaff J ordering an interim payment to the claimants of £450,000 with costs to be assessed. The defendants had contested that any payment be made. |
| 9 October | Judgment refusing an application by the claimants to reopen the issue of percentage split and to reopen refusal of permission to appeal on that issue. |
| 10 December | Judgment on damages |
| 19 – 22 February 2008 | Hearing as to costs, etc. |
| | Orders have been made to extend the time in which either party must file a notice of appeal to 21 days from the handing down of this judgment. |

**The law**

34. The exercise of the court's discretion as to costs is provided by Part 44.3 of the CPR. It is as well to set out the relevant provisions, namely all save sub-paragraphs (3) and (9).

"*44.3(1) The court has discretion as to –*

*(a) whether costs are payable by one party to another;*

*(b) the amount of those costs; and*

*(c) when they are to be paid*

*(2) If the court decides to make an order about costs-*

*(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*

*(b) the court may make a different order.*

*(3) ….. .*

*(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances including-*

*(a) the conduct of all the parties;*

*(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and*

*(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.*

*(5) The conduct of the parties includes-*

*(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;*

*(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*

*(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;*

*(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.*

*(6) The order which the court may make under this rule include an order that a party must pay-*

*(a) a proportion of another party's costs;*

*(b) a stated amount in respect of another party's costs;*

*(c) costs from or until a certain date only;*

*(d) costs incurred before proceedings have begun;*

*(e) costs relating to particular steps taken in the proceedings;*

*(f) costs relating only to a distinct part of the proceedings;*

*and*

*(g) interest on costs from or until a certain date, including a date before judgment.*

*(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).*

*(8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.*

*(9) ….. .*"

35. Paragraph 44(2)(a) is a restatement of the pre-CPR principle that 'costs should follow the event'. Its application requires the court to determine which is the successful party, and which is the unsuccessful party. That will usually be obvious, but as the cases show it can on occasion be a matter of some difficulty. This case is one of them. Paragraph (4) requires the court to have regard to, inter alia, the conduct of the parties, success on some parts of a case, and payments into court and admissible offers to settle. Paragraph (5) provides that conduct includes conduct throughout, in particular the extent to which any pre-action protocol was followed, the reasonableness of pursuing an issue, the manner of pursuit, and whether a claimant has exaggerated his claim.

36. It is submitted here that the claimants should be treated as the unsuccessful party because they have recovered so small a fraction of what they were claiming, but the defendants do not go as far as asking for a general order for costs in their favour: they submit that no order should be made. It is submitted that another route to the same outcome is to consider the exaggeration of the claim. Plainly they are closely connected lines of reasoning.

37. I will take the authorities to which I have been referred and which I have found helpful in order of time.

38. ***AEI Rediffusion Music Ltd v Phonographic Permance Ltd*** [1999] 1 WLR 1507 is an early case on the cost provisions of the CPR. Lord Woolf MR emphasised that while the 'follow the event principle' still had a significant role, it was a starting point from which a court could readily depart, and that under the new rules courts should be more ready to make orders reflecting the outcome on different issues.

39. ***Johnsey Estates (1990) Limited v Secretary of State for the Environment*** [2001] EWCA Civ 535 was a case where the claimant had made what I may call a partial recovery. It is necessary to look at the facts to see the circumstances in which the court decided as it did. It was a claim by a landlord for dilapidations, in a situation where by section 18(1) of the Landlord and Tenant Act 1927 the damages for breach of the repairing covenant might not exceed the diminution in the value of the reversion. The tenant's expert valued the diminution at £150,000, and the landlord's at £1.25m. The tenant paid £200,000 into court. The £200,000 was later paid out as an interim payment. The tenant's expert revised his valuation of the diminution to £200,000, and the landlord's down to £1.025m. The tenant paid into court a further £250,000 bringing his total up to £450,000. The tenant obtained leave to withdraw an admission that the costs of repair exceeded the diminution in value. The landlord introduced a new claim for breach of covenant relating to health and safety regulations. Its total claim then exceeded £2.25m before interest. At the trial the judge rejected the landlord's new claim. He put the cost of repairs at £840,106. He assessed the diminution in value of the reversion at £200,000. With interest that came to £236,000, which was what the landlord recovered. The judge awarded the landlord his costs up to the date of the first payment in £200,000. He ordered the parties to pay their own costs between the dates of the two payments in, save that the tenant should have its costs of the diminution in value issue, and that thereafter the tenant should have his costs. The landlord said that he should have all his costs up to the date of the second payment in. The Court of Appeal held that with regard to the period up to the second payment into court the landlord had succeeded: he had beaten the first payment in and had had to sue to do so. The tenant had then been contending that the diminution was £150,000. It was submitted for the tenant that the landlord had made an inflated and unrealistic valuation of his claims and that this had meant that the action could not be settled at an early stage. Rejecting the submission Chadwick LJ stated:

*"The submission has some superficial attraction on the facts of the present case; but, for my part, I would reject it. It seems to me that a court should resist invitations to speculate whether offers to settle litigation which were not in fact made might or might not have been accepted if they had been made. There are, I think, at least two reasons why a court should not allow itself to be led down that road. First, the rules of court provide the means by which a party who thinks that his opponent is not open to reason can protect himself from costs. He can make a payment in; he can make a* Calderbank *offer; now, under the Civil Procedure Rules 1998, he can make a payment or an offer under CPR Pt 36. The advantage of the courses open under the rules is that they remove speculation. The court can see what offer was made, when it was made, and whether it was accepted. Second, speculation is likely to be a most unsatisfactory tool by which to determine questions of costs at the end of a trial. It is not, I think, suggested that each party would be required to disclose, at that stage, what advice it had received, from time to time, as to the strengths and weaknesses of its claim or defence. But without knowing that – and without a detailed knowledge of the financial and other pressures to which each party was subject from time to time – speculation would be hopelessly ill-informed. If Mr Gaunt's submission were to be accepted generally, there would, I think, be a serious danger that, at the end of each trial, the court (in order to decide what order for costs it should make) would be led into another, potentially lengthy, inquiry on incomplete material into 'what would have happened if …?' I am not persuaded that that could be compatible with the overriding objective to deal with cases justly."*

He then summarised the factors that were relevant to costs as (1) the question whether the diminution exceeded the first payment in was in issue until the second payment in, (2) the landlord succeeded on that, (3) unless the landlord had been unreasonable in relation to it, he should have his costs of it, (4) he had not, (5) –(7) the landlord succeeded on issue whether the costs of repair exceeded the diminution, (8) unless he had been unreasonable, the landlord should have his costs on that to a date, (9) to (12) the landlord failed on various other issues. The appeal was allowed in a manner to give effect to these matters. This was a case where the Court of Appeal declined to take a broad approach that the claim was exaggerated and so the claimant should be deprived of costs. Instead it analysed the issues and the successes and failures and made orders accordingly.

40. I need cite only one passage from the judgment of Thomas J in *Quorum v Schramm* [2002] Lloyd's Rep.72:

"*40. On the facts of the case, I am quite satisfied that the claimants did not exaggerate the claim; they had taken the opinion of a distinguished expert. It is clear that valuation of a work of art of this kind is extremely difficult. I do not think it right to say that a claimant who acted in reliance upon the evidence of a distinguished expert who had proper grounds for advancing his view, can be said to have exaggerated the claim. Nor, it seems to me, can it be said that the claim was one that was unreasonable or too large. It was put forward in good faith and there were reasonable grounds for advancing it. Furthermore that reliance on the expert evidence of value did not in any way affect the length of the trial. It would have been necessary to review the evidence of the contemporaneous attempts to market* La Danse Grecque*, the history of the dealings in it and to hear the two distinguished experts, Mr Dauberville and Mr Roundell. This is not a case therefore where size of the claim put forward has affected the length of the trial; nor can it be said that the claim was exaggerated or unreasonable.*"

41. The claimant in *Islam v Ali* [2003] EWCA Civ 612 made a claim for running the defendant widow's husband's accountancy practice at £40 per hour totalling £156,000. He was awarded £12,746, which was calculated after deducting about £76,000 which he had already received. That was more than the defendant had offered in

settlement. Two questions were posed for the court: who was the real winner; what did justice require? Auld LJ reached his conclusion as follows:

"*23. In my view, the reality of this case is that Mrs Ali was the winner. She was facing a claim substantially greater than the amount finally awarded. There were, as I have said, competing claims and offers not only as to the manner of calculation of the amount due but as to the amount, and issue as to the latter ranging from nil to a balance of £80,000 after giving credit for the monies received. The sum of £12,746.41 ordered was arguably as limited a loss as it was a gain. And it emerged as a result, not only of Mr Islam losing the case on principle on the main issues in the case, but also as to the true amount due out of a very much larger claim. The disparity between what Mr Islam sought, including what he put Mrs Ali through to get it, and what he received was so large as to put the relatively small amount finally awarded in the balance between two rival contentions into relative insignificance.*"

The defendant had submitted that there should be no order as to costs, and that was the order made. This was a case where there had been no dispute as to the basis on which recovery was in fact ordered : the claimant had failed on the other disputed basis which he put forward.

42. ***Painting v University of Oxford*** [2005] EWCA Civ 161 was a claim for personal injuries. Judgment was entered for the claimant for damages to be assessed with an agreed deduction of 20 per cent for contributory negligence. At the trial of quantum the claimant asked for £500,000 less the 20 per cent. She was awarded £25,331. Nonetheless she was awarded all her costs. The defendant had paid £184,442 into court, but later remembered that it had video evidence which suggested that the claimant was not as bad as she was suggesting. Leave was obtained to withdraw all but £10,000. The judge found that the claimant had misled her medical expert as to the continuance of her back injury, but he held that the defendant could have protected itself by a more adequate payment, had not done so, and should pay. The Court of Appeal considered that the trial had been concerned overwhelmingly with the issue of exaggeration, on which the defendant had won, and so was to be considered the winner. There were two further points referred to by the court. If the claim had not been so exaggerated, it would have settled at an early stage. The claimant never made any counter-offer. ***Islam v Ali*** was cited, and also ***Malloy v Shell UK Ltd*** [2001] EWCA Civ 1272, a case concerned with dishonest exaggeration where the trial judge's award of 75 per cent costs to the defendant was increased on appeal to 100 per cent. In the course of his judgment agreeing with the leading judgment of Maurice Kay LJ, Longmore LJ stated:

"*26. However, exaggeration can take any forms and the rule makes no distinction between intentional exaggeration or unintentional exaggeration. Here, Mr Farmer was constrained to accept that Mrs Painting had been deliberately misleading in the course of a claim, and the fact that the exaggeration is intended and fraudulent is, to my mind, a very important element which needs to be addressed in any assessment of costs*"

43. It does not emerge from the judgment in *Hooper v Biddle & Co* [2006] EWHC 2995 (Ch) in any clear terms what the underlying dispute was. It was a claim against solicitors and its seems from paragraph 20 of the judgment of Miss Prevezer QC sitting as a deputy High Court judge that the defendants had acted in a property transaction whereby the claimant leaseholders intended to obtain the freehold, but had failed, allegedly by reason of the solicitors' negligence. The claim was settled on the day before trial when the claimant accepted the defendants' open offer of £38,000 with the court to determine costs. It seems that at the letter of claim stage the claimants put the claim at £3.75 million, but when proceedings were started that was reduced to £350,000 plus interest. The single joint expert who was appointed valued the claim at £38,000. That was 2 months before the trial. Later the claimants made a Part 36 offer to take £38,000 plus costs, and the defendants responded with £38,000 plus no costs on the basis that the claimants were unlikely to get their costs. After further offers the defendants offered £38,000 with the court to determine costs. That was the offer which was accepted. The claimants got no interest. The claimants submitted that they had recovered the full amount of the expert's valuation and that liability was always in issue; they had had to sue to get it; the defendants had declined to mediate. The defendants submitted that the claim had always been grossly inflated and the claimants had only recovered less than 10 per cent of it. The defendants asserted that they were not against mediation and had done everything to settle the case. The judge held that it was appropriate to make no order as to costs. The outcome was to be regarded more as a failure for the claimants. Their costs were of the order of £120,000. The judge accepted the defendants' contention that the claim would have been handled in a wholly different way if it had been valued at £38,000.

44. The facts in ***Jackson v Ministry of Defence*** [2006] EWCA Civ 46 are set out in the headnote as follows:

"*The appellant MOD appealed against an order for costs made in favour of the respondent soldier (J) following a trial for quantum in a personal injury action. J had issued proceedings for personal injury against the MOD for injury suffered during a training exercise. J advanced substantial claims for damages for future loss of earnings and for specially adapted accommodation based on his account of his residual disability. The medical evidence did not support J's claim of residual disability and those claims were eventually abandoned, reducing his claim from over £1 million to £240,000. The MOD made a CPR Part 36 payment into court in the sum of £150,000. The parties were ordered to attend a pre-trial joint settlement meeting but no agreement was reached. Damages of £155,000 were awarded with costs reduced by 25 per cent to reflect the fact that the award had only just beaten the payment into court and the fact J had exaggerated his evidence. The MOD contended that (1) the judge should have taken into account the proceedings of the joint settlement meeting as it had gone with the intention to negotiate and had made an offer to settle; (2) the costs should have been reduced by more than 25 per cent as J had exaggerated his claim and the reduction did not reflect the fact that the MOD had incurred expenses trying to meet the exaggerated claim.*"

The Court of Appeal declined to consider the settlement meeting : it had been held "*without prejudice*". In the course of his judgment dismissing the appeal Tuckey LJ stated:

"*15. ..... . The claimant was successful in the sense that he established a claim for substantial damages and beat the payment into court, albeit by a small margin. The defendant was perfectly able to protect itself against the fact that it faced an exaggerated claim. As most defendants do in such circumstances, it had access to experienced lawyers and (if necessary) experts to evaluate the strength of the claim it faced. It could with the benefit of such advice -- and perhaps with the benefit of hindsight in this case should -- have made an earlier Part 36 payment into court, and certainly could have increased that payment into court by making a further payment after the unsuccessful settlement meeting. The judge took into account the fact that the claimant had only just beaten the payment in which had been made, as I have already said. What is more, the judge made it clear that it was open to the defendant to challenge specific items relating to the abandoned claims, such as the costs of the experts which were not relied on at trial, at the detailed assessment, where of course the claimant will only be able to recover costs which were reasonably incurred. This is in fact what has happened here, as can be seen from the defendant's points of dispute to the large bill of costs filed on behalf of the claimant.*"

Liability had been disputed but was admitted shortly before the trial.

45. The main issue as to costs in ***National Westminster Bank v Kotonou*** [2007] EWCA Civ 223 related to the judge's order that the parties should each pay one half of the other's costs. The cause of this order was that, although Mr Kotonou had won on the issue of setting aside his guarantee by reason of misrepresentation by the bank, it was only on the fifth representation added on the second day of the trial that he succeeded. He lost on the other four. The Court of Appeal emphasised the court's duty to make issue-based costs orders where appropriate and to do so by means of percentages of the overall costs : paragraphs 21 to 23 of the judgment of Chadwick LJ. The court declined to interfere with the judge's assessment of the appropriate order.

46. Last in this line is the case of *Hall v Stone* [2007] EWCA 1354, where the Court of Appeal were divided. It was a claim for personal injuries arising from a very minor collision between cars, where the three claimants were awarded damages of £1,000, £400 and £600 respectively. It seems that liability was not in issue. The trial judge awarded them only 60 per cent of their costs, and they appealed against that order asking for 100 per cent. It had been a multi-track case instead of being allocated to the small claims track. The defendants cross-appealed, saying that if it appeared that the judge had erred in the exercise of his discretion the order should be reduced. The most important issues at the trial had been whether the claims had been brought dishonestly or whether there had been honest but exaggerated claims. The judge found there was no dishonesty but that the symptoms of injury had been exaggerated to an extent. I note that this seems a somewhat contradictory finding, and that it is possible that the contradiction explains the different approaches in the Court of Appeal. The judge found it difficult to say who had won. Offers had been made by the defendants, which were exceeded in one case by a small amount, in another by a little more, and in the third case not at all. The judge took that into account. Looking at the matter overall he concluded that an order for 60 per cent appropriate. Waller LJ considered that the claimants were to be considered the winners. He held that nonetheless the court should not interfere with the judge's order. He was entitled to take account of the exaggeration of the claims as he did. Smith LJ, with whom Lloyd LJ agreed, reached a different conclusion. She did not consider that the exaggeration of symptoms should sound in costs, nor that initial exaggeration of the claims had any real effect on the costs of the action. She held in paragraphs 80 and 81 of the judgment:

"*80. Mr Higgins submitted that, if the appellants' claims had not been exaggerated in the early stages, the respondent would never have bothered fighting them at all. I can see the force of Mr Higgins's argument but I am not prepared to draw the inference he seeks. I note that the judge made no finding about that. If the respondent's attitude had been that she was prepared to pay a modest sum for these injuries but not the inflated sums which were being sought, her remedy was to make appropriate offers, without prejudice save as to costs.*

*81. On the basis of the judge's rulings and his observations in the course of argument, it does not appear to me that there was any conduct that the judge could have taken into account against the appellants. He certainly had not identified any. Yet, at paragraph 9 of his ruling, he said he would make a global order 'to reflect the offers that were made, the conduct during the course of the case and so on'. He seems to have had in mind the fact that the appellants and/or their advisers advanced the claim on quantum rather high. However, at no stage does he suggest that this resulted in any escalation of costs. In my judgment, the judge fell into error by purporting to take conduct into account against the appellants without identifying the conduct which he had in mind.*"

She held that the judge was wrong to have held that the claimants should have accepted the defendants' offers. She considered that the defendants were the successful parties and they should have their costs in full save for those relating to some medical reports which they had not relied on. It seems to me to be a case in which the judgments turned very much on the views of the facts taken by the court.

47. I do not find it easy to see a thread running through these eight cases (***Johnsey*** to ***Hall***). In each the court was reacting to the particular situation in the case, and was seeking an appropriate solution, that is to say, to do justice between the parties in accordance with the overriding objective stated in CPR 1.1.

48. The leading case on the effect of refusals to agree to mediation is that of the Court of Appeal in ***Halsey v Milton Keynes General NHS Trust*** [2004] 1 WLR 3002. My own summary in ***Hickman v Blake Lapthorn*** [2006] EWHC 12 (QB) of the principles to be extracted was cited to me without dissent. I quote from paragraph 21 of my judgment so far it is relevant:

"*(a) A party cannot be ordered to submit to mediation as that would be contrary to Article 6 of the European Convention on Human Rights – paragraph 9.*

*(b) The burden is on the unsuccessful party to show why the general rule of costs following the event should not apply, and it must be shown that the successful party acted unreasonably in refusing to agree to mediation – paragraph 13. It follows that, where that is shown, the court may make an order as to costs which reflects that refusal.*

*(c) A party's reasonable belief that he has a strong case is relevant to the reasonableness of his refusal, for otherwise the fear of cost sanctions may be used to extract unmerited settlements – paragraph 18.*

*(d) Where a case is evenly balanced – which is how I understand the judgment's reference to border-line cases, a party's belief that he would win should be given little or no weight in considering whether a refusal was reasonable: but his belief must [not] be unreasonable – paragraph 19.*

*(e) The cost of mediation is a relevant factor in considering the reasonableness of a refusal – paragraph 21.*

*(f) Whether the mediation had a reasonable prospect of success is relevant to the reasonableness of a refusal to agree to mediation, but not determinative – paragraph 25.*

*(g) In considering whether the refusal to agree to mediation was unreasonable it is for the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful – paragraph 28.*

*(h) Where a party refuses to take part in mediation despite encouragement from the court to do so, that is a factor to be taken into account in deciding whether the refusal was unreasonable – paragraph 29. Public bodies are not in a special position – paragraph 34.*"

**The defendants' costs incurred against Wilson's and the costs that they have had to pay Wilsons.**

49. I take this first because it enables me to put these costs on one side and to concentrate on the remainder.

50. In my ex tempore judgment delivered on 11 May 2007 I gave my reasons for awarding Wilsons their costs on an indemnity basis. I held that the decision to join Wilsons was a tactical one, and that no proper consideration had been given to whether there was any sufficient basis for making a claim against Wilsons: if it had been properly considered, it would have been realised that there was not. It was stated in WHCG's letter of 9 October 2005, the Protocol letter of response that, if the claimants did not join Wilsons and Mr Fitzgerald in any proceedings, the defendants would do so: paragraph 3.04. The suggested basis was that Mr Fitzgerald had been involved in the commercial decisions on the leasing. I presume that this came from Mr Ashworth. It had no foundation. The defendants applied to join Wilsons prior to the case management conference on 23 March 2006. The claimants resisted the application on the basis that there was no case against Wilsons and that the joinder would add to the complexity of the action and costs. (Nonetheless, subsequently, as I have said, the claimants yielded to the temptation to join Wilsons as defendants, and in addition to adopting the defendants case against Wilsons to add their own independent claim. I ordered that Wilsons should also have their costs against the claimants on an indemnity basis.)

51. In his submissions on this aspect Mr Johnson rightly accepted that the joinder of Wilsons was for tactical reasons. He said, however, that it was done because of the size of the claim. That might carry some weight if the defendants had had a properly arguable case against Wilsons, or at the least had good grounds for thinking that they had. As my judgment on indemnity costs explains, it became clear during the opening days of the trial that the defendants had never properly considered whether they had a case and what it was. I have no doubt that the defendants should carry the consequences of their conduct, and that the claimants should not. Mr Johnson submitted as a fall back position that in any event the claimants should reimburse the defendants what they have had to pay Wilsons in respect of Wilsons costs relating to quantum. For Wilsons ran their own full case on quantum. (It had occurred to me that the defendants and Wilsons could have combined forces on that, but it does not appear that this was ever considered.) The defendants knew the case that they were bringing Wilsons into: they must face the consequences of their own conduct.

52. I conclude that I should decline to order that the defendants' costs payable to Wilsons should be reimbursed by the claimants. It also follows that in general the claimants should not have to pay the defendants' own costs incurred against Wilsons. I have not been provided with any estimate of the costs the defendants have incurred against Wilsons, and have no means of forming a view as to the amount or proportion.

**The discrete issues**

53. I take these next because what is ordered on this is relevant to the order as to the balance of the costs. The defendants ask me to assess what proportion of the costs overall were related to these issues and ask for an order that the claimants should bear that proportion of their own costs and of the defendants' costs, including Wilsons' costs: written submissions paragraph 2.3(1). The claimants stated that, if it was problematic to make the estimates, they were happy that the matter be resolved by detailed assessment, for they were confident that the defendants had over-stated the costs substantially. But Mr Speaight submitted for the claimants that I should not make an order as sought because of two matters, which I will consider first.

54. The two matters were the defendants' raising only at the start of the trial that the correct measure of damage was a valuation basis rather than earnings, and the late service of the witness statement of Mr Jones. The position as to Mr Jones requires an explanation. His witness statement was not served on behalf of the defendants until 19 January 2007. No explanation as to why it was so late has ever been provided. He was managing director of BIA from 1999 to mid 2003 and so was a very important witness as to BIA's attitude to the leases. He was far

less favourable to the claimants than Mr Rippon-Swaine who had previously been the only witness able to speak as to the 2002 and 2003 lease negotiations. So the arrival of the further witness statement was a blow to the claimants. His evidence made it more difficult for them to establish that they would have achieved a turnover rent, particularly one with a substantial percentage split. I refer to paragraph 78 of the liability judgment.

55. I accept that these are matters that I should take into account, but I do not consider that they come in here. I should take them into account when I consider the order which I should make as to the costs generally, that is, whether it is right to make no order as the defendants suggest. I refer to them in paragraphs 76 and 79 below.

56. The issues on which the defendants won and which they ask me to take into account are:

(1) **The rights of way issue**. This had two aspects. The first was whether Mr Ashworth should in the period of the negotiation of the leases have appreciated that the claimants might have a right of way over the Airport road and should have advised the claimants to investigate this. I held that he should not: I refer to paragraphs 69 and 143(2) of the liability judgment. The second aspect arose in the month or two before the trial when the claimants raised the assertion that they in fact did have a right of way. This involved the instruction on the defendants' side of a separate leading counsel with expertise in this esoteric branch of the law, Mr Edwin Johnson QC. (I insert here that in consequence it was Mr Johnson who has stepped into the shoes of Mr Timothy Lamb QC to argue costs, following Mr Lamb being made a circuit judge). I dealt with the several arguments in paragraphs 202 to 215 of my judgment, and held that there was no right of way. On my analysis of the issues which arose in relation to negligence, the actual status of the road was irrelevant.

(2) **An independent car park**. The claimants' case was that, if BIA had not agreed to pay an appropriately high turnover rent, the claimants would either themselves, or far more likely through an independent specialist operator, have run a car park for the airport on the land and collected the profits which they had claimed by way of damages. The problem with this was that the success of such a venture would have so diminished BIA's income that BIA would have been bound to take forceful steps to prevent it. As BIA controlled the road giving access to the terminal it could prevent access to the road from the claimants' land whether direct access as is now enjoyed or by buses carrying parking passengers and taking a long way round. A letter to a potential car park operator telling it that access was not permitted would have stymied the venture. This had not been thought through by the claimants' advisers. Time and evidence, including expert evidence, was taken up with this issue.

(3) **Decking** The claimants asserted that the capacity of the car park would in due course have been doubled or trebled by the addition of decking to carry one or two floors of cars in addition to those at ground level. In paragraph 198 of the liability judgment I held that there was no realistic prospect of decking being constructed. The problems had simply not been faced.

(4) **The cost of quantifying damages on the alternative loss of earnings basis** The assessment of damages on a dual basis followed from the request of the claimants, to which I acceded in my ruling of 15 May, where I gave my reasons for holding that this was the overall better course.

(5) The 2000 lease The claimants' did not succeed in establishing negligence in respect of the 2000 lease. It is, however, apparent from the liability judgment that the full investigation of the negotiations for the 2000 lease was essential to any conclusion as to the subsequent negotiations. There was little additional evidence caused by the allegation, though some time was spent on submissions in connection with it. It was a case which was responsibly made.

57. Each side produced estimates of the costs incurred in connection with these issues. The defendants instructed Mr Landolina, an independent costs draftsman brought in for this purpose, who therefore had no prior acquaintance with the action. His figures were answered by Mr Brunton of Stockler Brunton. As has happened so often in this action, the positions taken are at opposite ends of the spectrum. Mr Landolina also considered other issues, but they were not included in the defendants' written submissions as requiring an issues order: see paragraph 6. Mr Johnson was right not to do so. I am asked to consider these estimates and thereby form a view as to the proportion of the defendants' costs which should be paid by the defendants. The claimants would for the same reason be unable to recover the same proportion of their own costs.

**Issues (1) The rights of way issue, (2) An independent car park, and (3) Decking**

58. Mr Landolina gave a single figure for the additional costs of these items, namely £345,379. Mr Brunton gave £59,908 for the first, £44,026 to £46,026 for the second, and £16,840 to £22,840 for the third, totalling £120,774 to £128,774. Mr Landolina's figure divides into £139,504 for experts, and £205,875 for solicitors' on account costs. I consider that his figures for the experts, Mr Theophilus, Mr West and Mr Stern are over-stated, and I estimate a reduction of £25,000 to take account of this, giving about £115,000. Mr Brunton allowed only £36,200 to £42,200 for profit costs, which is substantially too low. Mr Landolina at about 20 per cent of the total profit costs to 11 May 2005 (£984,000) is substantially too high. Doing the best I can, 12.5 per cent seems a more reasonable figure, which gives approximately £125,000. I have here taken account of the hours allocated by Mr Landolina, and the fact that these issues undoubtedly extended the trial. Mr Landolina takes no specific account of that important factor. The total then becomes £240,000.

**Issue (4) The cost of quantifying damages on an alternative basis**

59. Mr Speaight accepted that the claimants should bear these costs subject to success on appeal on the measure of damages. Mr Landolina estimated that the defendants' costs attributed to the damages hearing and preparation for it were £675,000, and he attributed half of this, £337,500, to the earnings measure of loss. Mr Brunton

estimated these costs at £43,900 to £93,900. The assessment of damages on the loss of earnings basis was very much easier than that on a valuation basis because it did not involve the very difficult process of valuation. It involved looking at the position at the date of the assessment which was easier than as at 2002 and 2003. Comparatively little time was taken up with it at the hearing. My impression is that overall about 15 per cent of the costs would be related to this basis. That gives a figure of about £101,000.

**Issue (5) The 2000 lease**

60. A full analysis of the circumstances relating to this lease was inevitable. I do not consider that in the circumstances the additional time that was taken up with the issue of negligence in relation to it should attract a separate order for costs.

61. I conclude that of the order of £240,000 of the defendants' total unassessed costs of £1.6m to 11 May 2007 when the liability judgment was delivered relate to issues which should be paid by the claimants. That is 15 per cent. The £1.6m includes costs incurred in advancing the claim against Wilsons. I have held that the claimants should not be responsible for those. I include in that the costs which the defendants incurred against Wilsons on the discrete issues. That is because they joined Wilsons for tactical reasons, did so without making proper any assessment of whether they had a case against Wilsons, and they knew the case that they were seeking to pass on to Wilsons. For the avoidance of any doubt I insert here that of course the defendants should not have to pay any of the claimants' costs which the claimants incurred against Wilsons.

62. There will therefore be orders that :

(1) the claimants shall pay the defendants 15 per cent of their liability costs as determined on detailed assessment if not agreed, and shall not recover 15 per cent of their own liability costs as determined on detailed assessment if not agreed.

(2) the claimants shall pay the defendants 15 per cent of their damages costs as determined on detailed assessment if not agreed, and shall not recover 15 per cent of their own damages costs as determined on detailed assessment if not agreed.

(3) the claimants shall not be liable to pay to the defendants any part of the defendants' costs incurred in bringing the defendants' claim against Wilsons.

**The Protocol – pre-action behaviour**

63. I have considered the letter of claim itself and the related correspondence, and I am satisfied that Stockler Brunton intended to comply with the Protocol. I consider that they gave a sufficient indication of how the claim was put so far as the facts and the negligence were concerned. I think that WHCG took an over-critical attitude and looked for difficulties. Paragraph B2.2(e) of the Protocol requires that the letter of claim shall include 'an estimate of the financial loss suffered by the claimant and how it is calculated. Supporting documents should be identified, copied and enclosed. If details of the loss cannot be supplied, the Claimant should explain why and should state when he will be in a position to provide the details. This information should be sent to the professional as soon as reasonably possible.' Section F of the letter was written with this in mind. The claimants faced a very real difficulty in estimating their loss because of the difficulty in assessing future car park usage derived from estimates of passenger numbers. The letter showed the defendants what their approach was and by quoting a rental of £770,457 for current market rent gave the defendants an indication of the size of the figures. I do not consider that at this point they could have done more. I reject the submission that there was conduct here which should be reflected in the orders for costs.

**Mediation**

64. In his oral submissions Mr Johnson stated that the defendants' point in relation to mediation rested on the exaggeration of the claim. The size of the claim was, as he put it, the elephant in the room. It is tempting simply to move on to the issues raised in connection with the size of the claim, but that would not in fact do justice to the parties' submissions. I need to consider whether what happened in relation to mediation should play a part in my orders as to costs.

65. On 16 October 2006 Simmons & Simmons (who represented Wilsons) wrote to Stockler Brunton saying that, even though the claim was between £80m to £100m, costs would be very high. They suggested mediation, saying that they had discussed it with WHCG. Stockler Brunton replied on 17 October saying in essence four things: (1) the defendants and Wilsons must reach agreement between themselves first, (2) then there should be a without prejudice meeting between solicitors, (3) then they would consider mediation, and (4) the claimants 'would not consider settlement except on the basis of a very substantial payment indeed.' On 20 October Stockler Brunton wrote saying that if the defendants were thinking of the sort of figures in the counter-schedules of loss, the chances of a successful mediation were nil. I refer to my summary of Wilsons' counter-schedules in paragraphs 23 and 27 above. On 23 October Simmons & Simmons wrote saying that it seemed that 'some quite entrenched positions are being adopted by all parties', and that it was precisely here that mediation could help. On 24 October Stockler Brunton wrote saying that there must be a without prejudice meeting between solicitors first, and that a refusal to do so was tantamount to a refusal to mediate. They wrote again saying that it was essential that at the meeting each solicitor had instructions as to the maximum to be offered or the minimum to be accepted, and that they had such instructions. This was a curious lead in to a mediation. On 26 October WHCG wrote saying that liability and causation, not to mention quantum were in issue, and asked if that made the chances of a successful mediation nil. On the same day Stockler Brunton wrote stating that a without prejudice meeting must take place to assess the viability of a mediation with the attendees having clear instructions.

66. The meeting was held on 7 November and was attended by Mr Stockler and Mr Brenan from Stockler Brunton, Mr Williams of WHCG, and Mr Pollock, Mr Roberts, and Ms Hughes of Simmons & Simmons. The meeting was without prejudice, and Mr Stockler stated that it should not later even be referred to. Mr Brennan took a note which was later typed up. There is a dispute as to how accurate and complete the typed version is. Mr Pollock set out his account of the meeting in a letter to his clients dictated later that day. At the meeting Mr Stockler stated that he would put his clients' bottom line and wanted to see if a mediation would be worth while. He put his worst case scenario at £70m. He said BIA had no alternative but to lease the claimants' land and between 80 to 90 per cent was a standard turnover rent. He made no discount for risk on liability. I accept Mr Pollock's description of Mr Williams' response rather than that recorded by Mr Brenan. I think it unlikely that Mr Williams would have bluntly told Mr Stockler that the purpose of mediation was to persuade the claimants they would lose, and not to pay them anything. Mr Pollock wrote: 'This led to quite a heated discussion between Mr Williams and Mr Stockler. Mr Williams' position was that, in the light of Mr Stockler's comments, he had nothing to offer and he refused to give any indication if any money would be forthcoming by way of a settlement offer at mediation. He tried to persuade Mr Stockler that a mediation would still be worthwhile but Mr Stockler made it clear that he was not willing to mediate if there was no money on offer and if all the defendants were interested in was to try and "*work on*" his client.' The difference between the records may largely be one of emphasis.

67. On 8 November 2006 Stockler Brunton wrote to WHCG in an open letter referring to the meeting. This was in breach of the without prejudice basis and in breach of his requirement that it should not be referred to. He stated in his letter that the meeting might be referred to on the question of costs. That was not the basis on which it had been agreed that it should be held. The letter concluded that WHCG had no genuine intention to resolve the matter. On 14 November a joint letter from Simmons & Simmons and WHCG was sent to Stockler Brunton. Simmons & Simmons had made the running in drafting and preparing the ground for the letter. It had been preceded by, in particular, a telephone conversation between Mr Pollock and Mr Stockler in which Mr Pollock had said that he hoped to persuade Mr Williams to say that the defendants would attend mediation on the basis they might have to make a substantial payment. He also said that if the statement was not made 'then I would understand why the Earl would not mediate.' – Mr Pollock's attendance note. The letter of 14 November stated that it was wrong to say that mediation had no chance of success or that there was no genuine intention to resolve the matter. The letter stated that Wilsons would be mediating in the knowledge that they may have to make a substantial payment. It said that the defendants would also attend with full authority to settle. The first draft of the letter had provided that both the defendants and Wilsons would mediate in the knowledge that they may have to make a substantial payment: but WHCG would not accept that. On 20 November WHCG wrote stating that the defendants were willing to mediate 'without any proviso whatsoever.' On 20 November Stockler Brunton wrote referring to the attitude of WHCG at the meeting on 7 November (alleged to be that Mr Williams had said he would attend solely to persuade the claimants that they had no case), saying that the claimants would only settle for 'substantial damages' and that unless the defendants were prepared to settle on that basis, a mediation would be a waste of time and money. The position taken by WHCG in these discussions is reflected in their offer of 30 January 2007 (paragraph 31 above). Underlying all was an unwillingness to pay the claimants anything.

68. I do not consider that Mr Stockler's insistence that the claimants would recover at least £70m was reasonable. But neither do I consider the attitude of WHCG was reasonable. In my view they had a weak case on liability as regards the 2002 lease, a stronger case on causation (ie whether, if Mr Ashworth had pursued a turnover rent, he would have succeeded), and a very strong case that any split would be well below 80 per cent. Simmons & Simmons, whose clients had a very strong defence, were prepared to take a far more conciliatory attitude in order to get to the mediation room. It is most revealing that Mr Pollock told Mr Stockler that, if WHCG would not accept that they might have to make a substantial payment, he would understand why the claimants would not mediate. In my view mediation failed as much by reason of the attitude of WHCG as that of Stockler Brunton. There was obduracy on both sides. This is consistent with what happened at the trial, where the claimants stuck to their 80 per cent and the defendants simply argued that the claimants were entitled to nothing. It is also consistent with the defendants not making any payment into court despite their justified view of the inflation of the claim and despite the huge costs.

69. In these circumstances, where the failure to mediate was due to the attitudes taken on either side, it is not open to one party, here the defendants, to claim that the failure should be taken into account in the order as to costs. For the avoidance of doubt I will state that I do not intend to suggest by this that there should be a particular order as to the costs incurred in connection with these "negotiations".

70. Mediation came up again following the pre-trial review on 15 December 2006. The parties were then heavily engaged in preparation for the trial with a great deal of work to be done. It was not pursued with any vigour by either side, and the reality probably is that it was simply not feasible to pursue it at this time.

71. A mediation was set in train following the judgment on liability and the preparation of evidence for the trial on damages. It took place on 12 October 2007. It followed a Part 36 offer by the defendants to settle for £1m save for costs – which would remain to be determined by the court. At the mediation the defendants offered £1m inclusive of interest with each side to bear their own costs. The claimants made an offer of £9m plus 80 per cent of the claimants' costs. That was rejected, and the mediation got no further. At this time the lowest figure put forward by the defendants for the damages was £267,000, and the highest put forward by the claimants was about £5.3m. It is not difficult to judge that the correct figure would be between these two, that is, substantially

lower than £5.3m. The claimants' offer therefore assumed a considerable success at the damages hearing together with a strong chance of success on an appeal. They had permission to appeal on the measure of damages, but had been refused as to the split. It also assumed that any appeal by the defendants would be unsuccessful.

72. I consider that the claimants' position at the mediation was plainly unrealistic and unreasonable. Had they made an offer which better reflected their true position, the mediation might have succeeded. It would be wrong to say more. As far as I am aware the courts have not had to consider the situation where a party has agreed to mediate but has then taken an unreasonable position in the mediation. It is not dissimilar in effect to an unreasonable refusal to engage in mediation. For a party who agrees to mediation but then causes the mediation to fail by his reason of unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate. In my view it is something which the court can and should take account of in the costs order in accordance with the principles considered in *Halsey*.

**The Part 36 and Part 44 offers**

73. I have referred to the offer dated 20 August 2007 of £1m leaving costs to be determined by the court. If interest is taken into account, as will appear, the claimants have comfortably beaten this offer. I should take no account of it.

74. The damages trial was due to begin on Monday, 29 October 2007. By letter of Friday, 26 October faxed at 5.08pm, the defendants offered £2m with costs to be determined by the court. This offer comfortably tops the claimants' recovery including interest. It was open for acceptance to 5 pm on Friday, 2 November. Stockler Brunton complained that it referred to the mediation proceedings and asked that it should be re-issued. That was a point of no importance so far as the substance of the offer was concerned. It was not accepted. The damages trial concluded on Tuesday 6 November but a number of matters were raised following the sending out of the judgment in draft. The offer did not fall within Part 36 because it did not include costs and was only open for 7 days. It is something to which I must have regard in accordance with Part 44.3(4)(c).

75. I consider that the timing of the offer was designed to be as disadvantageous to the claimants as possible. The evidence on damages was complex and difficult, and the burden on their single counsel was considerable. There were only two days of hearing after the offer expired. The offer should have been made at least a week earlier, if not very soon after the failed mediation on 12 October. Taking account of these circumstances I do not consider that it is just to make an order reflecting the claimants' non-acceptance of the offer within the time limited.

**Exaggeration**

76. I will begin by looking at the figures advanced by the claimants in the report of their expert accountant, Mr Taub, dated 19 January 2007. I do so because the figures were done on the basis of a number of variables. I do not forget that the claimants had earlier advanced a claim up to £100m.The highest claim calculated by Mr Taub was £87.8 million based on all the most favourable variables including a 93.4 per cent split and two levels of decking: paragraph 40.20. If decking was excluded the claim became £52.1m based on a 93.4 per cent split and other variables which are described but not stated: paragraph 4.24. So one cannot say that decking accounted for the difference of £35.7m, although the figure gives an indication of the effect of the decking claim. The lowest figure, £6.9m, assumed that no planning permission was received for Field C, the subject of the 2003 lease, and a split of 20 per cent: paragraph 4.25. As I stated in the liability judgment, in particular in paragraph 137, the claimants' case remained throughout that the split should have been 80 per cent. Mr Joseph's figures were calculated on a loss of earnings basis. That basis was not contested until the start of the trial. It is an issue on which I had no hesitation in giving the claimants permission to appeal.

77. The claimants have recovered £915,139 before interest. That is a large sum but small in comparison with £87.8m. If damages should be assessed on an earnings basis, the figure is £6,792,569 before interest. Had the claimants been able at the end of January 2007 to predict my findings, that is the figure they would have arrived at because there was then no challenge to their measure of damage. It is a substantial sum, though but a small proportion of £87.8 million. It is larger than Mr Taub's lowest figure based on a 20 per cent split. Had I found for a 20 per cent split, the figure would have been doubled to about £14m.

78. As I have said, apart from the measure of damage there were two main reasons why the claimants fell so far short of their target. One was the continuance of the case that an 80 per cent split was appropriate, and the other was decking. The issues were the same in relation to whether an 80 per cent split might have been agreed, or a 40 per cent split, or a 10 per cent split. For the real issue was what split might have been agreed. By aiming for 80 per cent the claimants made their claim very large, and the size of a claim does inevitably have an effect on the parties' costs. Decking was a comparatively short point, which has been included in this judgment among the discrete issues. To use the racing vernacular, it was a non-runner.

79. The 80 per cent originated with Mr Stuart. It was continued by Mr Joseph. It was suggested to me that the claimant trustees were bound to advance the claim for as much as they could in accordance with the advice they received. As a general proposition I would accept that. But as the defendants' case supported by Wilsons developed, it should have become apparent that they had a very real fight on their hands as to whether BIA would have agreed to a turnover rent at all, and, if they succeeded on that, as to what split might have been achieved. The reports of Mr West and Mr Theophilus were dated 24 and 23 November 2006. Once those had been absorbed it should have been apparent that the claimants had no chance of achieving a finding of an 80

per cent split, and long before this the doubts should have been increasing. The evidence of Mr Jones served only on 19 January 2007 was little more than a further nail in the coffin with regard to 80 per cent. It real effect was to increase claimants' their difficulties in establishing a lower but still sizable split.

80. The defendants' position was that Mr Ashworth had not been negligent in failing to press for a turnover rent, and that, if he had done so, he would not have succeeded. That was put forward with the utmost resolution. The claimants succeeded in establishing negligence where it mattered, namely in respect of the 2002 lease and hence also the 2003 lease. That was a considerable victory. In my view the claimants were ill-served by Mr Ashworth when the opportunity came in respect of the 2002 lease, and they had to fight every inch of the way to establish it. They also succeeded in proving that a turnover rent could have been obtained. Where they fell short was on the size of the split.

81. I do not think that it is a satisfactory approach in the circumstances of this case to nominate the winner as a means of deciding what order for costs is appropriate. It is too simple a question. The claimants have won on liability and have recovered very substantial damages, but the defendants succeeded in cutting down the sum awarded to a fraction of what the claimants were asking for.

82. The defendants firmly and rightly believed, - if 'knew' is too strong, that the claim was exaggerated, and they conducted the defence in that state of mind. They did not, however, make a payment into court, or a Part 36 or 44 offer (until 20 August 2007). That may have been because they were so confident of their defence: if so, I do not consider that it was based on a realistic appraisal of their difficulties in respect of the 2002 lease. Nonetheless I of course accept that where liability is in dispute a payment into court is not so simple as where the issue is only as to damages.

83. What was the effect of the exaggeration of the claim by means of the claim for an 80 per cent split, and decking? Obviously, it meant that the defendants were facing a much bigger claim. That justified a greater expenditure of costs. But, as I have said, the defendants were rightly confident that it was exaggerated. It meant that the contest as to split took place in a different context simply to the extent that if, for example, the claimants had claimed a 25 per cent split, it would have been different. The same evidence of fact, and the same expert opinions would have been deployed on the issues as to the strengths and weaknesses of the parties in a properly conducted negotiation. One point requires specific mention. I think that the defendants would have instructed leading counsel even if the claim had been put forward at a more reasonable level. It would still have been for a very large sum and the issues were complex. The defendants continued with leading counsel after the size of the claim had been cut down by the liability judgment.

84. In *Johnsey Estates* Chadwick LJ stated that the court should not speculate whether an action might have settled if a smaller claim had been presented. In case it should be thought relevant on an appeal, I will simply record that my view that, if the case had been presented on an earnings basis, without decking, and, say, a 25 per cent split, it must be uncertain given what the defendants showed of their attitude, that this action would have settled.

85. In my judgment, it accords with the authorities to take account of how the exaggeration of the claim has come about. I here use exaggeration to mean no more than that the claimant only recovered a fraction of his claim advanced. The worse case from a claimant's view is where the exaggeration is deliberate and involves dishonesty as in *Painting*. Unreasonable conduct falls in the middle. It may occur without fault. But even where that is so it may be appropriate to reflect in the order for costs the fact that the claimant has only recovered a fraction of his claim. The appropriate order depends on the circumstances and the court must seek a solution which does justice between the parties. Here, in summary the claim was initially put too high because of the advice the claimants received. As the action proceeded the claimants' belief in their claim for damages at the highest level should have diminished until by the trial they should have realised that it had no real chance of success.

86. I have to bear in mind that I have already decided that the claimants should bear part of the defendants' costs and should not recover the same part of their own costs because they lost on discrete issues. Those issues included decking. The rights of way issue and the independent car park issue related to the size of split. I do not think that an order that there be no other order for costs would do justice to the claimants. For they have succeeded in the manner I have described. But equally I do not think that in the circumstances they should have the whole of the balance of their costs. Something should be deducted to reflect the fact that they claimed so much more than they recovered. I have simply to balance the various factors which I have referred to and to decide what is appropriate: there is no formula to be applied or any more logical process. I consider that it will do justice in the circumstances to order that in respect of their liability costs the defendants pay the claimants 70 per cent of their costs after deducting their costs incurred in respect of the discrete issues. Those costs will of course exclude the claimants' costs incurred against Wilsons.

87. In respect of the damages costs I have to take account of the mediation on 12 October 2007. By this point substantial costs had already been incurred in relation to damages, in particular in the preparation of reports. The defendants were able to protect themselves here by a timely offer – liability had been decided. I consider that justice will here be done to order that the claimants have 80 per cent of their costs relating to damages.

88. The outcome as to the claimants' costs is :

(1) They will not get 15 per cent of their liability costs by reason of the discrete issues and will only get 70 per cent of what is left by reason of their having recovered so much loss than they claimed. So they will get 59.5 per cent of their costs incurred against the defendants in connection with liability as assessed or agreed.

(2) The claimants will not get 15 per cent of their costs on damages by reason of the loss of earnings assessment, and they will get only 80 per cent of what is left by reason of their attitude in mediation. So they will get 68 per cent of their costs incurred in connection with damages, as assessed or agreed.

(3) The claimants will have to pay costs to the defendants as set out in paragraph 62.

89. For the avoidance of any doubt, I should state that in assessing these figures of 70 and 80 per cent, I have taken into account that I am not conversely ordering the claimants to pay 30 and 20 per cent respectively of the defendants' liability and damages costs. I consider to make such an order would favour the defendants more than is appropriate in the circumstances.

90. I have not so far taken into account the defendants' costs of their application for disclosure from Manchester Airport Group. I consider that a specific order should be made in respect of these. They were incurred for the benefit of the claimants as well as the defendants : the information was required. At present the defendants are bearing these costs. Subject to the overall order for costs the claimants should bear half. So if there were no overall order each should bear half, and if it were ordered that the defendants bear the claimants' costs, the claimants' would then not bear any part of the Manchester Airport Group disclosure costs. But I have ordered that the claimants' only get three quarters of their costs (subject to discrete issues). The claimants' should therefore pay one quarter of one half, namely one eighth, of the defendants' costs payable to Manchester Airport Group.

**The order of 10 December 2007**

91. I record that Mr Speaight accepted on behalf of the claimants that they should not have their costs in respect of an application under Part 40 – the slip rule, to amend the order of 10 December 2007. I have however to deal with the reserved costs of that hearing. At the hearing I ordered that a sum of £550,000 should be paid to the claimants. Taken with the interim payment ordered by Langstaff J of £450,000, it provided £1m. I was asked to reserve the costs of the hearing pending my decision on costs and interest. As my orders on costs will result in a payment to the claimants and in the light of my award of interest later in this judgment, I should order that the reserved costs be paid by the defendants to the claimants.

92. I am aware that in considering the issues of costs between the claimants and the defendants there are other matters which were relied on by one party or the other. I have not forgotten them, but I do not consider them of sufficient weight that they require to be taken into account by me. If there is no agreement, there will have to be a detailed assessment of the claimants' and defendants' costs and matters which I have not referred to can then be raised.

93. There are a number of existing orders as to costs. They, of course, will stand.

**Payment on account of costs.**

94. I invite brief written submissions as to what is appropriate in the light of the orders which I propose. These should be provided within 7 days of the judgment being sent out in draft, and I will hear such further submissions as seem appropriate following the handing down of the judgment.

**B. Interest**

95. In the light of the history which I have set out and my findings in relation to the Pre-action Protocol I do not consider that there is any reason not to award the claimants interest on the judgment sum for the full period. The judgment sum comprises damages by way of a sum in respect the 2002 lease and a sum in respect of the 2003 lease. Interest should run on the appropriate sum from the date of each lease.

96. The authorities establish that the rate at which interest should be awarded is the rate at which a party of the general description of the claimant can commonly borrow money. I refer to *Claymore Services Ltd v Nautilus Properties Ltd* [2007] BLR 452 where Jackson J reviewed the authorities. I have here a letter from Lord Malmesbury's bank stating that he has been able to borrow at 2½ per cent above base rate. Lord Malmesbury has been funding the action. The letter states that the borrowing is half secured and half unsecured, and that the bank would ordinarily charge 4½ to 7 per cent over base on unsecured debt. Interest is intended to be compensatory. I am satisfied that the appropriate rate for interest on the judgment sum here is 2½ per cent over base rate. I see no reason to draw a distinction between the rate at which Lord Malmesbury can borrow and that at which the trustees might borrow.

**C. Permission to appeal**

97. **Claimants** I have already dealt with some applications by the claimants. They raise three further matters, all of which relate to the damages judgment.

98. It is submitted that, rather than making particular findings in respect of each variable relating to the valuations, I should have found a range of possible views and assumed that one hypothetical purchaser would be advised by a valuer who took the top of the range, which would then give the value. That is not how the court approaches valuations. The court attempts to find what an appropriately skilled valuer would have stated the value was. Apart from this the claimants' concept takes no account that a valuer who is as the top end on one variable might be at the bottom end on another. I refuse permission.

99. The claimants seek permission to appeal against my findings as to the discounts rates stated as being 17 and 25 per cent. This refers to paragraph 31 of the liability judgment where I found rates of 17 and 20 per cent to be appropriate: I reduced the figure of 25 to 20 per cent. These findings were based on my assessment of complex

expert evidence. It is not suggested why I was wrong to decide as I did, save that my figures were too high. Permission is refused.

100. It is sought to appeal against the rate of 4.5 per cent which I found for inflation of car park charges in paragraph 45 of the damages judgment. This was higher than the defendants' figure of 3 per cent, and was based on an assessment of the evidence. Permission is refused.

101. **Defendants** The defendants seek permission to appeal in respect of what are essentially three matters. I say essentially because the proposed grounds of appeal divide the first point.

102. The first point is founded on the claimants' case being that Mr Ashworth should have negotiated for a turnover rent and should have obtained a split of 80 per cent. The claimants did not advance any other case as an alternative. Having found that Mr Ashworth should have tried to obtain a turnover rent, I had to consider what he should have tried for in terms of split. I considered this in paragraph 138 of the liability judgment. I concluded that something in the region of 20 per cent would have been an appropriate opening stance and that anything much higher would have been likely to have met with a flat refusal. I add that, if that had happened, there would have been nothing to prevent Mr Ashworth putting forward a more realistic figure. The point that it is sought to take on appeal is that, as no case was advanced in terms of 20 and 10 per cent, it was not open to me to find as I did, either as to breach of duty by Mr Ashworth, or as to what the outcome of an appropriate negotiation would have been.

103. I raised the point that the claimants were on 80 per cent and the defendants were on zero per cent very early in the trial, and that I might be in the middle. I refer to the transcript for Day 1, page 63. It was clear to me from the start of the trial that, if I found negligence, it would not be in relation to an 80 per cent split but in relation to a much lower split, because on the basis of what I had read I had concluded that 80 per cent was unrealistic. Mr Lamb did not refer to a likely percentage split in either his written or oral opening submissions. The defendants' case then was, and remained, that Mr Ashworth had not been in breach of duty in failing to seek a turnover rent. On the other hand Mr Douglas on behalf of Wilsons did assert in paragraph 147 of his opening written submissions in the alternative that it was most unlikely that the claimants would have got more than 10 or at the most 20 per cent. In cross-examination of the experts no one investigated what split might have been obtained, if BIA had agreed to a turnover rent. The case put by Mr Speaight was that a turnover rent would have been conceded by BIA. The case put by Mr Lamb was that it would not have been. Mr Speaight did put 80 per cent Mr Ashworth – Day 7, page 19, and got a robust answer. 80 per cent was also put to Mr Jones. I did not think that it was appropriate to ask the factual witnesses what they might have done in a factual situation which they had never considered. The possibility of negotiations was explored by me in a general way with Mr Jones at Day 8, page 84 and following.

104. So far as I was concerned the trial proceeded on the basis that at the end I would have to carry out the balancing exercise as to the strengths of the parties which I carried out in the liability judgment, and decide what the claimants might have achieved. It was my clear impression that this was how it was seen by the parties. The considerable evidence, written and oral, of many of the expert witnesses was pointed to that end. There was some evidence as to the cost of alternatives for BIA. It was never said that, if it was not 80 per cent or near to it, everyone was wasting their time.

105. In Mr Lamb's written closing submissions on behalf of the defendants it was not stated in express terms that the defendants had a complete answer to the case, namely that 80 per cent was a non-starter and nothing else was open : the point was taken less directly. However, in answer to my question in oral submissions, Mr Lamb answered that this was the case: Day 16 pages 6 and 7. He returned to the point at pages 22 and 23. In contrast with Mr Lamb Mr Douglas's written closing submissions did deal with the size of any split, and he suggested under the heading of 'What better deal would have been struck?' that 10 per cent or at the most 20 per cent would have been ceded by BIA. Mr Douglas stated orally that he did not support Mr Lamb and that it was open to me to conclude that, for example, 10 or 40 per cent was right on the evidence that I had heard: Day 16, pages 81 and 82.

106. I dealt with Mr Lamb's submission in paragraphs 137 and 138 of the liability judgment. I have expanded somewhat on what happened at the trial because for the purposes of the application for permission to appeal the argument has been expanded from the brief way it was put by Mr Lamb, and I think that it is helpful on a point of this nature for higher court considering any further application for permission to have the trial judge's account of what happened at the trial.

107. I conclude that it was plain throughout the trial that a major issue was what turnover rent, if any, might have been conceded by BIA. I refuse permission to appeal on the grounds covered by this point.

108. The second proposed ground relates to the judgment on damages. I largely accepted the evidence of the defendants as to discount including for risk: I have referred to this in paragraph 99 above. I did not accept their evidence as to passenger numbers, but took those put forward by the claimants. It is submitted that the defendants' valuation must be taken as a whole because the elements interrelate. The effect of this would be that, if I found some part of the claimants' evidence unsatisfactory – as I did, I was bound to accept all the defendants' evidence. Conversely, I suppose, if I had started with the defendants' evidence and found some part of that unsatisfactory. I did find the defendants' evidence as to passenger numbers unsatisfactory. I do not consider that the court can be limited in this way in a valuation case. I refuse permission to appeal.

109. The third proposed ground also relates to the damages judgment but this time to the earnings basis assessment. The submission made at trial was that having assessed a probable income over the relevant years a discount should been applied to take account of the risk that BIA might become insolvent. I dealt with this in paragraph 64 of the judgment and I see no possible fault in the reasoning. The point made in the proposed grounds of appeal is a different one. It is submitted that a discount rate of 14 per cent should be applied as with the capital loss assessment. That confuses the two assessments. With a capital loss assessment the court has to take into account the fact that a buyer will pay less for a probable future income stream because it is future and uncertain, even though it has been assessed as the most probable. With a loss of earnings calculation the court has to assess the probable income and, having done that, discount it for early receipt. The court is not concerned with any further discount. The defendants' point is misconceived. Permission to appeal is refused.

Anthony Speaight QC (instructed by Stockler Brunton) for the Claimants
Edwin Johnson QC and John Gallagher (instructed by Williams Holden Cooklin Gibbons LLP) for the Defendant