JUDGMENT : Mr Justice Jack : Queens Bench. 11th May 2007

A. Introduction.

1. The claim in this action is for negligence in connection with the negotiation of leases of land to Bournemouth International Airport Limited for car parking. The land in question is part of the Hurn Estate, and the freehold is vested in the trustees under the Settled Land Act 1925 of a family trust made in 1963, modified in 1969, often called *'the 1969 settlement'*. The tenant for life is the Earl of Malmesbury. The primary defendants are the well-known firm of Strutt & Parker - surveyors, property consultants, managers and estate agents. A partner in the firm who was later a consultant, Mr Ian Ashworth, had the carriage of the negotiations on behalf of the Estate. He negotiated the terms of four leases which were entered into in 1997, 2000, 2002 and 2003. It is alleged that he was negligent and in breach of his duty in relation to all save the first. The main allegation against him is that he should have negotiated leases with rents which reflected the earnings of the car park and provided for the Estate to receive the greater part, 80%, of those earnings. The most important lease is that of 2002. The 2003 lease was supplementary to it and brought in some more land. They will run until 13 August 2026. The initial rent under the 2002 lease was £9,000. Following a review under the terms of the lease it became £30,051 as from 8 July 2005. The earnings of Bournemouth International Airport from car parks in 2005 was £854,000 and in 2006 £1,804,000, the majority of which came from the car park on the leased land.

2. The claim form was issued on 9 November 2005. Strutt & Parker served its defence on 17 January 2006. On 17 May 2006 Strutt & Parker issued an application to join the solicitors, Wilsons, and Mr Peter Fitzgerald, a partner in Wilsons, later a consultant, as defendants to a counterclaim under Part 20. Wilsons have their offices in Salisbury. Mr Fitzgerald had acted as solicitor to the Estate for very many years. He was a trustee of the 1969 settlement until these proceedings caused him to be replaced by Mrs Hobbs. The claims against Wilsons and Mr Fitzgerald are made conditionally upon Strutt & Parker themselves being held liable. The claims which are now pursued have been reduced from those in existence at the start of the trial. The sole claims now made are against Mr Fitzgerald as solicitor to the Estate, and through him against Wilsons, on the basis that, if Mr Ashworth failed in his duty, so did Mr Fitzgerald. Claims alleging breach of duty by individuals in the conveyancing department of Wilsons have gone. It was not until 2 November 2006 that the claimants obtained an order joining Wilsons as defendants. Save in one respect the claimants did not seek to make any positive case against Wilsons, but sought only to adopt any case which Strutt & Parker established. They now seek only to adopt such case as Strutt & Parker may establish against Mr Fitzgerald, and through him, Wilsons: the independent claim has been abandoned.

3. Finally there is a counterclaim by Strutt & Parker for unpaid fees relating to Mr Ashworth's services in the sum of £35,541.

4. It was agreed between counsel as the evidence drew to its close that I should not hear the accountancy evidence. I am to decide the main points of principle leaving the consequences to a further hearing if they cannot be agreed.

5. The claimants are (1) Lord Malmesbury, (2) Mr William Maltby, (3) Kathleen Hobbs, and (4) Wilsco 283 Limited. As I have stated, Lord Malmesbury is the tenant for life of the Hurn Estate under the 1969 settlement. He had the power to grant the leases without reference to the trustees of the settlement as they did not exceed 25 years. It may be that he is the proper claimant and that the other claimants are not: but although at one time this seemed likely to be agreed, in the end it was not. I did not hear submissions on it. Mr Maltby and Mrs Hobbs are the present trustees under the settlement. Wilsco is a company in which the relevant land was once vested as bare trustee for Lord Malmesbury. The land has since been re-vested, and Wilsco can be ignored. Lord Malmesbury had the courtesy title of Viscount FitzHarris until he succeeded his father in 2000. I will refer to him throughout as Lord Malmesbury. Although Lord Malmesbury may be the sole claimant in respect of these claims, I will refer to 'the Estate' as representing the interests on his side. That is how they are referred to in the contemporary documentation, and it enables me to include the trustees and remaindermen where their interests may arise.

6. I will refer to Bournemouth International Airport Limited as 'BIA'. I will use the term 'the Airport' to refer to the airport itself.

B. The history

7. It is first necessary to provide a description of the Airport. It lies to the north east of Bournemouth and was formerly part of Merriton Heath. It came into being as an airfield during the Second World War when it was compulsorily acquired from the Hurn Estate. It may be taken as very roughly rectangular in shape save that the south east corner is not owned by the Airport but by the Estate. The main runway runs from east to west and the airport is larger in that direction. Its southern boundary is formed by the B3073, called in the vicinity of the Airport, Parley Lane. The main buildings including the terminal are by the south eastern boundary. They are reached by a road called the Airport Road, which runs north from Parley Lane for a short distance. This road is bounded on its east side by the Estate's land. The terminal is immediately to its west. The main long stay car park is opposite the terminal immediately across the Airport Road on the Estate's land. There is another smaller long stay car park on the Airport's land to the north of that, but still south of the runway. It is unsurfaced. There is short stay car parking on the Airport's land adjacent to the terminal. There is a substantial industrial or business estate on Airport land at the north west corner and another smaller development on its land at the north east corner. There is a lane called Pussex Lane, which runs north west from the B road, Parley Lane, to the east of the relevant Estate land. It is closed off where it meets the Airport. It is surfaced with tarmac but somewhat overgrown and unkept. The main access to the Airport is via the Bournemouth spur road, the A338, a dual carriageway leading from the M27 to Bournemouth. This gives access to the B3073. Much of the land to the south of the Airport and Parley Lane is owned by the Estate. The land is

all characterised as green belt save the land on the Airport which is designated for industrial or commercial development. There is no direct access to the airport by rail, but BIA runs a bus service from Bournemouth railway station.

8. The business of BIA, the company, is in part the operation of the Airport and in part the management and development of the industrial and commercial property on its perimeter. The following table may indicate something of their relationship.

Turnover	Operating profit	Operating profit	Operating profit	Operating profit
	Air traffic	Property/commercial	Air traffic	Property/commercial
1996	£2,566K	£3,835K	(£762K)	£1,208K
2000	3,101K	5,451K	(1,044K)	1,884K
2005	7,318K	4,275K	£2,879K (net £1,650K)	£2,879K (net £1,650K)

9. In 1996 and 2000 commercial activities included car parking – the evidence of Mr Baron, Day 7, page 101. The income from car parking in those years is unknown. In 1997 it was £283K, and in 1999 £310K. I have included under air traffic turnover for 2005 car parking £854K, and concessions £1,842K, as these are related to the air traffic business. Aviation income in 2005 by itself was £4,622K. The operating profit was not divided into divisions in 2005. The years are financial years ending in the years stated.

9. There will be some meetings and conversations in relation to which it will be appropriate to return and make further findings of fact when I consider whether or not Mr Ashworth was in breach of his duty.

10. The story begins in 1988 when BIA made an application for planning consent for a car park on two fields on the Estate's land across the Airport Road opposite the terminal, which have been called Fields A and B, B being to the north of A. BIA was then jointly owned by the Dorset County Council and the Bournemouth Borough Council. This application was eventually granted on 12 August 1992. It had to be implemented within 5 years.

11. On 4 June 1990 Mr Stephen Rippon-Swaine, then a partner in Joliffe & Flint, chartered surveyors, wrote on behalf of BIA concerning a suggestion that the Estate should grant a lease of the land. He proposed that the rent should include percentages of the income from car parking varying between 5 and 10% with amount. This was a part of a negotiation which carried on into 1992, but came to nothing.

12. Strutt & Parker were appointed land agents by the Estate in December 1992. The person mainly involved on behalf of Strutt & Parker in the management of the Estate was Mr Anthony Fortescue. He was not concerned directly with negotiation matters concerning the Airport. Such matters were handled by Mr Ian Judd of Ian Judd & Partners, surveyors.

13. In 1989 the Estate had granted an option to Argent Estates over 27 hectares of land with a view to releasing its development value. Argent planned a substantial development including a hotel, petrol filling station, and a business park. By 1995 Argent had withdrawn. I mention its involvement because it illustrates the strong desire of Lord Malmesbury to find a way of achieving the development of Estate land in the vicinity of the Airport.

14. Early in 1995 BIA was sold to National Express Group PLC. In April of that year Strutt & Parker suggested that in the context of a new owner the Estate should appoint *'a development surveyor'* to meet with National Express to discover their intentions and prepare a report as to how the Estate could best develop its land. The letter stated:

"We firmly believe that the combination of the change of ownership of the Airport and the impending Consultation Draft of the Christchurch Borough Local Plan gives an ideal opportunity to maximise the potential development value of the land near Hurn Airport. Indeed, it is particularly fortunate that the Local Plan procedure is now underway but, in turn, this means that action needs to be taken immediately. ……

The situation at the Airport is now so different that we believe that a fresh approach to the new owners could well be beneficial. The forthcoming Consultation Draft of the Local Plan gives the opportunity to work with National Express to mutual benefit. Such an approach needs to be well coordinated and attractive to National Express. We believe we are well suited to this task. We are well known in this field of development and we know the Senior Executive Directors of National Express. We have the necessary expertise to conduct and coordinate these negotiations and we can call upon assistance within the firm, as well as work with your existing advisors and any others that may be necessary. Until National Express' intentions are known, it is not possible to advise the precise team of advisors needed."

The surveyor in question was Mr Ian Ashworth, a partner in Strutt & Parker who specialised in commercial property. He was the author of the letter. By letter of 14 April 1995 Lord Malmesbury made the appointment.

15. Until the appearance of National Express BIA could well have been described as stagnant. The airport operation itself ran at a loss, which was in part supported by the income obtained from lettings on the northern sectors. National Express wished to improve the airport and was prepared to provide funds to do so. In 1996 the runway was extended to accommodate larger aircraft able to cross the Atlantic. This gave it an advantage in that respect over its neighbour, Southampton Airport.

The 1997 lease

16. In 1995 it was clear to all involved that steps must be taken to implement the planning permission granted in 1992 before it lapsed. BIA had no need for car parking on the land at this point but wished to provide for future growth. BIA first sought to buy the land, but the Estate refused to sell. Eventually it was agreed between Mr Ashworth and Mr Graham Holland that there should be a lease of Field A to BIA for three years at a rent of £1,000 per annum. Mr Holland was a partner in Holland Mitchell, chartered surveyors. He was consultant to National Express on matters relating to BIA. It was agreed that the lease should be outside the security of tenure provisions of the Landlord & Tenant Act 1954. BIA was to do the work necessary to provide a car park. The lease was dated 9 July 1997. On 18 June 1997 Mr Howard Baron, BIA's commercial director, had written to Mr Ashworth saying that in the event of the lease not being renewed BIA would not seek compensation from the Estate for the cost of works carried out by BIA. I should also mention that on 6 March 1997 Mr Ian Judd, the surveyor who had been involved in the 1990/2 negotiations with Mr Rippon-Swaine wrote to Lord Malmesbury reminding him of that fact and referring to *'a combination of rent and turn-over'*. He did not want that to be omitted from the negotiations. Mr Ashworth received a copy of the letter.

17. No criticism is made in respect of Mr Ashworth with regard to 1997 lease. It was a temporary measure to preserve the positions of the parties and the benefit of the planning permission. BIA had no real immediate need for the land as car parking: it had sufficient parking space on its own land near the terminal.

18. There was a further reason why the lease was regarded as temporary. In the summer of 1997 BIA was considering a new Master Plan. This included the building of a new terminal and car parks in part on the Estate's land. The Estate's advisers were kept informed and had meetings with BIA's advisers. Planning permission was applied for on 28 November 1997 and was recommended for approval by the Planning Department on 25 February 1998. It seems that the Council voted to grant approval but that it was never formally granted. Initially this was because a section 106 agreement was required to be entered into by BIA and the Estate. Later it was because the application might be, and in due course was, called in by the Secretary of State. The section 106 agreement was the subject of prolonged discussion between BIA and the Estate in 1998 and 1999. Considerable effort went into it.

The 2000 lease

19. The car park next raised its head when on 30 October 1998 Mr Holland wrote to Mr Ashworth. He said that although limited use had been made of it further surfacing work was required to bind the surface. I add that it was not at this time being used by more than a few passengers, but was used in a small way by Airport employees and perhaps contractors. Mr Holland stated that National Express had approved £165,000 for the work to be done in that year but required a lease for longer than the remaining two years. He asked if the Estate would grant an extension of the existing lease. The existing lease was of Field A only, and the negotiations for the 2000 lease did not involve Field B, which lay to the north of Field A and abutted what was BIA's southern boundary at that point. Mr Holland also referred to BIA's concern that the *'bigger deal'* was only moving forward slowly, and that it might not come to fruition before the lease expired. By the *'bigger deal'* he must here have meant the intended new terminal. In a note of 2 November 1998 Mr Ashworth described the request as *'extraordinary'*. He wrote to Lord Malmesbury on 3 November 1998 saying that the letter raised important issues and that it gave a further opportunity to ask BIA to explain its intentions. By a letter of 4 November Mr Ashworth suggested to Mr Holland that the matter be discussed at an Estate BIA liaison meeting. That meeting was held on 16 November. A number of matters were discussed apart from the car park, which takes up only a small part of the minutes. Mr Howard Baron, the Commercial Director of BIA stated that £100,000 had previously been spent but the surface was not adequate for use. He had £65,000 to spend that year and £100,000 in the next year. When Mr Ashworth expressed surprise that all would be *'torn up'* for the new terminal, Mr Baron said that the terminal project was delayed and the car park would be needed for longer: the laid out part was clear of the site for the new terminal. Mr Baron also informed the meeting that it was his view, which might or might not be accepted by National Express that, if the planning application for the new terminal was called in by the Ministry, it should be abandoned because of the delay and costs that would be incurred. He later stated that BIA had had a 're-think' about the new terminal. The predicted increase in passengers had not occurred for a number of reasons. The project was postponed to 2003/4, though that could change. The forecast of passengers was:

    1997 270,000
    1998 300,000
    1999 400,000

    The opening of the new terminal would coincide with a throughput of about 500,000 passengers p.a. It was agreed that Mr Holland should pursue the extension of the car park lease as a matter of urgency.

20. On 20 November 1998 Mr Ashworth received a message to telephone Mr Holland to discuss the car park and that Mr Holland would be sending a fax. The fax was sent in the form of a letter dated 23 November. In it Mr Holland suggested that the existing lease be surrendered and a new lease for 10 years from 9 July 1997 should be granted. The rent was to be £1,000 p.a. for the first 3 years, £5,000 for the fourth and fifth years and thereafter £10,000 p.a.

21. On 25 November 1998 two telephone conversations took place between Mr Ashworth and Mr Holland. Mr Ashworth referred to their content in his letter to Mr Holland the next day. Mr Ashworth wrote that Mr Holland had said that the Airport would not pay a 'full economic rent' because it would be incurring a capital expenditure of some £500,000 on upgrading works, and because of the limited car parking revenues. Mr Ashworth had asked for a rent which included an element based on the turnover of the car park. He recorded that Mr Holland had refused this

because of the difficulties in monitoring usage. (At that time usage was on a pay-and-display basis with no means of distinguishing between users of the parks on the Airport's land and users of the park on the Estate's land.) They had left it that Mr Holland would come back to him with a revised rental structure for, say, a five year lease from 9 July 1997. Mr Ashworth suggested that by July 2002 the Airport would then want to renew the lease at a full economic rent or deal with the car park in conjunction with the arrangements concerning the new terminal.

22. In his letter to Mr Ashworth of 1 December 1998 Mr Holland enlarged on the problems with a turnover rent. They were (1) the car park was used only by staff and the usage was unlikely to grow significantly in the short term; (2) any substantial use the next year would come from a major further tranche of air charter business; (3) much of car parking was paid for through an overall arrangement whereby it was included in the price of a charter ticket; and (4) the cost of installing a form of auditing system. Mr Holland proposed a new lease to expire in July 2004 with a rent of £1,000 to July 2000, £5,000 for the next year, £10,000 for the next 2 years and £15,000 for the last year. So the lease was for 5 years instead of the 10 years he had first proposed and the rent in the fifth year was to be £15,000 instead of £5,000. There was to be no security of tenure or compensation under the Landlord & Tenant Act. The much better rent was the fruit of Mr Ashworth's negotiation. The original offer would have brought the Estate £13,000 over the term of the lease. Now it was to get £31,500.

23. The proposal was considered at a meeting of the Estate Trustees on 3 December 1998, which was attended by Mr Ashworth for the relevant item. The minutes record that 'The Trustees agreed that [Mr Ashworth] should do what he can to increase these rents and it may be better to have the total rent averaged out annually over the term'. In his evidence Mr Ashworth accepted that subject to that he would have advised the Estate to accept the offer. The minute also records 'Originally a turnover rent was suggested but a scale rent is now proposed …'. In his evidence Mr Ashworth suggested that he may have said more than the minutes record. I think it unlikely that he said anything of substance which was not recorded. This was an example of something which Mr Ashworth did on a number of occasions, namely saying he might have done something which was not recorded, and that he had no recollection either way.

24. In further discussions between Mr Holland and Mr Ashworth a rent of £7,000 was agreed for 5 years to 9 July 2004. Mr Ashworth wrote to Mr Holland confirming the Estate's agreement on 8 December. He set out the context in relation to the development of the new terminal. The National Express legal department were to send a draft lease to Wilsons. That was done on 10 December.

25. In a memorandum dated 24 December Mr Fitzgerald recorded his view, already conveyed to Mr Ashworth, that it was important to have a break clause in the lease enabling it to be terminated if planning permission was granted for any form of development over the land, because BIA would otherwise use the lease as a means of reducing the purchase price. This requirement was not accepted by BIA and was a reason for the substantial delay in the completion of the new lease, which did not occur until 20 January 2000. The other and main reason was that BIA and the Estate were occupied with the proposals for the new terminal and the section 106 agreement.

26. With effect from 1 May 1999 Mr Ashworth ceased to be a partner in Strutt & Parker and became a consultant acting in respect of specific clients and projects. By letter of 5 March 1999 Lord Malmesbury confirmed that he should continue to act as *'haggler'* to the Trustees.

27. On 24 March 1999 Mr Fitzgerald wrote to Mr Ashworth to say that he had read that Drivers Jonas had particular experience of rental performances in relation to airports and asked if the appropriate expertise was available at Strutt & Parker or should they take one-off advice. Mr Ashworth did not reply. He said in evidence that he did not do so because he considered that he had adequate expertise. He was irritated by the letter but not offended. I asked him if he did not have a good relationship with Mr Fitzgerald. He replied that they had known each other a long time: they had never been close.

28. On 21 July 1999 the section 106 agreement was signed and on the same day the Christchurch Borough Council sent it and other documents to the Government Office for the South West so it could be considered whether to call in the application for planning permission for a new terminal partly on the Estate's land.

29. In September 1999 the question of the new car park lease came alive again. On 3 September Mr Holland wrote to Mr Ashworth referring to their telephone conversations. The agreement which they had reached was that the new lease would expire in July 2005 with a rent of £9,000 (the previously agreed figure was £7,000). On 13 September Mr Ashworth replied agreeing those terms on behalf of the Estate. On 15 September Mr Fitzgerald again raised the question of a break clause. By letter of 19 November National Express agreed to a clause, and its terms were agreed in early December.

30. By letter to BIA's advisers dated 20 December the Government Office for the South West stated that the planning application for the new terminal was being called in.

31. On 19 January 2000 Mr Holland telephoned Mr Ashworth to pursue the new lease. It was signed on 20 January. It ran until 8 July 2005, and the rent was £9,000 per annum payable quarterly. It related to Field A only.

32. On 7 February 2000 BIA announced that it was withdrawing its planning application for a new terminal partly on the Estate's land. In the announcement the managing director, Mr Glynn Jones, stated that passenger numbers had doubled in 4 years and BIA was determined to find a way of improving the Airport's facilities. He said that BIA would shortly be submitting a planning application for interim improvements to the existing terminal. The announcement came as a blow to the Estate and its advisers. Mr Fitzgerald discussed the position with Mr Ashworth

on 2 March 2000. Mr Ashworth's view was that the Estate would make its real money by selling land to enable the widening of Parley Lane to provide a better access to the Airport's estate to the north. Mr Ashworth is recorded as stating that the Estate was getting a fairly modest rent for the car park but when the lease ran out it could get a full rent without crediting the Airport for the work done by it.

The 2002 lease

33. In 2000 the scheme whereby car parking vouchers might be supplied to some charter passengers came to an end.

34. On 12 May 2000 Lord Malmesbury wrote to the Chief Executive of National Express, Mr John Spooner, referring to his disappointment at the withdrawal of the planning application for the new terminal on Estate land. He asked if he might have an early indication of BIA's intentions as to a new terminal. The outcome was a dinner on 2 August. Prior to this at a meeting on 17 July the Estate was advised that BIA was looking to build a new terminal on its own land to the south and west of the existing terminal. Among its reasons were that this enabled it to keep its existing car parking and avoided a need for Estate land. It was looking for an expansion in passengers of 7% each year for 30 years, from 300,000 p.a. to 6 million p.a. Because of the need to up-grade the existing car park on Field A and the cost of that, BIA was likely to approach the Estate to re-negotiate the existing short lease or to buy the land. There was discussion at the meeting of the improvement of Parley Lane. This was something that the Estate hoped for because it would enable it to sell the necessary land. It was stated on behalf of BIA that the acquisition would be carried out by the Dorset County Council using compulsory purchase order powers, which would be unfavourable to the Estate. This information was provided to Mr Ashworth. Prior to the dinner Lord Malmesbury was advised to say nothing about road widening or ransom strips in connection with it. By a letter from the Estate's highways consultant, Mr Richard Parker, dated 26 July Lord Malmesbury was advised that the building of a new terminal with capacity for 1 million passengers a year was unlikely to lead to road widening. This was copied to Mr Ashworth. The dinner was pleasant. Lord Malmesbury learnt that BIA had no intention of building the new terminal in the near future. Cooperation between BIA and the Estate was discussed.

35. At the beginning of September 2000 it was announced that National Express was selling its airports. The plans for the new terminal with car parking to its west were published early that October. The accompanying environmental statement said that parking spaces were typically provided at the rate of about 1,650 per annual million passengers. So the terminal intended to handle 1.25 million p. a. was to have 1,750 short and long term spaces including staff parking. The intention was to retain the existing 1,000 spaces on the Estate's land, to lose the 450 spaces on Airport land to the north of the Estate's land required for a taxiway, and to provide a new car park to the south west of the new terminal, which would provide 650 spaces. Passengers using that car park would have been bussed to the terminal – evidence of Mr Baron, day 7, pages 113 to 115. Planning consent was granted on 18 October 2001.

36. In February 2001 it was announced that the Manchester Airport Group was buying East Midlands and Bournemouth Airports.

37. A meeting was held on 21 March 2001 between Lord Malmesbury and the Estate's advisers. It was reported among many other matters that Mr Glyn Jones had offered to Dorset County Council to pay parking income to a sustainable transport fund, but Mr Baron had advised against it 'as 40 – 50% of the total income at the airport is derived from car parking'. There was discussion of the position regarding the widening of Parley Lane at the point where the proposed new car parking to the west of the intended new terminal required new access to be provided with a 4 lane stretch. Mr Ashworth thought this would put the Estate into a ransom position and recommended legal advice be sought when the position was clearer.

38. Mr Baron, the Airport's Commercial Director left in May 2001. One of his last acts was to order an electronic pay-on-foot system for the car park on Field A. This was not installed immediately. The cost may have been in the order of £50/60,000. This was a system whereby a driver would take a ticket to raise a barrier to permit him to enter. On leaving he would have to pay the charge for the period he had parked, thus validating the ticket to raise a barrier and permitting him to leave. The system enabled the earnings of the car park to be known.

39. On 20 July 2001 Mr Rippon-Swaine telephoned Mr Anthony Fortescue of Strutt & Parker. As I have said, Mr Fortescue normally dealt with estate management matters, but at this time Mr Ashworth was on holiday. Mr Rippon-Swaine told him that passengers were complaining that they could not push trolleys over the car park gravel, and that the Airport wanted to tarmac it but needed a longer lease to write off the expenditure. Mr Fortescue informed Mr Ashworth of the approach. This was followed up by a letter from Mr Rippon-Swaine dated 24 July putting the need to improve the car park surface in strong terms. The letter stated that depreciation of car park expenditure was usually over 25 years. Mr Rippon-Swaine also wanted to discuss Field B as an extension to the existing park. Mr Rippon-Swaine was now employed by BIA as head of property services.

40. A meeting took place on 7 September 2001 attended by Mr Glyn Jones, the Managing Director of BIA, Mr Rippon-Swaine, Mr Ashworth and Mr Fortescue. Mr Fortescue later set out his detailed recollection of the meeting in a report dated 11 September. Mr Jones gave an overview of the new situation at BIA. Mr Baron (Commercial Director) and Mr Holland had departed. Future negotiations would be with Mr Jones and Mr Rippon-Swaine. Mr Jones said he had not realised how obstructive Mr Baron had been. It was stated that the Airport anticipated 1.25 million passengers p.a. in 10 years. Parking, short and long term, was a critical factor for any new terminal. Mr Jones expected the Airport to become a more significant regional airport because he did not think that Gatwick would obtain a second runway and Southampton had no room for expansion. It was proposed that the Estate should grant

a 20 year lease taking in Field B at a nominal £100 per acre. Mr Jones stated that the cost of widening Parley Lane was prohibitive.

41. On 20 September Mr Rippon-Swaine wrote to Mr Ashworth with his proposals asking him to present them to the Trustees meeting on 26 September. They were for a 24 year lease to include Field B. The rent for Field A was to be £9,000 p.a. until the expiry of the existing lease on 8 July 2005 when there should be a rent review, with rent reviews 5 yearly thereafter. The letter was silent as to the basis of review. Field B was to be rented at £300 until it was used for parking when it would go onto a level pro rata with Field A. Mr Ashworth replied on 21 September. He wanted to know what was BIA's planning consultant's advice as to the current planning status of Field B. Mr Rippon-Swaine wrote on 24 September saying that the advice was that Field B had consent for use as a car park because the 1992 consent had been implemented. He looked forward to hearing from Mr Ashworth as soon as possible after the Trustees meeting.

42. There was a meeting of Lord Malmesbury, Lord Fitzharris and Mr Fortescue on 26 September 2001. The meeting was mainly concerned with Estate matters and the Airport occupies only half a page in five pages of minutes. Mr Ashworth did not attend. The meeting had before it Mr Fortescue's report dated 11 September. The minutes state that Mr Fortescue enlarged on his report. There was agreement that it should be confirmed that the planning permission was still effective in respect of Field B. That was later resolved positively. It was also agreed that the Estate should pay for Mr Ashworth to attend a conference in London concerning development in and around airports on 16 November. There was a Trustees meeting the same day. The Airport was not referred to, presumably because it had been covered at the earlier meeting.

43. On 3 October 2001 Mr Jones wrote to Lord Malmesbury to tell him that the Secretary of State had decided not to call in the application concerning the new terminal, thanking the Estate for its assistance. The outline application was granted on 18 October 2001. It had a life of 5 years but any renewal had to be applied for within 3 years. An application for renewal was made in 2004 but remains undetermined. The present position is unclear (contrast paragraph 5.3.2 of the draft Airport Master Plan of July 2006 with paragraph 184 of Mr Warner's report).

44. It is difficult to understand what was happening on the Estate's side at this point. Mr Ashworth did not attend the meetings on 26 September 2001. The proposals made by Mr Rippon-Swaine by letter of 20 September are not referred to in the minutes of the meeting on 20 September between Lord Malmesbury, Lord Fitzharris and Mr Fortescue. Mr Fortescue had been copied in with Mr Rippon-Swaine's letters of 20 and 24 September and Mr Ashworth's of 21 September. Mr Ashworth and Mr Fortescue knew that Mr Rippon-Swaine wanted to hear quickly.

45. On 4 October 2001 Mr Ashworth wrote to Mr Rippon-Swaine saying that he understood that the proposal for the new lease had been looked on favourably at the Trustees meeting. He said he was waiting to hear from Mr Corcoran on planning issues and would be in touch to commence detailed negotiations following his return from holiday on 18 October.

46. On 14 November 2001 Mr Corcoran wrote to Mr Ashworth about the planning permission, saying in effect that all was well. On 16 November Rachel Pearson, estates surveyor at BIA wrote to Mr Ashworth asking about progress. On 28 November 2001 Mr Ashworth reported to Lord Malmesbury on his attendance at the airports conference on 16 November. He had had a discussion with one of Manchester Airport's advisers about road improvements.

47. On 14 December 2001 Mr Rippon-Swaine wrote to Mr Ashworth. This followed a telephone conversation. Mr Rippon-Swaine set out his proposals for the car park lease in very much the same terms as before. He anticipated that Field B might be needed in 3 years but it was more likely to be 5. Mr Fortescue noted on his copy of the letter "Discussed with RIA [Mr Ashworth]. Agree its time to renegotiate base rent." Mr Ashworth noted on his copy the matters he wished to raise with Mr Rippon-Swaine, namely 'implementation [in relation to Field B], improvements, rent review, costs, security [of tenure].' He wrote on 10 January 2002 raising those matters. As to rent reviews he stated "Rent Reviews – the detailed basis and mechanics of this will need to be fully recorded in the lease and I would welcome your early thoughts on this please." The letter did not otherwise refer to Mr Rippon-Swaine's proposals for rent.

48. On 16 January 2002 Mr Ashworth wrote to Lord Malmesbury reporting generally on the current situation with the Airport. He said that passenger numbers had reduced and it was not apparent for the moment how or when this would be reversed, and the new terminal would not be needed for at least 5 years. He then wrote:

"The Estate is cooperating with [the Airport] to enable the new car park to be properly surfaced and this will involve the surrender of the current lease with a simultaneous renewal for a longer term to facilitate the funding of the re-surfacing work. The new lease will incorporate an additional area of approximately 3 acres with an obligation on [the Airport] to implement the outstanding element of the extant planning permission for car park development."

The greater part of the letter was taken up with road or access improvement matters, where the situation did not look favourable to the Estate.

49. Mr Rippon-Swaine replied to Mr Ashworth's letter of 10 January on 17 January 2002. He accepted the points made by Mr Ashworth. He proposed that the rent review should be dealt with 'on the same basis as we deal with other car parks on the estate, i.e. that the rent be reviewed every 5 years (first review 8 July 2005), and linked into the percentage increase in our seasonal ticket car parking charges.' The Airport had in fact no car parking areas which were let on the basis of a rent review in line with season tickets. Mr Ashworth was still concerned that the part implementation as car park of the area covered by the 1992 planning permission might be ineffective, and this caused a delay in his reply. On 13 March Mr Jones wrote to Mr Ashworth referring to the delays since 20

September, saying that the Airport 'wished to provide an improved and passenger friendly car park in time for the coming season'. Unfortunately Mr Ashworth was then in hospital. When he was out he went to see Mr Rippon-Swaine in early April. Mr Rippon-Swaine wrote to him on 12 April referring to their meeting and setting out the terms they had agreed. The terms were more detailed than had been previously agreed and included Mr Ashworth's agreement to the season ticket rent review term. Mr Ashworth spoke to Lord Malmesbury on 29 April. He followed up the conversation with a letter the same day. In it he set out the terms which 'I have tentatively negotiated with Steve Rippon-Swaine and which I recommend for approval.' He asked for instructions. Lord Malmesbury replied on 30 April saying, 'As the terms seem attractive please expedite as quickly as possible.'

50. On 2 May 2002 Mr Ashworth sent heads of agreement to Mr Rippon-Swaine. On 3 May Mr Rippon-Swaine sent a telephone message to Mr Ashworth. It was that the chief executive of the Manchester Airport Group was delighted and had asked if they could have a 99 year lease instead of a 24 year lease. Mr Rippon-Swaine signed the heads of agreement on 7 May. On 8 May he sent them back. He also said he was awaiting the trustees' response to the proposal of a 'further extended term or purchase', but in the meantime he did not wish to delay the work on the car park. On 9 May Mr Ashworth instructed Wilsons to prepare the new lease. On 28 May the Airport's Board considered the proposal for the new lease. Mr Rippon-Swaine's paper for the board concluded that the Airport needed to protect its position for the long term as regards car parking; that the gravel surface made the existing car park unsuitable for use and an extended lease justified the cost of improvements; and that the opportunity to obtain extra land should be taken. On 30 May Mr Ashworth wrote to Mr Rippon-Swaine putting any negotiations for a further agreement in relation to the car park land on hold. On 2 July Mr Rippon Swaine asked for information as to the revenue from 'extra car parking spaces for tenants and also third parties.' He was informed that it was £3,400 p.a. from tenants and £8,100 p.a. from car hire companies. He then asked for confirmation that the annual tenant's cost per space was £100, which was given. After various delays the lease of 2000 was surrendered and the new lease entered into on 14 August 2002. It was for 24 years from that date.

The 2003 lease

51. On 30 October 2002 it was announced that Buzz, then the United Kingdom's third largest low cost airline would be commencing flights from the Airport in March 2003. Buzz estimated that it would put 750,000 seats into the market from Bournemouth in its first year. On 10 December Mr Ashworth had a meeting with Mr Jones and Mr Rippon-Swaine. Mr Ashworth noted 'Terminal was not about to be built. Buzz starts March. Passengers go from 380,000 to 1m p.a. straight away. Car park to be sorted.'

52. The construction of the car park as it now is on the Estate's Field A began in February 2003 following design work beginning once the lease was signed. It included tarmacing of the access ways, gravel in the actual parking spaces, electronic barriers and pay-on-foot boxes. It is fully automatic. The cost was of the order of £400,000. The work was completed in March. This then became the primary long stay car park. The car park on the Airport land to the north became in effect largely an overflow park.

53. On 10 January 2003 Mr Rippon-Swaine wrote to Mr Ashworth referring to a conversation which they had had before Christmas. He stated that he wished to discuss a lease for Field C, the area to the east of the land covered by the existing lease. He proposed that it should be supplemental to the latter and on the same terms as provided for the northern part of that, Field B. He anticipated bringing the northern part into car park use later in the year. Mr Ashworth wrote to Lord Malmesbury recommending the proposal on 14 January. He stated that it provided a useful opportunity for the Estate to obtain and implement development on further land within the Green Belt. Lord Malmesbury gave his agreement the next day. Mr Ashworth wrote to Mr Rippon-Swaine with agreement on 21 January.

54. In early February 2003 it was announced that Ryanair had taken over Buzz. A consequence of this was that Buzz's plans to fly from Bournemouth were abandoned. (Ryanair had been operating flights to Dublin from Bournemouth since 1996). Mr Rippon–Swaine informed Mr Ashworth on 5 February that the Airport still wished to go ahead with the further lease although the application for planning permission for use as a car park would be delayed until the land was needed. On 11 February Mr Rippon-Swaine wrote saying that it was nonetheless expected that passengers would go up from 275,000 in 2001 and 408,000 estimated for 2002 to 525,000 in 2004. He said he believed that it was only a matter of time before a replacement arrived for Buzz. He stated that the new lease would provide an economic case for the installation of an electronic 'pay on foot' system for the leased land. On 25 February Mr Ashworth wrote to Lord Malmesbury asking for his instructions. Mr Ashworth wrote saying that he had Lord Malmesbury's consent on 26 March. On 1 April he wrote to Wilsons instructing them as to the new lease. It was executed on 28 November 2003. The proposed lease had been considered by the Airport's board on 29 April. Mr Rippon-Swaine's paper for the board presented the following conclusions: that car parking was a major commercial revenue generator for the airport, that possession of the further land secured valuable future parking, that the 23 year lease had a minimal rent until additional parking space was required, and that the Airport could decide when to apply for planning consent and to use the land.

Later events

55. On 27 January 2005 Mr Fitzgerald wrote to Mr Ashworth stating that the Estate had decided to appoint a new development adviser. On 5 May arrangements were concluded whereby Mr Ashworth handed to Mr Fitzgerald Strutt & Parker's files. He also then presented his account from 1 May 1998 to date, totalling £35,541 before VAT.

56. On 8 June 2005 Mr Fitzgerald wrote to BIA asking the price of a season ticket as the first step towards a rent review under the 2002 lease. By letter of 17 June he was informed that the highest charge was £220 p.a. and the

average £192. Negotiations followed which were complicated by the Airport's use of Field C as an overflow car park in the summer of 2005 without planning permission having been obtained. The outcome was the agreement in December 2006 of a revised rent of £30,051.78 for the land covered by the 2002 lease.

57. On 17 June 2005 the claimants' solicitors wrote a letter before action alleging negligence by Mr Ashworth in relation to the leases of 2000, 2002 and 2003, and that he should have negotiated leases whereby 80% of the net car park receipts went to the Estate. That gave a current rent of £770,457.

58. Work to incorporate Field B in to the Field A car park commenced in July 2005 and was completed that August at a cost of £378,052.

59. In July 2006 BIA published its draft Master Plan 2006 – 2030. This includes statements as to car parking development by 2015 and by 2030. It envisages the use of the leased land in addition to other land.

60. On 14 December 2006 BIA announced a £32 million redevelopment programme.

61. On 1 November 2005 the Estate entered a complex option agreement with Sutton Overseas Holdings Limited, a company controlled by Mr Paul Sutton, a property developer. This gave an option over Estate land including Fields A, B and C. The agreement either has become or will shortly become ineffective. I was told that a further such agreement is being negotiated.

62. There are aspects of the dispute between the parties which I have not covered in the above history. It is more convenient to refer to them separately in due course.

C. The evidence relating to the Estate's view of the Airport Road between 1980 and 2005

63. On 8 January 1980 BIA wrote to Lord Malmesbury about access to a field by Pussex Lane Farm House which had been closed off by a gate. The letter refers to a farmer, Mr Lucas, having had a special arrangement with BIA allowing him to use the Airport Road. Lord Malmesbury then wrote to Mr Fitzgerald asking him to check whether a right of access to the field was kept when the Airport was conveyed by the Estate. Mr Fitzgerald advised that it was not (letters of 15 and 26 February 1980).

64. On 1 March 1994 Mr Corcoran, the estate's planning adviser, wrote a letter to Mr Judd about the 1992 planning consent for car park. It records that Mr Judd had said he would check the Estate's right of access to the land from the Airport Road. Mr Corcoran produced a report for the Estate dated 29 March 1994. It stated 'It is not clear if Malmesbury have a right of access to their land from the Airport Road or whether a new access to Parley Lane is essential to avoid any ransom.' A copy of this report was provided to Mr Ashworth at some point after his appointment.

65. In 1996 Mr Corcoran provided a further report dated 26 March. Mr Ashworth had then been appointed for nearly a year. The report stated in paragraph 7.2 'Access to the Car Park is shown from the airport access road which is a private road and owned by [the Airport] to which the Estate does not have a right of access.' So, in Mr Corcoran's mind, the position had been clarified. Mr Corcoran and Mr Ashworth produced a joint report dated 28 March 1996. Paragraph 7.2 of that report was in similar terms and suggested access could be obtained to implement the planning consent from Pussex Lane.

66. The question next arose in 2001 at the meeting held between Lord Malmesbury and the Estate's advisers on 21 March. The context appears to be concern whether the 1992 planning consent had been implemented sufficiently to preserve it in respect of Field B. Mr Corcoran raised the possibility of the Estate securing access from Pussex Lane 'thereby avoiding a ransom situation from [Manchester Airport Group].' Mr Fortescue was to inspect the site and consider the position with Mr Corcoran. In a letter to Lord Malmesbury of 29 March Mr Corcoran considered the possibility of the Estate seeking to implement the 1992 planning consent by work to Field B. He referred to the Estate creating an access through the hedge from Pussex Lane. He said "it is not clear to me at the moment what benefit the Estate can turn this to." This was prior to the Airport raising the question of a further lease to include Field B in July 2001, and the Estate's advisers appear to have been concerned that the planning consent had not been secured with regard to Field B by implementation. In an e-mail of 30 March Lord Malmesbury showed that his concern was that something should happen to Field B and he hoped that BIA would show an interest in it. At an Estate meeting attended by Lord Malmesbury, Lord Fitzharris and Mr Fortescue on 2 April 2001 it was agreed that Mr Fortescue should 'inspect possible alternative access to car park site.' I note here that neither Mr Corcoran nor Mr Fortescue were called to give evidence, so there is no explanation from them. The minutes for the similar meetings on 15 May, 26 June and 14 August 2001 record the same as the 2 April minutes. But the minutes for the next meeting, that on 26 September 2001 do not, and Mr Fortescue's proposed inspection seems to have been dropped. It is likely that it was overtaken by the progress with BIA on a new lease and by the fact that Mr Corcoran was seeking to confirm with Christchurch Borough Council that the planning consent was still effective in relation to Field B. That was favourably resolved a letter from the Borough dated 5 November 2001 – albeit that the letter was in guarded terms. The very clear implication is that the Estate did not then consider that it had any right of access via the Airport Road.

67. On 25 November 2006 Mr Ashworth wrote to the Christchurch Borough Council asking the status of the Airport Road. The Borough replied on 30 November that it 'is private and as such is not maintained by the Council at public expense.'

68. It has at all times been the Airport's position that the Airport Road is a private road and that the Estate has no right to use it.

69. The position thus is that after Mr Corcoran's report of 26 March 1996 the thinking on the Estate's side was that the Airport Road was a private road, and that the Estate had no right of access along it.

D. The Airport witnesses

70. I will next consider aspects of the evidence of those witnesses who were involved with the management of the Airport. Their evidence is particularly relevant to the issue of what the outcome might have been in respect of the leases in respect of which complaint is made if Mr Ashworth had taken a tougher line in negotiation or if the Estate had decided not to lease its land to the Airport but had decided to lease it to an independent car park operator. Some of them only emerged as witnesses at a late stage. I will take them in what seems to me to be the most logical order rather than in the order in which they were called.

71. **Mr Graham Holland** was called on behalf of Strutt & Parker. He is a surveyor and since 1981 has always been in private practice. He specialises in commercial property, and has some limited experience of car park leases. In April 1995 he was retained as a consultant to National Express in relation to commercial property aspects of the Airport. In 1998 he negotiated the terms of the 2000 lease with Mr Ashworth. His involvement with the Airport tailed off in 2000. The evidence provided in his witness statement was to this effect. He and Mr Baron realised the importance to the Airport of implementing the planning consent for a car park on the Estate's land before it lapsed. The importance was not simply the possibility of a car park but to promote the prospect of further commercial development. This led to the 1997 lease. It formed a relatively small part of the discussions then going on. In October 1998 he was asked by Mr Baron to see if the 1997 lease could be extended. The temporary park on the leased land was then being used only by staff and as an overspill for passengers, but further work was required to bind the surface to avoid complaints, the minimum having been done previously. He recalled a number of heated discussions with Mr Ashworth by telephone as to rent. Mr Ashworth raised the question of a turnover rent. The Airport was not prepared to pay one because the park was used primarily by staff and there was no electronic monitoring system to record usage. There was also the problem of parking vouchers. The car park had no track record on which to base a turn over rent. The Estate could not insist on one because the balance of power lay with BIA. The Airport had land which it could use for parking and it controlled the access to the Estate's land.

72. In cross-examination on behalf of the claimants Mr Holland said that he had felt that his negotiating position was strong enough to avoid being forced to pay a turnover rent. He said that the discussion with Mr Ashworth had been very blunt: he just said the Airport was not having a turn-over rent. He was looking for certainty as to what the rent would be: he was not concerned with the additional cost to the Airport which a turnover rent might pose in later years. (day 5, page 36). He said that the arguments he had put to Mr Ashworth – which are set out in the correspondence, were to justify the decision which had been made not to have a turnover rent, but he did not accept that their validity should be questioned. He thought that it had been Mr Ashworth who had raised a turn-over rent. He said that Mr Ray McEnhill, then chief executive of National Express, would follow his advice and was an uncompromising negotiator. Mr Baron's evidence was also that Mr McEnhill was very decisive.

73. **Mr James Baron** was called on behalf of Strutt & Parker. He was commercial director of BIA from 1996 until May 2001. His evidence is therefore relevant to the 2000 lease but not directly relevant to the 2002 or 2003 leases. He was appointed early in National Express's ownership of BIA and left soon after Manchester Airport Group purchased the company. He has a background in commercial management and property. He is not a surveyor. The evidence provided in his witness statement was to this effect. In 1996 he saw the Airport as an industrial estate with a runway. The company was loss-making. National Express provided money to improve the Airport, and by 2001 it was making a profit of £850,000. The company nonetheless continued to be run on a frugal basis. At the time of the 1997 lease the Airport had no need for additional car parking, but it was in the long term interests of BIA and the Estate to implement the existing planning consent. He thought that generally the Estate and Mr Ashworth had an inflated idea of the value of the Estate's land. National Express would never have permitted BIA to pay a substantial sum as rental for an unnecessary car park. He took the view that the car park was a short term requirement. BIA had areas in the north west sector which could be used as alternative car park areas. One was the former BAC employee car park. BIA could have provided the bussing of passengers which that would have involved. There would also have been a loss of income from lettings of the BACC for open storage. The Airport would have elected to sustain those costs and losses rather than give the Estate the level of income it now asserts should have been negotiated. BIA also had other sites which it could consider to avoid the loss of revenue. BIA and the Estate worked together to a degree in what he called a partnership, in particular in planning matters, but the relationship was not an easy one. Mr Holland's brief was simply to get leases of the Estate's land as cheaply as possible. He said in paragraph 96 of the witness statement:

'If Ian Ashworth had insisted upon a turn-over rent during the pre-renewal lease negotiations, this could possibly have been accommodated although it would have been very much against our wishes and I may well have refused.'

74. In his oral evidence in chief Mr Baron said that there was no way that BIA would have contemplated a lease where the Estate obtained 80% of the car park revenue after deduction of amortised capital costs and operating costs. In his evidence in cross-examination on behalf of the claimants Mr Baron agreed that in negotiations for the 2000 lease Mr Ashworth had asked for a turnover rent. He said that, first, a turnover rent was inappropriate in 1998 when no passengers were using the car park and, second, one was not necessarily appropriate in a situation where BIA was providing all the passengers. He said that at that time BIA was not thinking about the cost of a turnover rent: it was against one in principle. He said that a 'strategic' decision had been taken against it, the reasons being those given by Mr Holland. He said that the Estate's position was very weak because BIA controlled the access to the Terminal through its control of the Airport Road, and BIA also provided the passengers. He stated that the passage

from his witness statement which I have quoted remained his evidence. In re-examination he said that BIA had a very good relationship with Christchurch Borough Council because BIA was seen as the main economic generator for the area: he could not conceive BIA being refused planning consent for a car park on its own land in a situation where disagreement with the Estate was fettering BIA's ability to operate.

75. **Mr Stephen Rippon-Swaine** was called on behalf of the claimants. He is a chartered surveyor and was in private practice in 1987 when he was appointed as a consultant to the Airport. In 1993 he became employed by the Airport as estates manager and in 1997 he became head of property services. He left in 2004 and is now in private practice. He was involved in internal discussions relating to the 2000 lease. He negotiated the 2002 and 2003 leases.

76. In his witness statement he stated that he reported to the managing director and liaised with Mr Baron. He said that major land decisions were taken between the three of them. In 1998 he discussed the intended new lease with Mr Holland. Mr Holland told him that Mr Ashworth had requested a turnover rent. This was discussed between Mr Holland, Mr Baron and himself, and they agreed to avoid a turnover rent if at all possible. He stated that the reasons given by Mr Holland to Mr Ashworth were ultimately of little importance on the issue whether a turnover rent was appropriate. He said, in contrast to Mr Holland;

'If we had been pushed to the limit in negotiations we would have yielded on the principle of a turnover rent. The Estate could have dug their heels in and insisted on a turnover rent and we would have had no alternative. We needed car parking facilities and there was no other land available in the south [east] sector.' [First witness statement, paragraph 26]

He referred to BIA's ownership of the Airport Road. He referred to the lack of security for parking in the north west sector and the costs of bussing passengers to there. He referred to the improvement in BIA's fortunes after the millennium. He said that as of 2002 the leased car park was only covered with gravel and only used by staff. (I note that it seems plain there was by then some passenger use.) He said: 'Passenger growth was improving and discussions were being held with other airlines. It was obviously necessary to negotiate for an extension to the car park lease.' He said that he suggested to Mr Ashworth the season ticket rent review provision. It was important to the Airport that car park usage could increase without an increase in rent. The Airport wanted the longest term it could get, and 25 years was as long as he thought the Estate would grant. He was worried that with the planned increase in passengers the Airport might be left with inadequate parking. He said:

'We were lucky that the Estate was amenable in 2002 to negotiations to extend the lease term at all. We would have been placed in a far worse position if the Estate had refused to negotiate with us and allowed that lease to expire. My concern for future car parking from 22nd December 2001 to August 2002 is evident from the written pressure which I was exerting on Mr Ashworth to agree the terms that I had been proposing. I was clearly worried that, with the planned expansion of flights from the airport, BIA would be left with a wholly inadequate provision for car parking growth.

If the Estate had refused to grant us a renewal lease on those terms then we would have paid more. A rent of £9,000 per annum is not a large sum of money for BIA with its turnover of £11 million. I cannot say how much higher BIA would have gone. We probably would have conceded a turnover rent at the time. We were negotiating with Buzz and we could not afford to land ourselves in a situation where we would not have car parking to service our passengers.' [First witness statement, paragraphs 41 and 42]

As to rent review he stated:

'I would have expected that in the normal negotiations, there would have been a proper rent review every 5 years. BIA would have been prepared to pay market price and I would have asked people whom I knew in the aviation industry what the market price was.' [Third witness statement, from paragraph 11]

In the summer of 2003 he decided that he should obtain a lease over Field C, and negotiated one with Mr Ashworth. It was very cheap. BIA considered that the problem would be to obtain planning permission. In his third witness statement he gave his view that it was the Estate which was in a strong negotiating position rather than BIA. He also stated that the chief executive of Manchester Airport Group had told him that he thought the 2002 lease was 'the deal of the decade'.

77. In cross-examination on behalf of Strutt & Parker Mr Rippon-Swaine agreed to an extent with Mr Baron that the Estate had an inflated view of the value of its land. He was asked a number of questions relevant to his view that BIA would have conceded a turnover rent in 1998 if it had been pressed – day 4, pages 73 to 88. He considered, in contrast with Mr Baron, that there were serious problems with parking in the northwest sector. He remembered discussing with Mr Baron and Mr Holland the reasons given by Mr Holland to Mr Ashworth for not having a turnover rent. He said the reasons were important in veering the Estate away from a turnover rent, which was their prime objective. He said that the existence of planning consent for parking on the Estate's land was a difficulty if planning consent was sought for parking elsewhere, which was a pressure on them. He had no view as to what an acceptable split of turnover would have been between BIA and the Estate. He referred to the season ticket review mechanism in four passages – day 4, pages 89 to 92, pages 100 to 106, pages 114 to 117 and pages 123 to 125. Having considered them and some contradictions which may seem to appear I have concluded that when he negotiated the 2002 lease he was of course aware that the review mechanism had the effect that the rent was independent of the usage of the car park, and I have concluded that he put forward the season ticket mechanism with it in mind that it gave BIA the possibility of controlling the car park rent in the future by means of its control of the season ticket price, but that it was not his intention that BIA should exercise that power to disadvantage the Estate unfairly. Part of his

intention in asking for the ticket revenue on 2 July 2002 was to see how BIA stood in its ability to keep the ticket price down.

78. **Mr Glynn Jones** was called on behalf of Strutt & Parker. He was managing director of BIA from August 1999 to mid 2003. The negotiation of the 2000 lease was largely complete before he came onto the scene. He was managing director when the 2002 lease was negotiated, likewise with the 2003 lease although he left before the latter was signed. In his witness statement dated 17 January 2007 Mr Jones stated that at the time the leases were being negotiated, BIA, was financially 'a very marginal business. In reality it comprised two distinct businesses, one based on aviation and one based on property letting. The aviation business made a substantial annual loss and was in effect subsidised by the profits from the property letting business. The reason why the aviation business was loss-making was a combination of high fixed costs and low passenger numbers.' He also stated that passenger numbers were volatile. He said income from charter and full-service airline usage of the Airport was reducing in his time because of the impact of low cost carriers. That, together with the long runway, which Southampton did not have, encouraged BIA to target low cost airlines. Because low cost airlines will not pay substantial landing fees, income had to come from ancillary activities, of which car parking was a very important part: the income from parking was almost as important as the passenger numbers. He considered the claim that, if properly advised, the Estate would have retained up to 90% of the parking revenue to be bizarre. The Airport was in a strong postition for three main reasons: although the Estate land was ideally placed for parking, the Airport had land which could easily be converted to parking, and the Airport would have faced the costs involved including bussing passengers; access to the Estate's land was effectively controlled by the Airport; and the Estate had a vested interest in maintaining a cordial relationship with the Airport in order to achieve the maximum long term value from its land so it could not overplay its hand on the car park leases. He was not in a position to agree a turnover rent: he would have had to refer the matter to Manchester Airport Group. He himself would only have agreed a turnover rent which, following an evaluation, showed no greater cost to the Airport then the actual 2002 terms. He said the Airport would not have been interested in setting up a turnover rent system because of the capital expenditure. (However, it must be pointed out, that is effectively what the Airport did with the pay-on-foot system decided on in 2001 and installed in early 2003.) He said it was not obvious at the time of 'the *negotiations'* that that there would a large income in the future from the Estate car park. The Airport would certainly have evaluated the costs of a car park in the north west sector if it had been faced with the loss of the Estate car park or a very considerable increase in its cost. The Airport would have sought to prevent the Estate running a car park on its own. Given the importance of the Airport to the region it would have been able to make a very strong case for planning permission for further car parks of its own, had it faced a substantial reduction in parking revenue.

79. In cross-examination on behalf of the claimants Mr Jones confirmed that in September 2001 when the 2002 lease was under negotiation BIA still had poor passenger numbers which were proving difficult to improve: they were talking to a number of low cost airlines: they needed to get car parking at the lowest possible cost because they did not know what the future was. He agreed that it was not a realistic option for the Airport in the autumn of 2001 to do nothing about its car park situation. He did not think that it was desirable for BIA to construct a car park on its own land, because BIA wanted to have a long term constructive relationship with the Estate. He thought it would have been extraordinarily difficult for the Estate to have run a car park on its land using a car park operator: BIA would have been very opposed to it and would have done a lot to prevent it happening. He thought the airlines would have understood BIA's position if it had fallen out with the Estate over the car park. Commercial pressures would have forced BIA to take steps against the Estate, because if BIA could not derive income for parking, it became very difficult to work with low cost airlines. He said that BIA would have found a way to operate a low cost shuttle service to a distant car park: they had learnt to cut their cloth in every circumstance. If the negotiations with the Estate had become difficult, the evaluation by BIA would have been relatively simple: what was it being asked to pay; what were the costs of alternatives? BIA would have taken into account the desirability of maintaining its long term relationship with the Estate and accorded it a value. As to planning consent, BIA had obtained permission for a scheme with a further 650 spaces in the south east sector, and had considerable support from local and regional bodies, including the planning authority where it had a very good relationship. He agreed that if BIA had applied for planning consent for a further car park and had failed, its position would have been much weakened: it would have been risky for either side to have proceeded independently. He judged the Estate's position in the negotiations to be very weak principally because of its access problem but also because of the desirability on its side of maintaining good relations. Mr Jones accepted that, if the Estate had stuck out for a turnover rent, the Airport would have asked what the Estate wanted, and would then have explored the implications. They would then have balanced it against the cost implications of the alternatives. He said that it would have been possible for BIA to prevent a car park operator on the Estate's land from using the Airport road, perhaps simply by writing to the operator and denying them permission. There was no possibility whatever that BIA would have accepted an 80% split in favour of the Estate. He said that it was valuable to the Airport to be able to control the rent reviews through the season ticket provision although it would also have had to have a view to its relations with the Estate. He said that the season ticket rent review provision was unique to the Estate.

80. **Mr Aidan France** was called on behalf of the claimants and came in answer to a subpoena. He was the first among these witnesses to give evidence. He is director of revenue management for Manchester Airports Group, though not a director of the company. He was involved in the acquisition of BIA together with East Midlands Airport. He later used the phrase 'buy one, get one free' to describe the purchase, Bournemouth being the free one. That should probably not be taken literally, but it gives the flavour. He was then head of business strategy. He oversees the passenger forecast process. Their forecasts are intended to be as accurate as possible and are developed in line with those of

the Civil Aviation Authority. His company had experience of the cost of bussing passengers to and from car parks, and could make an appropriate assessment. He was not close enough to BIA's business to say what BIA would have done if the lease on the Estate car park had not been renewed, but there were options. He could not say whether BIA would have discussed a demand for a turnover rent because he was not involved in the negotiations. He was asked if BIA could have afforded to pay more than the rent of £9,000. He said that the airport business as opposed to the property business was then making a small loss, and in that context the answer was no. He said that the commercial activities of an airport were very important, and if one was under threat, what would be done would depend upon the threat. He agreed that if the Estate had refused the rent of £9,000 negotiations would have followed to discover what the Estate's sticking point was and BIA would have had to assess the cost of alternatives in the light of it. He said that the commercial activities at the Airport were very important to the business and they would not welcome a third party taking over the Estate car park and would take steps to prevent it, but what would have been done he could not say.

81. I did not think that any of these witnesses were doing other than their best to convey to the court the truth as they saw it after a passage of time. Nor was it contended otherwise. It is as well to bear in mind that time and the litigation process may harden perceptions. The most important differences between the witnesses are between Mr Holland and Mr Rippon-Swaine as to the acceptability of a turn-over rent as a matter of principle and the comparative strengths of the Estate and the Airport in negotiation. Mr Holland had the carriage of the negotiations in 1998 to 2000, and he provided advice to National Express. His evidence is supported by that of Mr Baron and Mr Jones. Mr Rippon-Swaine had the carriage of the negotiations for the 2002 and 2003 leases. He was the only one among the four who considered that the Estate had a stronger hand than the Airport. It is important to have in mind that the position in 1998 was different to that in 2001 and 2002. I will return to these issues.

E. The evidence of Mr Ashworth as to the negotiations and his advice, the evidence of Lord Malmesbury.

82. **Mr Ashworth** is a Fellow of the Royal Institution of Chartered Surveyors. He joined the Salisbury office of Strutt & Parker in 1992, and later established the commercial department there. He became a partner in the firm in May 1980. Since May 1999 he has acted as a part time consultant to the firm advising specified clients on specific projects. His work in this latter period had largely involved greenfield development projects. As I have already set out, Mr Ashworth first became involved with the Estate in 1995. In this section I will refer only to such of Mr Ashworth's evidence as to the negotiation of the leases as is not covered in my relation of the history

83. It was an important part of Mr Ashworth's evidence that he had in mind at all times what he called 'the bigger *picture*'. He was not alone in that, and BIA itself had very much in mind the advantages of cooperation between it and the Estate. From the Estate's viewpoint the bigger picture comprised (1) the possibility of development work on the Estate's land adjacent to the existing terminal, which might also lead to road improvement works requiring Estate land, (2) the possibility of development work in the south east sector of the Airport, likewise benefiting the Estate by a requirement for road improvement land, (3) the possibility of employment development work in the north west sector, requiring Estate land for the improvement of the B3073 (4) less important, the possibility of mineral works, that is gravel extraction, at the adjacent Hurn Court Farm. It was a feature of Mr Ashworth's approach that he did not wish to take a hard line on the car park leases for fear of jeopardising *'the bigger picture'*. In order to assist cooperation between the Airport and the Estate there were regular meetings between the two teams – Mr Ashworth, Mr Corcoran (planning) and Mr Parker (highways) for the Estate, and Mr Holland, Mr Baron and another for the Airport.

84. The relevant evidence from Mr Ashworth's witness statements is as follows. I mention the negotiations for the 2000 lease only to say that Mr Ashworth stated that Mr Holland took a hard line and resisted his attempts to get a higher rent. It was made clear to him that BIA was operating on a tight budget. He stated that he was also made aware that BIA controlled the access and that the planning consent was for airport parking. Moving on, his statement emphasises his involvement in 1997 and 1998 with the plans for the new terminal partly on the Estate's land and with the section 106 agreement.

85. Mr Ashworth was surprised in October 1998 to receive Mr Holland's letter requesting an extension to the car park lease. The reasons, which I have already set out, were explained to him by Mr Holland. He had two or three telephone conversations with Mr Holland, saying that the Estate was disappointed that BIA seemed in the light of the request not to be pursuing the new Terminal. In such a conversation he raised with Mr Holland the possibility of a rent on a turnover basis: Mr Holland made it clear that there was no way that BIA would agree. The statement says that he believed that Mr Holland told him that, if he held out for a turnover rent or a market value rent, BIA would site the car park on its own land. He was sure that he had reported the reasons for the refusal of a turnover rent at the trustees meeting on 3 December 1998. The Estate was aware of the situation that there was not an open market situation because there was only BIA as a potential lessee and BIA owned the road access. At the meeting Mr Ashworth was instructed to do what he could to try and increase the rent it being suggested that it might be better to average it out over the 5 years. This resulted in his agreement of £7,000 p.a. This was increased to £9,000 in September 1999.

86. The request made by BIA in July 2001 for a further lease also came as a surprise to Mr Ashworth. He did not report to the Estate on BIA's proposals in September 2001. That was done, or done in part, by Mr Fortescue at the meeting on 26 September to which I have referred and which Mr Ashworth did not attend. So Mr Ashworth gave no direct advice to the Estate at this point. He believed that he spoke to Lord Malmesbury about the new lease by telephone on the occasion referred to at the start of his letter to Lord Malmesbury dated 16 January 2002, which reported on

his meeting with Mr Corcoran and Mr Parker. He thought he had advised Lord Malmesbury that the lease was in the Estate's interest because to have the parking area extended and the facilities up-graded would urbanise the green belt land. He discussed Mr Rippon-Swaine's proposals including the season ticket proposal with Mr Fortescue: he received no adverse comment. All on the Estate's side were aware that BIA was in a much stronger bargaining position than the Estate. He met Mr Rippon-Swaine to discuss the terms on 5 April 2002. He did not recall discussing a turnover rent with him: if he had, it would have been dismissed for the reasons given by Mr Holland. He had no reason to think that position had changed. He wrote to Lord Malmesbury on 29 April recommending the terms that had been agreed. He had spoken to Lord Malmesbury earlier that day by telephone. He was certain he would have discussed why it was in the Estate's interest to cooperate to achieve the urbanisation of the Estate's land. Lord Malmesbury had not raised any objections to anything.

87. On 21 January 2003 Mr Ashworth wrote to Mr Rippon-Swaine that having consulted his clients he was instructed that the Airport's proposals for Field C were approved in principle. The witness statement says only that Mr Ashworth believes that he discussed the proposal with Lord Malmesbury and obtained his instructions. On 25 February he wrote to Lord Malmesbury asking for his instructions on the drawing Mr Rippon-Swaine had sent. Lord Malmesbury must have given his approval to proceed.

88. In his third witness statement he said that, if he had suggested to the Estate that it should construct its own car park or lease the land to a commercial car park operator, the suggestion would have been laughed at. Such a thing was never suggested: the Estate was not a developer. The discussion in 1997 of the Estate itself doing work to the land was in the context of saving the planning consent, and it turned out not to be necessary. In 1998/9 when the 2000 lease was being negotiated the main hope was that the proposal for the new terminal partly on the leased land would proceed: so the involvement of the Estate or a third party in the development of the car park would have been pointless. He did not think that the Estate could get planning permission to widen Pussex Lane or to build a new access road to the B3073, and he would have so advised. In any event the Estate would not have been prepared to fund such works. All save the first of those difficulties applied also in relation to the 2002 lease. No commercial operator would have been interested because BIA controlled the access to the terminal.

89. In cross-examination on behalf of the claimants Mr Ashworth said that he could not remember seeking the assistance of any one in Strutt & Parker in relation to the Estate and the Airport. I do not think that he did do so in any significant way. He said that he was not unfamiliar with car parks but had not been involved in a project where the car park was the major feature. He agreed that the money which BIA spent on the Estate's land was a tie between the Airport and the land. He said that he thought his request to Mr Holland for a turnover rent was a tongue-in-cheek suggestion and he would not describe it as an appropriate suggestion. I think, on the contrary, that he put it forward as a serious suggestion: it had never before been suggested otherwise. Mr Holland's reasoned response shows that he took it seriously. I regret that in his answer Mr Ashworth was attempting to play down the importance of the fact that he had asked for a turnover rent. Mr Ashworth said that having got it out of the way he and Mr Holland then got down to the 'nitty-gritty'. He suggested that he would have told Mr Holland that without a turnover rent the Airport would get no lease: I do not think that he did. It had never crossed his mind that the Estate might get planning consent for a new road giving access to the leased land. He was told by Mr Holland and Mr Baron that the Airport had other land where it could site a car park. He had not thought that the Airport would have much difficulty getting any planning consent required. He did not know what he had meant by *'a full economic rent'* in his letter to Mr Holland of 26 November 1998, but was floating a fly for the future. He did not accept that at the meeting with the Estate Trustees on 3 December 1998 he should have advised that a turnover rent was the most appropriate. He said that the reasons given by Mr Holland were not the whole reason, because the Airport was opposed to a turnover rent in principle. He advised in favour of the Airport's proposal, but he did not remember what further advice he gave: all were aware of the relative bargaining strengths of the parties. He thought that spinning out the negotiations which began in 1998 for 18 months would have been difficult. He thought reference in his negotiation to leasing the land to a car park specialist would have been a red rag to a bull. It would have brought to a head the access situation and he did not think that in the situation any reputable car park company would have been interested. He said that it would have been a possibility later in those negotiations when the planning application for the terminal partly on Estate land was not progressing as fast as hoped to have reopened negotiations on the lease, but did not think it would have achieved anything. Nor did he think that there was scope for fundamental change at the end of 1999.

90. In relation to the negotiations for the 2002 lease he denied that he did not pay much attention to the season ticket rent review provision. He said that his letter to Lord Malmesbury of 29 April 2002 recommending approval was, as the letter states, preceded by a telephone conversation, and in that conversation he would have run through the points set out in the letter. He did not recall mentioning any other possibility to Lord Malmesbury, and I do not think that he did: he simply informed Lord Malmesbury that the terms could be accepted. He agreed that by this point the personnel had changed, save Mr Jones, and the Airport had a new owner, but, he said, it was the same airport and car park, and the circumstances were quite similar. He agreed that the idea of the terminal partly on the Estate's land had gone, but said that the green belt status of the land had been confirmed, which was bad for the Estate. He said the need to avoid upsetting BIA with regard to the new terminal was replaced by the need to concentrate on what was left of the bigger picture. He agreed that the point about an electronic system for the car park had gone because one was being installed but the said the principle of opposition to a turnover rent remained. It was put to him that he had never even asked in 2002 what the attitude of the new owners was. He said that he thought it was raised in his discussions with Mr Rippon-Swaine and rejected as before. When it was correctly put to him that this

had never been suggested by him before he said that he would be very surprised if he had not raised the question of a turnover rent in his initial discussions with Mr Rippon-Swaine. In paragraph 9.15 of his main witness statement he had said that he did not recall discussing a turnover rent. It is likely that this was inserted because he was asked by the person taking the statement if he had discussed it. I am satisfied that he never raised the question of a turnover rent with Mr Rippon-Swaine. I do not think that it occurred to him to do so. I think that if he had decided to raise it and to make a case that it was now appropriate he would both have remembered and also it would have found a mention in the documents. Further, having been ordered by the Master to provide proper particulars of their pleading on this point, it was stated in further information provided on 19 August 2006 that the position had been made clear by BIA in respect of the 2000 lease "and so thereafter Mr Ashworth did not revisit it".

91. Continuing with Mr Ashworth's evidence, it was his view, he said, based on discussions with Mr Holland and Mr Rippon-Swaine, that BIA felt it was inappropriate for the Estate to participate in the car park business. He said as regards the need to preserve the big picture and the lease negotiations that it was not a question of being nice or nasty but of having a good commercial relationship and understanding. He had been asked whether he was saying that being nice over the lease negotiations increased the likelihood that BIA would later buy land for road widening. He said he considered that the season ticket price was a rent review index which he considered was put forward in good faith and he thought it not inappropriate. He said that Lord Malmesbury was aware that the season ticket price was controlled by BIA and that was discussed. I do not think that it was: I do not think that Mr Ashworth appreciated the danger of the rent review provision, nor did Lord Malmesbury. He was asked if he had known that the Airport was then receiving £400,000 in car parking fees, he would have regarded the rent of £9,000 as proper. He said he thought that he had negotiated the best deal available. He agreed that 24 years was very long for the lease of a car park, but, he said, it was an unusual situation. He said that there was no market to provide a market rent: if the Estate and BIA had parted company, the Estate would have been left high and dry with its fields, which was not something to contemplate. He thought that the control of access by BIA was an insurmountable problem and that neither Pussex Lane nor anything else provided a way round. He said that the suggestion the Estate could have obtained a split of 80/20 in its favour was very, very much mistaken.

92. As to the 2003 lease, he thought the parties saw it as a tidying-up exercise. He said he would give the same answers to questions about it as he had given in respect of the 2002 lease.

93. Questioned on behalf of Wilsons and Mr Fitzgerald, he said that he did not see the car park by itself as a part of the bigger picture. He never had in mind any figure that the Estate might make from road widening. He never considered that the car park had a substantial value in its own right. [Day 70, page 50]

94. At the end of Mr Ashworth's evidence I asked him some questions. In answer to my question whether he had at the relevant times knowledge of the importance of car park earnings for provincial airports in particular, he said that he had no direct knowledge. I asked him if he had an understanding as to whether such earnings were an important feature in their finances. He said he had no information as such but was aware that it was unusual for an airport to have car parking on third party land. He did not have knowledge as to the terms on which airport car parks might be leased, but would have imagined that where the airport leased land to the operator it would usually be on turnover terms. He would have expected that, he said, applying his approach as a surveyor because the airport would be in a strong position and in control. He did not remember if he had thought how he would have responded if Mr Holland had asked him what he had in mind as a turnover rent. He said that he did not know whether he had given thought to the car park earnings at any stage in the negotiations for the 2002 and 2003 leases: he thought that he would have done. I consider that the strong probability is that he did not. Yet it had been said at the meeting on 22 March 2001 that 40 to 50% of the airport income was derived from car parking. This does not seem to have registered with him. It was Mr Fitzgerald's evidence that Mr Ashworth's advice was always that the rents available for the car park were extremely modest (Day 9, page 103)

95. **Lord Malmesbury** described himself as primarily a farmer. I think estate owner should be added to that. He said, and I accept, that he has no experience in the matters which are raised by the issues in this action. He was familiar with the concept of a turnover rent from the 1990/2 negotiation.

96. Two witness statements by Lord Malmesbury were put in evidence. Most of what they contain is derived from the documents and it has already been covered in my recitation of the history of the negotiations. There are only a few matters to which I need refer. Lord Malmesbury thought in relation to the proposals for the 2003 lease that £9,000 was a good rent until 2005, and provided that the Estate was protected by an adequate rent review provision the length did not matter. He knew nothing about the use of season tickets at the Airport. The second witness statement put in evidence (numbered as his third) included the following. If he had been advised to consider and perhaps go ahead with the construction of a car park on Fields A and B, he would have procured the Estate to do so. The Estate could have afforded the costs, and would have made a profit. The Estate could have done the same work as BIA did in 2003 costing £400,000. If BIA had obstructed the access of passengers from the Estate's land, he would have contested the company's right to do so, and would have sought to have the Airport Road adopted by the local authority, or to obtain permission to widen Pussex Lane. I note here that this evidences an error in the claimants' thinking which continued into the trial, namely that if Pussex Lane could be used to obtain access to Parley Lane, the B road, passengers using a car park run by the Estate or by a third party operator could then be bussed up the Airport Road without objection from BIA. He said that he would have been ready to put such a car park out to tender to car park operating companies. Likewise, in 2000 he would have taken the car park back and put it out to tender. He said that he was never advised that the position as to the Airport Road as access was never raised with

him as a factor weakening the Estate's position. If he had been told that it was, he would have sought legal advice, and would have sought a declaration that there was a public right of way over the road. I will revert to this part of Lord Malmesbury's evidence.

97. In cross-examination Lord Malmesbury said he recollected discussion at a Trustees meeting before the 2002 lease about the idea of the Estate running the car park. He said it was dropped because the Estate was happy with the way negotiations were going. There is no direct reference in the documents to the idea of the Estate running a car park. There is a hint of it in the minutes of the meeting on 21 March 2001. I have set out the relevant matters under the heading of the Estate's view of the Airport Road. The context appears to have been that the Estate was concerned about Field B, namely that nothing was happening to it and it might be that the planning consent had lapsed. Lord Malmesbury's e-mail of 30 March 2001 makes it clear that the Estate was not intending to act in competition with BIA in relation to Field B but wanted BIA to make an offer in respect of it. That is a very different context to that envisaged of the Estate and BIA failing to agree a rent and the Estate running its own car park in competition with BIA. In July of that year the offer was made.

98. Lord Malmesbury also said in cross-examination that in 2000 the Estate would probably not have invested its own money in a car park but would have brought in a third party operator. He agreed that he did not think at the material times that he had a clear right of access up the Airport Road, and that that was his thinking until November 2006. He said later that on the basis of what he was told by Mr Judd he accepted that it was a private road. He agreed that there had never been any thought of decking on the car park land until the preparation of the claim.

F. The evidence of the car park experts

99. **Mr Graham Stuart** was instructed on behalf of the claimants. He is managing director of Britannia Parking, which he described as one of the larger companies providing parking spaces in the United Kingdom. He was asked to say whether the rents negotiated by Strutt & Parker were appropriate, and, if not, what full open market rents would have been. His revised report is dated 26 October 2006. In it he stated that the standard method of calculating rents for car park leases was, in short, to have a base rent which increases by an agreed percentage every year, perhaps by the RPI, coupled with a percentage of turnover above a certain level. He did not think that the reasons given by Mr Holland in 1998 for refusing a turnover rent were valid. He had made calculations of the rent the Estate should have received on the basis of a 80/20 turnover split between the Estate and BIA , with 80% going to the Estate. He had assessed passenger numbers and car park usage. He had assumed that planning consent was obtained for Field C, and that in due course the capacity of the Estate land would be increased by the building of decking, first one storey, and then two – that is, multi-storey car parking. On this basis he calculated that, if the car park leases had been properly negotiated, the Estate would receive a total rent up to 2026 of £182,450,187. Although it has been over-taken in much of its details by the evidence of other expert's and other material, this calculation is the origin of the Estate's claim. The report assumes that the situation between the Estate and BIA was similar to the typical position where a the owner of a car park leases it. It does not refer to any of the factors which might make the situation different. Mr Stuart had also made a witness statement saying that his company would have been most interested in running the Estate's car park.

100. In cross-examination Mr Stuart stated that he was not aware of any problem of access to the Estate's car park. He had assumed that BIA would be cooperating in the operation of the car park.

101. **Mr John Theophilus** was instructed on behalf of Strutt & Parker. He is a chartered accountant. Between 1998 and 2002 he was group property director of National Car Parks Limited – NCP. He is now a consultant. He stated that the relationship between BIA and the Estate was unusual because the party controlling the usage, tariffs and access to the car park land was not the Estate but BIA. BIA both controlled the access and had alternative land for car parking. He said that a base rent with a turnover element was common in car park leases, but not invariable, particularly where there was no established use or demonstrated demand for future use. He considered that it was unusual to have a rent review provision which was within the control of the operator. He wrote:

"In looking at the negotiations for the leases, BIA demonstrably had the upper hand. It would have been unlikely in any negotiations that they would have given up the major income stream which derived from car parking (and which, in any event, was apparently crucial to the overall revenue and profitability of BIA) or otherwise increased their costs by paying additional rent." [paragraph 3.08]

He stated that before investing in the Estate's car parking land an operator such as NCP would have required a number of safeguards such as unhindered access and guarantees as to revenue, and also information as to BIA's own intentions as to car parking.

102. He considered that the situation at the Airport was unique because the Estate was the landowner and BIA the lessee. The usual expectations as to rent did not apply. He was broadly in agreement with Mr Stuart as to the typical terms where the airport was the landowner and the lessee a car park operator. He referred to key factors affecting his expectation as to the leasing terms here as being (1) that apart from the planning consent for parking the Estate's land was subject to the restrictions of the Green Belt; (2) that BIA had its own land to use for car parking; (3) that BIA controlled the access to the Estate's land; (4) that BIA was not simply the intended operator of the car park but was generating the demand for parking; and (5) BIA was bearing the capital cost of creating the car park. He considered that, bearing in mind in particular that BIA generated the demand and the control which it had, BIA would look for 80 to 86% of the net revenue from the car park after costs.

103. He had looked at the Airport's car parks on behalf of NCP in 2000. The car park he was most interested in was the northernmost which is not on the Estate's land. That was then the one which seemed the most used. He was not impressed, and for a number of reasons including the sale of NCP nothing came of it.

G. The evidence of the surveyor experts

104. **Mr Guy Joseph** was instructed on behalf of the claimants. He is a chartered surveyor carrying on business in London and has particular experience of car parks, but limited experience of airport car parks. He approached the issue of proper rent on the basis of an open market situation with adjustments. He started from the position that it was well-established that a car park owner received the vast majority of the income derived from the land. It was his view that the rents under the three leases complained of were all below a market rent and should have comprised base rents with provisions for a share in turnover. The base rents should be subject to 5 yearly review. He considered that any rent review provision must be capable of reflecting any increase in the car park earnings. He considered that, if the Airport could deny the Estate access via the Airport Road, that should reduce the Estate's share of split from 90% to 75%. He considered that overall the Estate was in a stronger negotiating position than BIA. He thought that too much was made of the access position and not enough of the difficulties and costs which would arise for BIA if it could not use the Estate's land. He considered that Mr Ashworth had been negligent because there had been no discussions or negotiations between the parties exploring their positions. He estimated the annual costs of running a bussing service for passengers to a car park in the north west sector of the Airport would be £499,000 consisting of £200,000 capital costs and £299,000 operational costs. He had no experience on which to base his calculations, but had made his own enquiries. No other figures were put in evidence, but Mr Baron said that BIA had acquired buses for its service to and from the railway station for £300 each.

105. Mr Simon West was instructed on behalf of Strutt & Parker. He is a surveyor in practice in Bournemouth. The greater part of his experience has been gained advising on industrial and commercial property matters in Dorset and south west Hampshire. He considered that the key was the relative negotiating positions of BIA and the Estate, and that the negotiations did not take place in an open market environment. The factors favouring BIA were (1) the Estate was dependent on BIA for the commercial use of its land; (2) the Estate's land only has planning consent for car park use; (3) the control of the Airport Road by BIA; (4) BIA was not reliant on the Estate for car parking land; and (5) the importance of car parking revenue to BIA. He stated *'… [Strutt & Parker] had to balance an assessment of how badly BIA required the Site for car parking against the risk that if they pushed for too high a rent, BIA might choose to walk away from negotiations and use their own land …. .'* He said that the car park leasing 'formed only a small part' of the Estate's strategy for commercial development in conjunction with BIA. He concluded:

"In my opinion, the importance of protecting the Estate's longer term commercial position out-weighed the risk inherent in trying to achieve shorter term gains from the Airport. I believe the outcome achieved by the Defendants in securing the Estate's longer term commercial position in relation to the land, whilst at the same time generating an income stream in excess of that which might have been achieved from its agricultural use, represents a successful outcome under difficult circumstances. In the circumstances I am drawn to the conclusion that on balance, the Defendants were not negligent in their negotiations carried out on behalf of the Claimants in respect of the various leases negotiated with BIA."

That may be thought to be delicately expressed. He returned to the point later in his report, saying:

"I believe Strutt & Parker had to balance achieving the best level of rent against the risk BIA might walk away from the negotiations. Under difficult circumstances I believe Strutt and Parker achieved a level of rent in excess of agricultural rental values whilst at the same time protecting the Estate's longer term commercial position in relation to the Site. I believe Strutt & Parker were in a weak negotiating position and in the circumstances, I find it difficult to criticise the level of return that they achieved."

106. He did not think that the situation between the Estate and BIA in relation to the car park land was comparable to that of an airport seeking an operator to run car parks on its land. The Estate was not in the position of such an airport, and it could not be deduced by analogy with that situation that the Estate should be entitled to most of the income. He suggested that there were two possible rent review mechanisms. One was to link the level of payments to turnover. The other was to use some form of index. He did not think that a review based on comparables was practicable because of the lack of comparables. He rejected an *'open market'* basis because it was not an open market situation. He thought an index was a logical solution, but that Strutt & Parker had *'left themselves open to criticism by agreeing'* the season ticket provision where BIA could control the price of the tickets. He considered that the particular circumstances called for a surveyor with broad experience in commercial land negotiations capable of understanding the issues. He did not think that the car park could have been offered to an independent operator without the agreement of BIA. In cross-examination he said that he did not think that a ransom strip approach to valuation (***Stokes v Cambridge***) was appropriate. He said, speaking as a local surveyor with 20 years experience in the area, that if BIA had gone to the local authorities saying it needed planning consent for car parks because the Estate was asking for more than it could pay, given the perceived importance of the Airport to the area BIA would have got their support. He thought on what he had read that Mr Ashworth was entitled to assume that the Airport Road was owned by BIA.

107. **Mr Duncan Locke** was instructed on behalf of Wilsons and Mr Fitzgerald. He is a partner in GVA Grimley LLP based in the West End of London, and specialises in the landlord and tenant side of commercial property. He is experienced in car park work and has acted for NCP for over 10 years. He has advised on car parks related to airports but not on a car park on an airport owned by it. He is mainly concerned with open market rents. He suggested that the reason why he had never advised on an on-airport car park was that many are leased on a

management agreement basis (which would be turnover related) or leased with a turnover based rent. He was not asked to consider whether Strutt & Parker had been negligent, but to consider the role of a surveyor in negotiating 'heads of terms' for a lease. It was his opinion that a surveyor should advise his client about commercial considerations of which the surveyor is or should be aware which may affect the negotiation of the terms or the client's decision whether or not to enter into the lease. He considered that a surveyor would not expect a solicitor to comment or offer a view on the commercial terms which the surveyor had negotiated. His experience was that 24 year leases had 5 years rent reviews rather than 3 year reviews. In his live evidence he was referred to the joint statement which he had signed with Mr West. The statement agreed the 5 matters which I have set out in my review of Mr West's evidence as factors favouring BIA in the negotiations.

H. The duty of Strutt & Parker

108. The duty of Strutt & Parker is here the duty of Mr Ashworth. He is the only individual who was involved on behalf of Strutt & Parker and no wider duty on the firm is alleged. But, as I will point out, that duty included a duty to seek assistance within the firm when he needed it.

109. It was asserted in the written opening submissions on behalf of the claimants that *'the level of expertise to be expected was that of a major national firm of surveyors, which had expressly put itself forward as well suited to the task of advising on land value near an airport. In other words the expertise to be expected was the very highest within the profession of chartered surveyors.'* The answer on behalf of Strutt & Parker was that the claimants were not entitled to expect the highest standards in airport development - which was not asserted, but were entitled to *'expect the standard of a competent surveyor negotiator advising on such development of land near an airport.*'

110. I consider that the difference between the parties, such as it is, is to be resolved in this way. The standard of professional skill and care to be expected from Strutt and Parker was that to be expected of a major national firm. It was the competence to be expected from such a firm holding itself out as having the competence to act in connection with the development of land adjacent to an airport. It was to be the competence which might be drawn from the whole firm: that is to say that, if Mr Ashworth was not himself fully competent to deal with a situation, he should draw on the resources of the firm. If the firm could not provide the necessary expertise in a particular situation, it might be necessary to go outside it. It will be remembered that on 24 March 1999 Mr Fitzgerald had written to Mr Ashworth referring to the particular experience of Drivers Jonas of rental performances in relation to airports. However it does not seem to me that that should have been necessary.

111. It is important to have also in mind the principle that has often been expressed and I take it conveniently from the opinion of Lord Hobhouse in ***Hall (Arthur JS) & Co v Simons*** [2002] A.C. 615 at 737, a case concerning the duty of advocates: *"The standard of care to be applied in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. It requires a plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made.*"

That is not intended to imply that the standard to be expected of a specialist Queen's Counsel is the same as that to be expected of a white-wigged junior. Mr Ashworth was more in the position of the specialist Queen's Counsel.

I. Breach of duty and negligence in relation to the 2000 lease, 1988 – 2000

112. It is as well to say by way of introduction that the important lease is the 2002 lease because it runs until 14 August 2026 and the 2003 lease in effect follows on from it. This was the way the claimants' case was put: see opening submissions, day 1, page 30.

113. As I have set out, the negotiation of the 2000 lease took place in what were effectively two phases. The first phase ran from October to December 1998 when a rent of £7,000 was agreed in respect of Field A for a lease of 5 years to 9 July 2004. At that time BIA's plan to build a new terminal partly on the Estate's land was still in being. It was in this phase that Mr Ashworth asked for a turnover rent and was refused by Mr Holland with four reasons being provided as to why it was inappropriate. The second phase covers September to December 1999. The rent for Field A was then agreed at £9,000 and a further year was added to the lease. The lease was signed on 20 January 2000. It ran to 8 July 2005.

114. It was alleged in the amended particulars of claim served on 6 November 2006 under the heading of 'The 2000 lease' that Mr Ashworth should have been aware that it was normal commercial practice for leases of car parks to have a fixed rent based on estimated usage with an additional element based on turnover. It is alleged that he failed to examine Mr Holland's reasons for refusing a turnover rent and failed to realise that they were of little weight. It is alleged that Mr Ashworth failed to make any estimate of what a turnover rent might yield. It is alleged that he failed to advise the Estate on 3 December 1998 as to a turnover rent and the likely returns, and that Mr Holland's reasons were of little weight, and, by amendment, of the possibility of the Estate constructing a car park itself or letting the land to a commercial operator. It is pleaded that, if such advice had been given, Mr Ashworth would have been instructed to seek a turnover rent, which BIA would have agreed, or, failing agreement, the Estate would have pursued the options of constructing its own car park or dealing with a commercial car park operator. In anticipation of the case made by Strutt & Parker that BIA owned the Airport Road and so controlled access to the car park land, it was pleaded in paragraph 4 of the claimants' reply, leave for which was obtained at the start of the trial, that Mr Ashworth should have advised that the Estate should investigate the rights over the Airport Road. In his closing submissions Mr Lamb submitted that it was not open to the claimants to run this last case. However,

following my ruling that certain evidence as to the road should be admitted, he raised no objection to my giving permission to serve the reply.

115. I do not consider that Mr Ashworth was negligent in relation to the 2000 lease. It may well be that the process by which he decided to accept Mr Holland's statement that BIA would not pay a turnover rent and to advise the Estate to agree to the terms offered can be made the subject of some criticism. But that is not the test. The position he took is one, which in my judgment, could easily have been taken by a competent surveyor of appropriate standing.

116. It is important to remember what the situation at the Airport then was. Enough had been done to Field A to save the planning consent. The surface which had been provided was inadequate. Few passengers were using it: the great majority were using the park on the Airport's land to the north of Field B. Although there was a question mark over whether the plan for the new terminal to be built in part on the Estate's land would proceed, the plan was still in being, and it was hoped that the Estate would make substantial money from its land if it did. If it did, the car parking arrangements would be rethought. So the new lease which Mr Holland suggested in the autumn of 1998 was secondary to that. Secondly, although BIA was trying to achieve a substantial increase in passengers there were no real signs that it was succeeding. So there was no real need for the improved car park. One explanation seems to have been that BIA had been given the necessary money by National Express and so needed to spend it.

117. The next important point is that the lease was initially intended to last only until 2004. BIA was going to spend a substantial sum upgrading the car park and the Estate was to get the benefit of it at the end of the lease. Whether substantial numbers of passengers would use it, particularly in the earlier years was uncertain.

118. I accept that Mr Holland's reasons for refusing a turnover rent would not carry much weight if the car park had been better established than it then was, and had been as it was to be in the near future. But when applied to the existing situation his reasons did carry weight.

119. It is clear that Mr Holland's refusal of a turnover rent was in clear and strong terms. Mr Holland's evidence was that his negotiations with Mr Ashworth were on occasion heated, though he did not say that this negotiation was heated. I conclude that Mr Ashworth was entitled to conclude that it would be very difficult to get Mr Holland to change his position.

120. Mr Ashworth was also bound to take account of the strengths and weaknesses of the Estate and of BIA. For reasons which I will elaborate later he was entitled to think that though it was very much to the advantage of both sides to reach agreement the Estate was in the weaker position.

121. I have mentioned the position as to the intended new terminal. At this time that was a large part of what Mr Ashworth called 'the bigger picture' and there were good reasons for not risking a falling out at this point and to keep relations amicable.

122. In this situation and for these reasons I conclude that it was a proper exercise of judgment by a competent surveyor of appropriate standing that this was not the time to press for a turnover rent. It is notable that in his letter of 26 November 1998 Mr Ashworth referred to one alternative on the expiry of the proposed new lease as being for BIA to 'renew the lease at a full economic rent.' In his evidence Mr Ashworth said that he was attempting to put an idea into Mr Holland's mind. I think that he was doing more than that because BIA's position was that its expenditure should be reflected in the rent in the lease which became the 2000 lease. So in 1998 Mr Ashworth was taking what he could get and looking to the future. That was a proper exercise of judgment.

123. The final negotiation of the 2000 lease took place at the end of 1999 when the proposed lease was lengthened by a year and the rent upped to £9,000. It is pleaded in the amended particulars of claim, paragraph 53, that Mr Ashworth remained under a continuing duty and that he failed to correct his advice given earlier in 1998. The claimants' case as it was developed at the trial was not that the time that had passed should have resulted in Mr Ashworth starting the negotiation afresh: the case was that Mr Ashworth was negligent in 1998. I would, however, have rejected an independent submission that, regardless of whether he was in breach of his duty in 1998, Mr Ashworth should have tried in the autumn of 1999 to renegotiate what he had agreed earlier. There is nothing to suggest that he considered doing so, but if he had he would have been entitled to conclude that such an attempt would have been very strongly resisted and would simply have made further lease negotiations more difficult.

J. Breach of duty and negligence in relation to the 2002 lease, July 2000 to May 2002

124. As with the 2000 and 2003 leases, the issue of breach of duty in relation to the 2002 lease is to be decided in accordance with the circumstances as they then were and in accordance with what was or should have been known to Mr Ashworth at that time. Subsequent events are irrelevant.

125. The origin of the 2002 lease lies in BIA's decision to abandon the plan to build a new terminal partly on the Estate's land and its decision in the summer of 2000 to build a new terminal on its own land to the south and west of the existing terminal. It was looking to expand its passengers from 300,000 p.a. to 6 million p.a. over 30 years. Plans published in October 2000 showed 1,750 parking spaces, 1,000 being on Estate land. The wheels turned slowly but they did turn. Before he left in May 2001 Mr Baron ordered an electronic pay-on-foot system for the car park on Field A. BIA had also realised that it needed to be surfaced with tarmac rather than the existing gravel. BIA also realised that it needed to secure Field B. This led to Mr Rippon-Swaine's approach on 20 July 2001. In October outline planning consent was granted for the new terminal. It is clear that Mr Rippon-Swaine considered the need to improve the Airport's parking facilities as important and urgent. Nonetheless action on the Estate's side was leisurely. Terms for the new lease were agreed between Mr Rippon Swaine and Mr Ashworth in April 2002. The new lease

ran for 24 years from its date, 14 August 2002. The 2000 lease was surrendered. Under it the rent of £9,000 would have been payable until it expired on 8 July 2005. That was the rent for Field A under the new lease until 8 July 2005. Then there was a rent review tied to the season ticket price. So the rent under the 2000 lease became the base rent for the 2002 lease.

126. The allegations relating to the 2002 lease in the amended particulars of claim begin with a paragraph inserted by the amendment, paragraph 55A. It states that when in 2000 BIA abandoned its plan for a new terminal partly on the Estate's land and planned a new terminal on its own land, Mr Ashworth should thereafter have advised using a commercial car park operator to run the car park on the Estate's land when the 2000 lease expired. The significance of the abandonment of the plan to build partly on the Estate's land must be that then there was less reason to keep in with BIA. The paragraph ends 'using, if necessary, Estate land for access.' That is a reference to using Pussex Lane to get access to the B road, Parley Lane. This demonstrates the misconception on the claimants' side which continued into the trial, namely that once access was obtained to Parley Lane the access problem was solved. The access problem is caused by the status, or potential status, of the Airport Road as a private road owned by BIA. If BIA would be entitled to prevent passengers having access to the terminal by blocking off the exit from the Field A to the Airport Road so they could not just walk across as they do now, it would be no solution to bus passengers round via Pussex Lane or via any other access created to Parley Lane. BIA would have been entitled to say that it would not permit the buses to use its road. I will revert to the wider question of the Estate running the car park either itself or using a third party operator.

127. A second new paragraph, 57A, alleges that Mr Ashworth failed to take account of matters explained at the conference which he attended on 16 November 2001, which I have mentioned. I am not aware of any particular matters that were mentioned at the conference which are relevant here. None were suggested.

128. The further allegations which are made are these. Mr Ashworth failed to investigate the season ticket rent review proposal (paragraph 60), that he failed to advise the Estate properly as to a turnover rent and as to the possibility of the Estate running the car park itself or through a third party operator (paragraph 63 incorporating allegations made in respect of the 2000 lease), and that, if it was not his duty to advise a turnover rent, he should have advised that a 24 year lease should have full commercial rent reviews at 3 or 5 year intervals, or a break clause operable by the Estate. These allegations give rise to 12 specific allegations of breach of duty set out in paragraph 78, but the foregoing summary is sufficient.

129. I will next look to see how far the position had changed from that which existed when the 2000 lease was being negotiated:

(a) National Express had ceased to own BIA: the new owner was Manchester Airport Group. Mr Holland and Mr Baron had gone. Mr Jones was still the managing director of BIA. The negotiations were being handled Mr Rippon-Swaine in place of Mr Holland.

(b) BIA had invested a further sum of the order of £165,000 in the car park and it would lose the benefit of it if it ceased to be the lessee of the car park.

(c) The scheme whereby some passengers were given car parking vouchers had come to an end in 2000. I do not think that Mr Ashworth knew this, but he did not enquire what the position was.

(d) An electronic payment system had been decided upon. I am unclear whether Mr Ashworth knew this: it would have been an obvious enquiry to make.

(e) Steady and substantial passenger growth was anticipated as I have stated, and BIA was planning on the basis that it would happen.

(f) The prospect of the Estate selling land to BIA at a premium price for a new terminal had gone. The other aspect of 'the bigger picture' was the possibility of selling land to BIA for the widening of Parley Lane. As I have set out in my recitation of the history there were question marks as to whether and when this might occur, and whether it might be done by compulsory purchase – in which case as I have understood it the Estate would only have got the agricultural value of the land instead of a ransom value. There was a much reduced advantage in 'keeping BIA sweet' in the hope of good things to come. In my view the 'bigger picture' has been used by Mr Ashworth to justify the 2002 lease in a way which a brief examination of the facts does not support.

(g) Car park income was a major contributor to the income of the Airport. Mr Ashworth was told at the meeting on 21 March 2001 that it accounted for 40 to 50%. He should have been in no doubt that substantial sums were involved, which would grow as the passenger numbers increased.

(h) Although passenger use of the Field A car park was still apparently low, it was sufficient for the complaints of passengers to be a matter of concern. But more important, BIA's plans were for the car park on Field A to become the main medium and long term car park for the Airport, with Field B held in reserve.

(i) It follows from the last two matters that it should have been clear that a share in the income of the car park on the Estate land by way of a rent provision with a turnover aspect was very likely to have become an increasingly valuable asset.

130. Mr Ashworth's original evidence was that he did not raise the question of a turnover rent with Mr Rippon-Swaine because it would have been dismissed for the reasons given before, and that he had no reason to think that the position had changed. I have rejected his suggestion in another part of his evidence that he would have raised the question of a turnover rent with Mr Rippon-Swaine.

131. I have come to the conclusion that Mr Ashworth simply did not at any stage properly give his mind to the question of what the rent under the 2002 lease ought to be and what he might negotiate for. He does not appear to have appreciated the importance of the negotiation, and that it was far more important than the earlier negotiations. It is also of considerable importance that he never considered that the car park had a substantial value in its own right. He does not seem ever to have considered what a turnover rent at even a low percentage might bring in. That is in part because he had not, as I have held, given thought to what BIA might earn from the car park.

132. One indication of Mr Ashworth's approach comes from the note made by Mr Fortescue on his copy of Mr Rippon-Swaine's letter of 14 December 2001 "Discussed with RIA. Agree it's time to renegotiate base rent." Mr Fortescue was not a witness, but I have learnt from other documents that he is a careful recorder. I have no doubt that I should accept the note as accurate and meaning what it says. However Mr Ashworth did not make any attempt to renegotiate the base rent. He professed in evidence to be unclear as to what Mr Fortescue meant by 'base rent' (Day 6, page 105), but it can only have one meaning, namely the rent of £9,000 which was to run until 8 July 2005. That was a rent which had been negotiated to take account of BIA's expenditure and was not the full rent which might otherwise have been payable. That is the effect of Mr Ashworth's letter to Mr Holland of 26 November 1998. The same point is referred to in Mr Fortescue's note of his conversation with Mr Ashworth on 2 March 2000 At the end of his letter of 26 November Mr Ashworth had suggested that when the lease was renewed it should be at 'a full economic rent'. When the 2002 lease was under consideration BIA was intending further expenditure and the rent could properly have reflected that. BIA intended to write it off over 25 years (Mr Rippon-Swaine's letter of 20 September 2001). I can see no logical reason for taking the rent of £9,000 as the base rent after 8 July 2005. Mr Ashworth agreed with Mr Fortescue to 'renegotiate' it but simply failed to do so. A possible explanation is that Mr Rippon-Swaine's letter of 14 December 2001 had rightly proposed that the rent be £9,000 until 8 July 2005, when there would be a rent review of an unspecified nature. Mr Ashworth may have thought that the rent review would provide a new and appropriate 'base rent' and that is why he did not note 'base rent' on his copy of Mr Rippon-Swaine's letter but did note 'rent review'. If that was what was in his mind, he forgot about it when the time came. The outcome was that the inappropriate figure of £9,000 was taken as the base for the 24 year lease. It could be said that there was another reason why it was inappropriate: before the averaging the proposed rent for the last year of the 2000 lease had been £15,000 – Mr Holland's letter of 1 December 1998.

133. Mr Ashworth told me at the end of his evidence that he did not have any knowledge of the terms on which airport car parks were commonly leased, but from his general knowledge as a surveyor he imagined that it would be on turnover terms where the airport was the lessor. He had proposed a turnover rent to Mr Holland – although it appears that he gave no thought to what the turnover term, in particular the percentage, might be. He presumably did so because he saw the advantage to the Estate if BIA's business grew as was hoped. Indeed that was obvious. He has not said that he did not think that it would be advantageous but that he did not think he could get it.

134. Much had changed since the negotiation of the 2000 lease in 1998, as I have set out. Each of the four reasons given by Mr Holland in his letter of 1 December 1998 had ceased to be valid. A 24 year lease was being sought. In my judgment, in this new situation Mr Ashworth should have raised and pressed the issue of a turnover rent with Mr Rippon-Swaine. He should have advised the Estate that there were strong reasons to try to obtain a turnover rent. There was much to be gained and nothing to be lost by doing so. The evidence suggests that Mr Ashworth had not considered the quite large sums which might be payable by way of a turnover rent even if the percentage due to the Estate was quite modest. As I have said, I have concluded that he did not give his mind in any proper way to what the rent under the 2002 lease should be.

135. It was submitted that it would have been pointless for Mr Ashworth to ask Mr Rippon-Swaine for a turnover rent because the weight of advantage in any negotiation would have been so with BIA that the request would have inevitably have been refused. I accept that, if it was obviously hopeless, Mr Ashworth would have been justified in concluding that the matter should not be raised. But the position would have to have been very clear because there was nothing to be lost in trying. As I have stated, the situation had moved on from that in 1998, and, as I will set out in the next section of this judgment, the advantages were far from being all with BIA. There were strong reasons on each side to reach an agreement. So, far from being justified in thinking it pointless, there were strong reasons based on what Mr Ashworth knew for him to seek a turnover rent for the 2002 lease. The position is, however, that there is nothing to suggest that he in fact gave the question serious consideration.

136. If, as I have held, it was Mr Ashworth's duty to try and obtain a turnover rent, the question of what turnover rent he should have sought has also to be answered. For there is all the difference between a split of 80% to the Estate as has been contended for in this trial and a modest say 5%, each after deductions for running costs and capital expenses and a base rent. Mr Ashworth never thought about this. If he had, he might have concluded that he needed assistance as to what was appropriate in the unusual circumstances, which were outside his experience. Nonetheless, in a sense the answer was straightforward, namely as much as BIA could be persuaded by negotiation to pay. For, as will appear, I do not consider that the Estate had any viable alternative to reaching agreement with BIA. But Mr Ashworth would have had to have decided where to pitch his opening offer. In my judgment, it is clear that a relatively modest figure was required because of BIA's dependence on car parking income to fund the airport side of its operation. Mr Ashworth knew that and he knew that BIA was in a tight financial situation – there was no money to spare. So the proper approach would have been to be firm on the principle of a turnover rent but tentative and modest on the percentage figure. I regard the figure of 80% which was the only figure put forward at the trial on behalf of the claimants as wholly unrealistic. It takes no account of the particular situation. Something more in the

region 20 per cent would have been an appropriate opening stance. Anything much higher would have been likely to have been met with a flat refusal.

137. Mr Lamb submitted on behalf of Strutt & Parker that, as the only actual percentage of turnover Mr Speaight had advanced on behalf of the claimants in pleadings, submissions and cross-examination was 80% to the claimants, it was not open to the claimants to rely on any lower figure. Mr Douglas did not support him in that submission. The context of the submission was the percentage of turnover which might have been obtained. In my judgment the greater is here to be taken to include the less, and failure by the claimants to obtain a finding that 80% was the correct figure does not prevent them seeking a finding that a lesser figure was correct. That was the basis on which I conducted the hearing. I can refer in particular to day 1 at page 63 where I pointed out that I was faced with two extreme positions: the claimants at least 80% and Strutt & Parker at nil, whereas I might be somewhere in between. It was the case of both Strutt & Parker and Wilsons that on any view 80% was a wholly unrealistic figure, which the claimants had no chance of obtaining. I can say that that was also my view, which I formed at an early stage. So, if breach of duty was established, the real issue was what the split of earnings to be reflected would have been, and it was never going to be 80/20 in the claimants' favour. It seems to me that there must have been reasons why 80% was persisted in, but I saw no hint of what they might be. In his closing written submissions Mr Speaight wrote '…. *The Court is asked to find that there would have been a strong chance of BIA, if pressed hard enough, agreeing to a turnover rent in which a sizable percentage was paid to the Estate.*' When asked by e-mail what this meant, Mr Speaight replied that 80% remained the claimants' primary position but they 'also continue to recognise that the Court may make a decision somewhere in the middle. "*Sizable*" means – either our primary case of 80% or at any rate closer to the top than the bottom of the range.' In his oral submissions Mr Speaight did not really add to this but he made a submission with the aim of showing that a 50% split would have been cheaper for BIA than providing its own car parks. Mr Lamb did not suggest that I should find any particular percentage if I found breach of duty established. His case for Strutt & Parker was that BIA would not have agreed to a turnover rent and so no question of split arose. In his written closing submissions Mr Douglas submitted that only 10% or at the most 20% of the car park income would have been ceded by BIA. It is important that this situation should be recorded in the judgment, and I will have to revert to it. The immediate purpose of the paragraph, however, is my holding that the claimants are not tied to their 80% figure as the outcome of negotiations but it is open to them to ask the court to determine a lesser figure as appropriate.

138. It was always open to Strutt & Parker to advance a case in the alternative to their case that BIA would not have agreed to a turnover rent, that the highest split of turnover BIA would have agreed to after evaluating all the factors, financial and other, was X per cent. But that was not done.

139. As the claimants contend for an outcome of 80% it must also be their case that Mr Ashworth should have asked for at least 80% in negotiation. I do not think that the consequences of this received much attention in submissions. I have no doubt that such at request would have been unrealistic in the particular circumstances and would have been rejected out of hand. It was put to Mr Jones and he gave a very clear answer. Further, if this had been what had happened, it could have been suggested that by taking an unrealistic position Mr Ashworth would have been in breach of his duty - because he thereby lost the Estate the opportunity of getting a turnover rent at a much lower level. I therefore have the situation that, if Mr Ashworth had done what the claimants assert he should have done he would have got nowhere. It is only if he had pitched it far lower that he would have got into a negotiation. As Mr Lamb complained in closing submissions – Day 16, page 22, it was never put to Mr Jones or Mr Baron that they would have agreed to a lower percentage. I had myself considered doing so, but decided that it was not for me. On further thought I concluded that it would not be a productive exercise with any of the factual witnesses. It can be demonstrated in this way. Suppose that it had been put to Mr Holland that, if pressed, he would have agreed a quarter of one per cent in order to get a deal, he might have felt that he should answer affirmatively to such a low figure. But then the question may be repeated at one per cent, or five or ten per cent. The witness would be unable to answer because the question did not arise at the time and the answer would have depended on a difficult assessment of a number of factors, which assessment had not required to be made. So I reject the suggestion that Strutt & Parker have been disadvantaged in that way. The claimants' case that, if 80 per cent of turnover was not appropriate, then the court should take whatever figure it finds appropriate, involves a similar adjustment to what Mr Ashworth should have sought in negotiation. I think that this is the realistic way to look at the problem.

140. There can be no doubt that, if Mr Ashworth had advised Lord Malmesbury that he wished to respond to Mr Rippon-Swaine by seeking a turnover element in the rent, Lord Malmesbury would have accepted his advice and instructed him to do so. That is evident from the history I have set out.

141. I have no doubt that Mr Ashworth accepted the season ticket rent review provision far too quickly. He asked no questions. He had no knowledge as to who the season ticket holders were and their number. He cannot have appreciated that control over the season ticket price gave BIA potential control over the rent review. If he had, he would inevitably have been more careful: he would have asked Mr Rippon-Swaine appropriate questions, and rejected the idea. He was in breach of his duty. The fact that he made this mistake is indicative of his approach to the 2002 negotiations, namely that he was not properly applying his mind.

142. I will next consider whether Mr Ashworth should have advised the Estate that, if it could not get a turnover rent, the Estate should either run the car park itself or let it to a third party operator. I am satisfied that this was not a realistic option. When he was asked about it in cross-examination relating to the 2000 lease he said that it would have been a red rag to a bull, and that he doubted whether any reputable company would have been interested. He said

later, Day 6, page127: "*You are suggesting to me that the estate had a realistic alternative of accessing its land to the car park which had been created by BIA by means other than the airport road. I am sorry I did not see it that way in 2002. There was no evidence to suggest that that would work in commercial terms or practical terms, planning terms, operational terms or anything else*.' Those were, of course, off-the-cuff responses. It is significant, and should not be over-looked, that the allegation only came into the case by amendment in November 2006.

143. I heard considerable evidence and submissions developing the possibilities and difficulties of a car park run by a party other than BIA, and as to the status of the Airport Road. I have to consider the position as it appeared in 2001 and 2002. The important elements were as follows:

(1) BIA had no doubt that the Airport Road was a private road.

(2) Those on the Estate's side were of the same view. Apart from anything else that assumption underlies the discussions which took place in March 2001 concerning the possibility of work to Field B using Pussex Lane, which discussions I have described in Section C. Lord Malmesbury and his other advisers knew more about the road than Mr Ashworth. Mr Ashworth had no reason to question that view. Nor had he any reason to advise that it should be questioned. It is apparent from the documents in 2002 that the problem caused by BIA's ownership of the road was not only known to Mr Ashworth but was part of the context in which the discussions were being held. Lord Malmesbury must have been aware of it. I have to reject his evidence to the contrary. I do not think that that evidence was dishonest: it was mistaken. It is only in the context of this action that the road's status has been questioned in an attempt, and a late attempt at that, to try and get round the difficulty which the ownership of the road causes the Estate in establishing its case that it could have negotiated a high percentage turnover rent.

(3) Car park income was very important to BIA. If BIA had been threatened with the loss of that income, or a substantial part of it, through the operation of a rival car park, BIA would necessarily have had to take every step it could to prevent the loss. It could have prevented the operation of a rival car park by closing off the access from Field A to the Airport Road and forbidding the use of the Airport Road to bus passengers from Field A via Parley Lane. No commercial operator would have been interested in attempting to run a car park on Field A in the face of opposition from BIA. So a little thought in 2001 or 2002 would have resulted in the conclusion that a rival car park was a non-starter.

144. I therefore broadly accept the answers which Mr Ashworth gave in cross-examination on this point. I do not think that he was in breach of his duty in failing to advise the Estate that it should set up an independent car park on its land. He was not in breach of his duty in failing to raise the possibility. If he had advised the Estate that this was the route it should take, he would on the contrary have been in breach of his duty.

145. During the course of the trial I pressed Mr Speaight how he answered the point that BIA could frighten off any potential operator of the Field A car park by its control of traffic up the Airport Road (Day 11, page 20). Mr Speaight answered that the court was not so much concerned with the possibility of an independent car park actually being set up but with the potency of the suggestion as a threat in negotiations. For the reasons I have stated, such a threat would have carried no force with BIA, and the likelihood is that it would have been counter-productive.

146. I can deal more briefly with the allegation that, if a turnover rent could not be obtained, Mr Ashworth should have sought a rent review clause providing for a 'commercial rent'. A 'market rent' was also referred to during the trial. In my view this would have been unacceptable to BIA because in default of agreement (which would in the circumstances have been very likely) the matter would have been passed to an arbitrator with no provisions as to how he should fix the rent: it would in effect have been within his discretion. It would not be an open market situation because the Estate can only deal with BIA and BIA can only deal with the Estate. Nor would there be any comparables. The effect would be that the arbitrator would have to decide the issue at the heart of this action. While the risk in an arbitration would be less to the Estate because an adverse assessment would not be so disastrous, such a rent review provision would be undesirable for the same reason. In his closing submissions Mr Speaight accepted these difficulties, but suggested that they would have led to a negotiated agreement involving a turnover rent. That is possible but that does not make Mr Ashworth negligent for not having pursued a 'market' rent review clause. I must mention here the passage which I have quoted from Mr Rippon-Swaine's third witness statement where he states that BIA would have been willing to pay a market price on rent review and to making enquiries as to what it would be. This ignores the fact that it was not an open market situation. The issue had not arisen and Mr Rippon-Swaine had not thought this through. Had he done so, he would have seen the difficulty but, failing that, he would have been corrected by Mr Jones.

147. I do not consider that BIA could have been expected to agree to a break clause in the Estate's favour. The operation of the clause would deprive it of essential parking and the money which BIA had invested in it. Mr Ashworth was not negligent in not advising such a term.

K. Breach of duty and negligence in relation to the 2003 lease, January to April 2003

148. The effect of the 2003 lease was to bring Field C under the same terms as Field A when Field C was brought into use as a car park. I have already held that Mr Ashworth was in breach of his duty in not asking and pressing Mr Rippon-Swaine for a turn-over rent, and in not giving appropriate advice to the Estate in connection with the 2002 lease and Field A. That finding of negligence has its consequential effect in relation to the 2003 lease: If Mr Ashworth was negligent in respect of 2002, he was similarly negligent in respect of 2003. I was not addressed on the basis that there might be negligence in relation to the 2003 lease if there was not negligence in respect of the 2002 lease, and I need not consider that possibility.

L. The lost chance

149. The principle to be applied is agreed, and it finds expression in a number of cases, of which ***Allied Maples Group Ltd v Simmons & Simmons*** [1995] 1 WLR 1602 is in the forefront. I have already held that, if Mr Ashworth had advised that the Estate should press for a turnover rent, his advice would have been accepted. In the present situation there are then two questions. The first is whether the claimants have lost a significant chance of obtaining a rent with a turnover element, and, if yes, the second is the value to be put on the chance. The evaluation of the chance has itself two aspects: what terms including a turnover rent would most likely have been achieved, and the monetary value to be put on a lease with those terms in comparison with the existing 2002 and 2003 leases. The logic of these questions can be shown as follows. If there was no significant chance that terms could have been negotiated including provision for a turnover rent, the claimants fail. If there would have been a, say, 60 per cent chance, the claimants are entitled to 60 per cent of the value of the chance lost. If the figure for turnover split most likely to have been agreed in a negotiation in which the principle of a turnover rent was accepted was 20 per cent in favour of the claimants the hypothetical lease is to be valued on that basis. The claimants would have lost 60 per cent of the resulting figure, because they had a 60 per cent chance of obtaining it if Mr Ashworth had carried out his duty. There are other ways of looking at the problem, but they achieve the same result. Thus one could say, for example, that there was, on the basis that the principle of a turnover element was accepted by BIA, then a fifty per cent chance of achieving a turnover split of 10 per cent and a similar chance of achieving 30 per cent, so one would take 20 per cent. In my judgment, it is most helpful and realistic to decide what the most likely figure is rather than looking at the chances of a range of figures. That accords with ***Browning v Bracher*** [2005] EWCA Civ 753, paragraphs 122 and 212. These principles were not in dispute. What was in dispute was the measure of damage once these figures have been decided. The claimants contended for an assessment on the basis of loss of income as in a personal injuries action where loss of future earnings is claimed, that income to be compared with the likely actual income to give the loss. Strutt & Parker submitted that the damages should be assessed as they would be if the Estate had been buying or selling a capital asset. They contended for a valuation of the Estate's interest in the lease as it might have been in the absence of negligence compared with its actual value, in short, a comparison of the value of the reversions: they relied on what is sometimes called the breach date rule. This dispute will form the subject of the next section of the judgment. My task in this section is to decide what might have been achieved if Mr Ashworth had made a determined effort to obtain a turnover rent.

150. I must bear in mind that the claimants are not entitled to damages on the basis that Mr Ashworth would have obtained the best result which might have been obtained, nor a result which might have been obtained by the exercise of especial skill on Mr Ashworth's part. They are entitled to damages on the basis of what he would most likely have obtained in negotiation with BIA if he had done no more and no less than was required to fulfil his duty.

151. I approach the question of loss of a chance in connection with turnover rent in the light of the following exchange with Mr Jones:

> Mr Justice Jack: Well, what if you had taken the view that you were going to refuse to talk to the Estate about the turnover rent, but the Estate had been really insistent, would you then have said, "*Well, what are you looking for?*" I think the follow-up question was: depending on their answer, would you then have evaluated it?
>
> A. Yes, my Lord. The answer to the first question I think ultimately would have been that, yes, we would have asked them. Rather than get to a position where we had completely fallen out with them, we would probably have wanted to explore, I suppose as a matter of common sense as much as anything else, what the implications were. Then we would simply have said, "Okay. So that is what you want." We would have tried to get to the best proper understanding of what they wanted, relative to what their negotiating stance was. We would have understood what the costs were of that and we would have run that cost as part of the business case evaluation for a variety of alternatives."

Mr Jones' answer is consistent with the common sense of the situation because there is no doubt that if BIA failed to reach agreement with the Estate there were adverse consequences.

152. In the course of the evidence and submissions a number of factors were considered relating to the strengths and weaknesses of the negotiating positions of the Estate and BIA. Those that I consider significant are the following:

(1) **factors favouring BIA** either not ceding a turnover rent or not ceding a high percentage of turnover to the Estate:

(a) BIA provided the passengers to use the car park.

(b) The income generated by those passengers parking was essential to BIA. BIA dealt with and deals with low cost airlines: that is its market. Those airlines required and require low landing fees, with the consequence that BIA must find the income to cover its costs from ancillary activities. Car parking is a major and crucial ancillary activity. Car parking revenues for 1997, 1998 and 1999 were respectively £283,000, £318,000 and £310,000 (taken from BIA acquisition report 19 February 2001). Profit before tax for 1998 was £164,000 and for 1999 was £97,000. To look ahead, car parking revenue in the year to 31 March 2005 was £854,000 and the profit before tax was £1,672,000.

(c) Both BIA and the Estate believed that the Airport Road was a private road controlled by BIA. That was the historical position (and, as I shall hold, was correct in law). Thus BIA controlled the access to the Terminal and so had the ability to control what use could be made of the Estate car park.

(d) The cost of road construction associated with either bussing or making a new access to Parley Lane for any new car park on Airport land close to the terminal.

(e) BIA would need planning consent for any car park on its own land. I heard argument as to the application of the General Development Order, which might make consent unnecessary. However, BIA has never taken that position and has had no lack of professional advice. I should put the Order out of consideration.

(f) BIA had land available to it on the Airport which it could use as alternative car parking – subject to planning consent.

(g) If the Estate was to realise non-agricultural values for its land in the vicinity of the Airport, it was likely that it could only do so in conjunction with the Airport. (This factor, 'the bigger picture', should have been given limited weight for the reasons I have stated.)

(2) **Factors favouring the Estate** in obtaining a turnover rent with a higher percentage:

(a) The Estate's land was opposite the Terminal. It provided the most convenient large scale car parking. Passengers could walk to the Terminal. Fields A and B had planning consent for parking. No other land had.

(b) BIA had already spent at least £165,000 on Field A and possibly more – Mr Ashworth's letter of 26 November 1998 refers to £500,000, which would be lost if the 2000 lease was not renewed.

(c) Any other large scale car park would require BIA to bus passengers to the Terminal.

(d) The cost of road construction associated with either bussing or making a new access to Parley Lane for any new car park on Airport land close to the terminal.

(e) BIA would need planning consent for any car park on its own land. I heard argument as to the application of the General Development Order, which might make consent unnecessary. However, BIA has never taken that position and has had no lack of professional advice. I should put the Order out of consideration. If BIA failed to get permission, BIA would have had to come back to the negotiating table cap in hand.

(f) Charges for a distant car park in the northern sector might be lower, and some rental income from other uses of the substitute car park land might be lost.

(g) BIA might need the cooperation of the Estate for any road improvement exercise.

153. Any provision for a turnover rent has to be considered in the context of the other terms of the proposed lease. Any turnover rent has to be added to the base rent to arrive at the total rent for any one year. The turnover to be split between BIA and the Estate would be the car park income less running costs and capital costs. The length of the lease is important. It is also important that there are terms of the lease that at its end (1) BIA is not entitled to a renewal under the relevant statutory provisions, because they are excluded, and (2) the Estate is entitled to take possession of the land without compensation to BIA for the cost of work carried out to it. These last features did not receive much attention at the trial in the context of turnover split.

154. The claimants' claim for damages based on the failure to negotiate a turnover rent is described in Part A of their final schedule of loss, and figures are given in schedules A, B and C. The total is £100,555,373. Credit is given for the actual rent which has been paid or is anticipated against a calculation of turnover rent. No provision is made for the payment of a base rent to which the turnover rent would be additional. This is in contrast with the calculations provided by Mr Stuart, which include very substantial base rents as set out in his schedules 2 and 3. Neither calculation was examined during the trial.

155. Submissions were made as to the weight to be given to the various factors which I have listed as favouring BIA or the Estate in negotiations. No calculations were provided to show that it would be cheaper for BIA to pay a turnover rent based on a particular split of net income from the Estate car park than to provide its own car parking. No submissions were made to support a particular split overall. So it is left to me to make my own assessment without the assistance of rival submissions. This is an unusual and unsatisfactory situation. I have considered whether I should deliver what would in effect be the preceding part of this judgment and invite the parties' further submissions before embarking on this part of my task. I have decided against it because I think that in reality the claimants and Strutt & Parker would still be so far apart in their submissions that I would derive limited help from them.

156. I think that in any negotiation relating to a turnover rent the starting point for BIA would be to assess what the proposed rent would cost them. That is where I too should start. The rent under the 2000 lease was fixed at £9,000 until 8 July 2005. BIA could properly say that it should not change. It would be possible to proceed on the basis that this base rent should be thereafter reviewed in accordance with, for example, the retail price index with an element of turnover rent then being added. But that is a complication which I think is unnecessary. I propose to take the simpler position of a fixed base rent of £9,000 with a turnover element coming in after 8 July 2005. It is then necessary to see how the car park income would have been assessed to see what any particular percentage would yield. This is not an exercise which has been done for 2001 expectations.

157. Ms Congdon, Strutt & Parker's expert on air passenger forecasting produced figures for car park income for Fields A and B (called by her Car Park 1) in her Table B.9, which achieved some measure of agreement from the claimants' advisers. This was done in October 2006. It is more up to date than anything that BIA could have done in 2001. It takes account of material not then available and it is more sophisticated. But I am looking only for something which will give me an order of size rather than precise figures for a notional turnover rent. In the absence of other figures, it offers a sufficient guide to what assessment BIA might have made in 2001. The income figures in the following table are taken from Ms Congdon's table, save the figure for the income for 2005, which is the actual figure for all car parks. The costs figures are taken from Mr Stuart's table GS3. Mr Stuart assumed that there would be decking commencing in 2013. The contribution of decking to his costs has to be taken out. The capital cost is stated separately so that is straightforward. I have extracted the contribution to operational costs by noting that the increase in

operational costs in his table is 3.5 per cent, and taking the operational costs figure of £194,083 for 2012 as a base to be increased by 3.5 per cent p.a. thereafter.

Year	Income	costs	net inc.	1%	5%	10%	15%	20%
2005	£854K	£191K	£663K	£7K	£33K	£66K	£99K	£133K
2010	4.4M	219K	4.2M	42K	210K	420K	630K	840K
2015	4.5M	253K	4.3M	43K	215K	430K	645K	860K
2020	4.5M	293K	4.2M	42K	210K	420K	630K	840K
2026	4.4M	314K	4.1M	41K	205K	410K	615K	820K

158. The income is at 2006 rates without addition to take account of inflation of the charges. It will be seen that the effect of the costs is comparatively small. The issue of additional road construction costs was not investigated in any depth, in particular with the Airport witnesses. Such costs could be substantial.

158. The only actual figures which I have to set against these as costs to be saved by retaining the use of the Estate's land for car parking are Mr Joseph's costs for bussing passengers to a car park or car parks on the Airport itself. He assessed the annual costs at £499,000 consisting of £200,000 capital costs and £299,000 operational costs. I have no reason to question the operational costs, but I think that his capital costs involve a higher quality of bus than BIA would have found necessary. I think that it would be more reasonable to take a total figure of £350,000 to £400,000 p.a. When the Estate car parks were full, BIA would be involved in bussing in any event but would be bussing some of their passengers rather than all as would be the case if BIA did not have the use of the Estate's land. Taken on its own and looking only at the figures, the prospect of bussing suggests that BIA should have been prepared to cede a turnover rent of between 5 and 10 per cent, because that would have been the cheaper option. I think that there would also have been a disadvantage in having to bus to the north eastern because of the poor access via Parley Lane. The issue of additional road construction costs was not investigated in any depth, in particular with the Airport witnesses. Such costs could be substantial.

159. The weakness of the Estate's position was that it was dependent on BIA for the use of its land. The strength of its position was that its land was adjacent and had the planning consent.

160. If BIA had been faced with the loss of the Estate's land for car parking, it would have had to mount planning applications for substitute car parking on its own land. Space in the northwest and the south east would be required to provide sufficient spaces. The land in the northwest was designated for development, and that in the south east was Green Belt. BIA would first have to have shown a need. If the Estate had been demanding 80 per cent of its car parking revenue, BIA would no doubt have got a sympathetic ear from the planning authority. But, if it was engaged in a negotiation at a far more modest level, the situation would have looked rather different. The expert evidence which I heard shows that, sympathy or not, the outcome would have been far from a foregone conclusion. If BIA had been faced with the prospect of having to apply for planning consent, it is one which it would have decided that it wished to avoid if it could. No more detailed review of the planning prospects is required or appropriate for this purpose. The planning problem cannot be given a monetary value, but it would justify BIA in paying more to the Estate than would be appropriate if it did not exist.

161. In my judgment, if Mr Ashworth had stood out for a turnover rent at a modest level in 2001, both BIA and the Estate would have been in a position where they could not allow the negotiation to fail. The figures show that there was an economic case for reaching an agreement.

162. Nonetheless, BIA might have decided to take a hard line and to refuse a turnover rent as a matter of principle. Looking at the position overall and taking account of Mr Rippon-Swaine's view of BIA's position I think that the chance of BIA taking that line would have been very small, certainly well below 5 per cent. It is not significant and I should take no account of it.

163. In the negotiation BIA would have sought to concede as low a percentage of turnover as possible. While neither side could afford to allow the negotiation to fail, BIA was in the stronger position and this would have been reflected in the outcome. I have concluded that the figure which the parties are most likely to have agreed upon in the circumstances is 10 per cent. If Mr Ashworth had achieved that, he would have fulfilled his duty to the Estate.

164. Mr Speaight submitted that an analogy could be drawn with situations where a purchaser holds a ransom strip which provides the access to development land. Following the decision of the Lands Tribunal in ***Stokes v Cambridge Corporation*** (1961) 13 P&CR 77 a rule of thumb has developed that the price for the strip should reflect a fraction of the released development value, which is often taken as one third. Mr Speaight suggested here that this provided me with a resolution to BIA's control of the access to the Estate's car park. In my view the rule has no application here, by analogy or otherwise. The situation here is quite different to the usual ***Stokes v Cambridge*** situation. For similar reasons I do not think that assistance is to be found in ***Murphy & Sons Ltd v Railtrack plc*** [2002] EGLR 48.

165. It is possible that in a negotiation involving a turnover rent BIA might have reconsidered the proposed term of the lease. But no submissions were made suggesting that and I ignore it.

166. If a turnover rent had not been agreed, a rent commencing 9 July 2005 should have been agreed well in excess of £9,000 as uplifted by any rent review. On any view £9,000 was inappropriate for the reasons I have given. Because of my finding as to turnover rent, I do not have to determine what it would most likely have been. If that were not so, I would have needed to receive further submissions on the point.

M. The measure of loss

167. The claimants seek to recover damages assessed as the difference between the rents they have received and will receive under the leases negotiated by Mr Ashworth and the rents they would receive under the leases that might have been made if he had performed his duty. Thus in broad terms their claim is for the lost turnover rents which, as I have now held, he should have negotiated. They have sought in respect of the unexpired period of the leases to assess the passenger numbers and hence the future earnings of the leased car parks. For the past actual figures are used so far as they are known. Estimates are made for the future. An adjustment is made in respect of the future rents to take account of accelerated receipt. The approach is thus equivalent to that in a personal injury action where there is a claim for loss of past and future earnings.

168. It was not until the service of Strutt & Parker's opening written submissions that it was suggested that the claimants' approach was wrong. It was there submitted that the correct approach is to value the reversions which the claimants have and those which they might have had if Mr Ashworth had performed his duty. The loss was the difference, namely the diminution in the value of the reversions. That would involve putting a value on the land with the actual and hypothetical leases, namely what it would be likely to fetch in the market if it was put up for sale. This approach is well established as correct where a party buys land on the negligent advice of a surveyor or solicitor. In his closing speech for Wilsons and Mr Fitzgerald Mr Douglas tentatively supported Mr Lamb in this approach.

169. The difference is thus between what I may call a loss of earnings assessment and a valuation. As I have stated, there was agreement that either way the damages needed to be adjusted to take account of the lost chance element of the claim. That is done on the basis of my findings simply by taking the turnover split which I have held would most likely to have been negotiated if Mr Ashworth had performed his duty. For I have held that the chance of BIA altogether refusing a turnover rent was not significant.

170. It was unfortunate that this difference between the parties arose at a late stage when the trial was fully occupying the parties. No consideration had been given to how appropriate valuations might be done and what difficulties might arise. It was suggested that there might be little difference in the two approaches because the sum of the rents discounted for early receipt should approximate to what some one would pay as the market price. I am doubtful as to that. I suspect that any one buying the income stream based on a turnover rent and forecasts of passengers and parking fees would want a substantial discount for the uncertainties involved. There is, however, certainly a difference in this important respect. The loss of earnings basis uses up-to-date figures for the past and for the future, whereas the valuation basis prima facie involves the valuations being done as at the date of the leases on the information then available and ignoring future events.

171. The corner stone of Mr Lamb's submission for Strutt & Parker was the judgment in ***Inter-Leisure Limited v Lamberts*** [1997] NPC 49, a decision of Mr Michael Harvey QC sitting as a judge of the High Court. As in the present case the claim was by the freehold owners of land against the professionals, their solicitors, who had acted for them in connection with the leasing of it. A number of allegations of negligence were made. I need only refer to the failures to provide a properly drawn rent indexation clause, and to include in the rent review provision a term that the review should be upwards only. By the time the review arrived, the property market had collapsed and the new rent was fixed at a level which was substantially lower than the original. The lease was dated 1 October 1989. By October 1992 the defects in the lease were apparent. The trial took place early in 1997. The defendants contended that the damages should be assessed on the basis of the value of a properly drawn lease as at December 1989, applying what is called the breach date rule. It was submitted for the claimants that (1) the indexation claim should be assessed on the basis of the actual accrued losses rather than by valuation, and (2) the review clause claim should be assessed by valuation but a fairer assessment would be achieved by taking the values at December 1996, ie. the approximate trial date, alternatively October 1992. So the dispute in respect of this head of claim was as to the date at which the loss should be assessed and the application of the breach date rule. The claimants did not try to assess the rent they were likely to lose in the future and claim that. The judge accepted the claimant's submission in respect of the indexation claim: the losses had occurred and actual figures were available; so valuation was not appropriate. He took October 1992 as the date for valuation in respect of the review clause claim as this was the date by which the position had crystallised and the claimants knew of the deficiency. He did not think it right that the defendants should be liable if thereafter a further fall in value occurred. The decision was referred to with approval in ***Hanif v Middleweeks,*** Court of Appeal, 19 July 2000, B1/2000/0322, but it is clear that the issue to which the court was referring was the assessment by Mr Harvey of the loss of the chance, an aspect of his decision which is not relevant here.

172. As consideration of *Inter-Leisure* shows, there may be two aspects to the problem in the present case. The first is whether a valuation basis is appropriate or an assessment of loss of rent is appropriate. The second is the date at which the valuation or the assessment is to be carried out. The application of the breach date rule would provide for the valuation or assessment to be carried out at the date of the breach of duty, ignoring events between then and now. But the breach date rule has never been applied in claims for loss of earnings or loss of profits. In those situations the court has not excluded the use of the most up-to-date information. If it is right that the claimants are

entitled to recover damages on the basis of an assessment of the rent that has been lost, then the breach date rule is irrelevant: I refer to the opinion of Lord Steyn in the ***Smith New Court*** case at [1997] AC 254 at 284C cited below.

173. The authorities which were cited on behalf of the claimants on this part of the case began, chronologically, with ***County Personnel Ltd v Pulver*** [1987] 1 WLR 916. This was a claim against solicitors for negligence in the negotiation of an underlease on behalf of the tenants. The underlease entered into in February 1979 provided for the rent of £3,500 to be increased on the same date and in the same percentage as any increase in the rent under the head lease. In 1984 the rent was increased to £9,022 although the open market rental value was only £2,600. The claimants resolved the position by surrendering the underlease on payment of £16,000 and a sum representing the increased rent then due. The Court of Appeal first held that, contrary to the judge's finding, negligence was established. The issues as to damages and their resolution so far as relevant here can be taken initially from the judgment of Bingham LJ starting at page 924:

"The plaintiffs claim as damages the three sums which I have already mentioned: the capital sum of £16,000 paid to the mesne lessor in consideration of his accepting a surrender of the underlease in June 1984; £2,761 arrears of rent paid to the mesne landlord as part of that settlement; and £17,000 lost on the prospective sale of the underlease and the goodwill of the company's employment agency business. ……

The defendants attacked this method of calculating the claim as being bad in principle. It was said that the correct measure of damage (whether in contract or in tort) for negligent advice is the difference between (a) the open market value of the asset acquired as it actually was, and (b) whichever is lower of the price paid and the open market value on the asset in the state in which, as a result of the negligent advice, it was thought to be. I shall for convenience call this "the diminution of value rule." In the defendants' submission the diminution in value rule is to be applied as at the date of breach of contract or entry into the transaction and account should not in general be taken of events which occur later.

The principles to be applied in assessing damages in this case are in my judgment, these:

*(1) The overriding rule was stated by Lord Blackburn in **Livingstone v. Rawyards Coal Co**. (1880) 5 App.Cas. 25, 39, and has been repeated on countless occasions since: the measure of damages is "that sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."*

*As Megaw L.J. added in **Dodd Properties (Kent) Ltd. V. Canterbury City Council** [1980] 1 W.L.R. 433, 451: "In any case of doubt, it is desirable that the judge, having decided provisionally as to the amount of damages, should, before finally deciding, consider whether the amount conforms with the requirement of Lord Blackburn's fundamental principle. If it appears not to conform, the judge should examine the question again to see whether the particular case falls within one of the exceptions of which Lord Blackburn gave examples, or whether he is obliged by some binding authority to arrive at a result which is inconsistent with the fundamental principle."*

*(2) On the authorities as they stand the diminution in value rule appears almost always, if not always, to be appropriate where property is acquired following negligent advice by surveyors. Such cases **as Philips v. Ward** [1956] 1 W.L.R. 885 and **Perry v. Sidney Phillips & Son** [1982] 1 W.L.R. 1297, lay down that rule and illustrate its application in cases involving both surveyors and solicitors.*

*(3) That is not, however, an invariable approach, at least on claims against solicitors, and should not be mechanistically applied in circumstances where it may appear inappropriate. In **Simple Simon Catering Ltd. V. Binstock Miller & Co.** (1973) 228 E.G. 527 the Court of Appeal favoured a more general assessment, taking account of the "general expectation of loss." In other cases the cost of repair or reinstatement may provide the appropriate measure: the **Dodd Properties** case [1980] 1 W.L.R. 433, 456, per Donaldson L.J. In other cases the measure of damage may properly include the cost of making good the error of negligent adviser: examples are found in Braid v. W.L. Highway & Sons (1964) 191 E.G. 433, and **G & K. Ladenbau (U.K.) Ltd. V. Crawley de Reya** [1978] 1 W.L.R. 266.*

*(4) While the general rule undoubtedly is that damages for tort or breach of contract are assessed as at the date of the breach (see, for example, **Miliangos v. George Frank (Textiles) Ltd.** [1976] A.C. 443, 468, per Lord Wilberforce), this rule also should not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule. **The Dodd Properties** case [1980] 1 W.L.R. 433, both affirms this principle and illustrates it application.*

(5) On the fact of the present case the diminution in value rule would involve a somewhat speculative and unreal valuation exercise intended to reflect the substantial negative value of this underlease. It would also seem likely to lead to a total claim well above the figure the plaintiffs claim. By contrast, there is firm evidence that £18,761 is what it actually cost the plaintiffs, as a result of an arm's length negotiation after expiry of the first five years of the underlease, to extricate themselves from the consequences of the negligent advice they had received. Unless (which seem unlikely) it can be shown that payment of this sum did not represent a reasonable attempt by the plaintiffs to mitigate the loss they had suffered, this figure would represent a fair assessment of one head of the loss."

174. The citation sets out the overriding principle as stated by Lord Blackburn and also the diminution in value rule which usually applies where property is acquired following negligent advice from surveyors and solicitors. Bingham L.J., declined to apply the rule because in the circumstances there it would lead to an inappropriate assessment. Stephen Browne LJ agreed with the judgment of Bingham LJ. Although at the start of his judgment Sir Nicholas Browne-Wilkinson V.-Ch, also stated his agreement with Bingham LJ, he went on to hold that the diminution in value rule simply did not apply because the case was not concerned with the acquisition for a capital sum of a property having a capital value. He stated at page 927G:

"As to measure of damages, in my judgement the diminution in value rule is wholly inappropriate to the quantification of damages in this case. The diminution in value rule is concerned with a case where the client has purchased for a capital sum a property having a capital value. Such client thinks that it has certain features which render it more valuable. Due to the shortcomings of his professional adviser he is not aware of the fact that it lacked these features. The measure of damage is the difference, put broadly, between its actual value and the value it would have had had it possessed the features which he thought it had. The essence of such a rule is to compare two actual values. In the present case the plaintiffs were buying an asset which, as they thought, could have no capital value; they were buying an underlease at a rack market rent which would have no capital value. As a result of the negligence by the solicitors the plaintiffs have exposed themselves to a long-standing liability requiring them to pay substantial sums out of pocket. To apply any test of capital diminution in such circumstances would be wholly artificial. The loss suffered is the liability to pay a sum over a period of time. The plaintiffs managed to extricate themselves from such liability by the down payment of a capital sum. In my judgment, the capital sum they had to pay is the true measure of damage under that head."

175. The diminution in value rule is established in relation to situations where a claimant buys property following negligent advice from a surveyor or solicitor by a large number of cases. The dispute in such cases has often been between taking as the measure of loss the difference in the purchase paid and the value as properly described, or the cost of remedying the defect. The former is the usual measure. The law was fully explored in ***Watts v Morrow*** [1991] 1 WLR 1420. The reason for awarding the difference in value was stated by Ralph Gibson LJ at page 1434H:

"The task of the court is to award to a plaintiff that sum of money which will, so far as possible, put the plaintiff into as good a position as if the contract for the survey had been properly fulfilled: see per Denning L.J. in ***Philips v. Ward*** *[1956] 1 W.L.R. 471, 473. It is important to note that the contract in the present case, as in Philips v. Ward, was the usual contract for the survey of a house for occupation with no special terms beyond the undertaking of the surveyor to use proper care and skill in reporting on the condition of the house.*

The decision in ***Philips v. Ward*** *was based upon that principle: in particular, if the contract had been properly performed the plaintiff either would not have bought, in which case he would have avoided any loss, or, after negotiation, he would have paid the reduced price. In the absence of evidence to show that in any other or additional recoverable benefit would have been obtained as a result of proper performance, the price will be taken to have been reduced to the market price of the house in its true condition because it cannot be assumed that the vendor would have taken less."*

As Bingham LJ pointed out at page 1444 an award of the cost of repairs would actually put a claimant in a better position than if the correct advice had been given:

"*In* ***Philips v. Ward****, as in the present case, the cost of repairs exceeded the diminution in value. The Court of Appeal there pointed out that if the plaintiff received the house, for which he had paid £25,000, and £7,000 (the cost of repairs) he would in effect have obtained the house for £18,000. But the value of the house in the defective state in which it had actually been was £21,000, and had the defendant properly performed his contract the plaintiff could not have bought at any lower price. An award of £7,000 would not therefore have put him in the same position as if the defendant had properly performed his contract. It would have improved his position to the extent of £3,000 and thus put him in an advantageous position he could never have enjoyed had the defendant properly performed.*

The same simple approach applies here. Mr. and Mrs. Watts paid £177,500, the value of the house as it was represented to be. The value of the house in its actual condition was £162,500, a difference of £15,000. The actual cost of repairs was (in rounded-up figures) £34,000. If Mr. and Mrs. Watts were to end up with the house and an award of £34,000 damages they would have obtained the house for £143,500. But even if the defendant had properly performed his contract that bargain was never on offer. The effect of the judge's award is not to put Mr. and Mrs. Watts in the same position as if the defendant had properly performed but in a much better one."

176. The second case cited on behalf of the claimants was ***Knight v Lawrence*** [1991] 01 EG 105 (and elsewhere). This was a claim against a receiver for negligence in failing to serve notices triggering rent review clauses. The properties were later sold at auction with notice of the failure. As to the assessment of damages Sir Nicholas Browne-Wilkinson V Ch stated at page 147: *"The starting point is to try to ascertain what would have been the sale price of the properties if on December 11 1984 the rent reviews had properly taken place. That involves two stages. First, to find out at what the reviewed rents would properly have been agreed. Second, to find out, taking into account the higher rent payable as a result of such review, what increased price would have been obtainable for each of the properties."*

The actual sale price was to be deducted from that, and the resulting sum had then to be adjusted to see what difference its receipt would have made to the claimant. It is difficult to see that in the circumstances the court could have taken any other approach than to start with the lost sale price, and I do not think that the case assists me.

177. The negligence in ***CIL Securities Ltd v Briant Champion Long*** [1993] 2 EGLR 164, also cited on behalf of the claimant, was that of a surveyor in advising a landlord on rent reviews. The rents in respect of which negligence was found ran on for a period of 4 years, which had expired by the trial of the action. Damages were awarded on the basis of the shortfall in rents over that period – page 168E. There does not seem to have been any dispute that this was the correct approach, and it may be thought obviously right in the circumstances.

178. ***Knight v Lawrence*** and the ***CIL Securities*** case are two of the cases on rent reviews cited in Jackson & Powell on Professional Liability, 6th edition, in paragraphs 10-183 and 10-184 dealing with surveyors and rent reviews, to which passage Mr Lamb referred me. A third case cited there is ***Corfield v Bosher & C***o [1992] 1 EGLR 163. There the defendant solicitors failed to advise their client landlord as to the time limit in which he might appeal against an award made in an arbitration concerning a rent review. The damages were calculated on the basis of the increased

rent that might have been lost over the relevant period. It does not appear that the basis of assessment was disputed. These three cases are all decisions at first instance.

179. In ***Smith New Court Securities Ltd v Citibank NA*** [1997] AC 254 the House of Lords had to consider the measure of damages where shares had been acquired in reliance upon a false representation. The value of the shares had been subsequently depressed by an independent fraud involving the company so the date at which the shares were to be valued for the purpose of assessing loss was crucial, and the application of the breach date rule was the issue. Lord Browne-Wilkinson stated at page 265H:

*"Turning for a moment away from damages for deceit, the general rule in other areas of the law has been that damages are to be assessed as at the date the wrong was committed. But recent decisions have emphasised that this is only a general rule: where it is necessary in order adequately to compensate the plaintiff for the damage suffered by reason of the defendant's wrong a different date of assessment can be selected. Thus in the law of contract, the date of breach rule "is not an absolute rule: if to follow it would give rise to injustice, the court has a power to fix such other date as may be appropriate in the circumstances:" per Lord Wilberforce in **Johnson v. Agnew** [1980] A.C. 367, 401A. Similar flexibility applies in assessing damages for conversion (**IBL Ltd. V. Coussens** [1991] 2 All E.R. 133) or for negligence (**Dodd Properties (Kent) Ltd. V. Canterbury City Council** [1980] 1 W.L.R. 433). As Bingham L.J. said in **County Personnel (Employment Agency) Ltd. V. Alan R. Pulver & Co.** [1987] 1 W.L.R. 916, 925-926:*

> *"While the general rule undoubtedly is that damages for tort or breach of contract are assessed as at the date of the breach …… this rule also should not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule."*

In the light of these authorities the old 19th century cases can no longer be treated as laying down a strict and inflexible rule. In many cases, even in deceit, it will be appropriate to value the asset acquired as at the transaction date if that truly reflects the value of what the plaintiff has obtained. Thus, if the asset acquired is a readily marketable asset and there is not special feature (such as a continuing misrepresentation of the purchaser being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, freed from any continuing adverse impact of the defendant's wrongful act. The transaction date rule has one manifest advantage, namely that it avoids any question of causation. One of the difficulties of either valuing the asset at a later date or treating the actual receipt on realisation as being the value obtained is that difficult questions of causation are bound to arise. In the period between the transaction date and the date of valuation or resale other factors will have influenced the value or resale price of the asset. It was the desire to avoid these difficulties of causation which led to the adoption of the transaction date rule. But in cases where property has been acquired in reliance on a fraudulent misrepresentation there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation for the wrong done to the plaintiff, in particular where the fraud continues to influence the conduct of the plaintiff after the transaction is complete or where the result of the transaction induced by fraud is to lock the plaintiff into continuing to hold the asset acquired."

Lord Steyn stated at page 283H:

*"That brings me to the perceived difficulty caused by the date of transaction rule. The Court of Appeal [1994] 1 W.L.R. 1271, 1283g, referred to the rigidity of "the rule in **Waddell v. Blockey** (1879) 4 Q.B.D. 678, which requires the damages to be calculated as at the date of sale." No doubt this view was influenced by the shape of arguments before the Court of Appeal which treated the central issue as being in reality a valuation exercise. It is right that the normal method of calculating the loss caused by the deceit is the price paid less the real value of the subject matter of the sale. To the extent that this method is adopted, the selection of a date of valuation is necessary. And generally the date of the transaction would be a practical and just date to adopt. But it is not always so. It is only prima facie the right date. It may be appropriate to select a later date. That follows from the fact that the valuation method is only a means of trying to give effect to the overriding compensatory rule: **Potts v. Miller**, 64 C.L.R. 282, 299 per Dixon J. and **County Personnel (Employment Agency) Ltd. V. Alan R. Pulver & Co.** [1987] 1 W.L.R. 916, 925-926 per Bingham L.J. Moreover, and more importantly, the date of transaction rule is simply a second order rule applicable only where the valuation method is employed. If that method is inapposite, the court is entitled simply to assess the loss flowing directly from the transaction without any reference to the date of transaction or indeed any particular date. Such a course will be appropriate whenever the overriding compensatory rule requires it. An example of such a case is to be found in **Cemp Properties (U.K.) Ltd. V. Dentsply Research & Development Corporation** [1991] 2 E.G.L.R. 197, 201 per Bingham L.J. There is in truth only one legal measure of assessing damages in an action for deceit: the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants. The analogy of the assessment of damages in a contractual claim on the basis of cost of cure or difference in value springs to mind. In **Ruxley Electronics and Construction Ltd. V. Forsyth** [1996] A.C. 344, 360g, Lord Mustill said: "There are not two alternative measures of damages, as opposite poles, but only one; namely, the loss truly suffered by the promisee." In an action for deceit the price paid less the valuation at the transaction date is simply a method of measuring loss which will satisfactorily solve many cases. It is not a substitute for the single legal measure: it is an application of it."*

The passage where Lord Steyn refers to the possibility that the valuation method may be inappropriate is very relevant here. I have looked at ***Cemp Properties*** [1991] 2 EGLR 197, which is cited by Lord Steyn. There solicitors had made a negligent misrepresentation which led to the acquisition of property and the commencement of its development in ignorance of third party rights as to light and air. The Court of Appeal held that in addition to the market loss assessed at breach date the claimants were entitled to the costs they had incurred over eight months following the misrepresentation in ignorance of the true position: see page 200L to 201E and page 201K to M. So

somewhat contrary to the impression given by Lord Steyn the case was one where the breach date rule was applied to the valuation element of the damages and consequential losses were allowed in addition. It was, as the headnote states, a hybrid claim.

180. I was also referred to the decisions of the House of Lords in ***Miliangos v George Frank (Textiles)Ltd*** [1976] AC 443 and ***Swingland Castle Ltd v Alastair Gibson*** [1991] 2 AC 223 per Lord Lowry at 238, in each case as to the need not to take a rigid approach to the rules relating to damages.

181. In addition to the *Inter-Leisure* case Mr Lamb relied on ***Motor Crown Petroleum v SJ Berwin & Co*** [2000] Lloyd's Rep PN 438. In that case the defendant solicitor was instructed to act on an appeal against a refusal of planning permission for development. He negligently failed to advise the claimant to challenge a local plan, which had made it the more difficult to obtain planning permission to build a filing station. Damages were awarded on a lost chance basis starting with the value the land would have had with permission. There was no claim for the profits which might have been made from the station. The case was not concerned with the acquisition or sale of land. I do not consider that it assists me.

182. I have also looked at various cases cited by Mr Harvey in ***Inter-Leisure***. In ***Kennedy v Van Emden*** [1996] PNLR 409, (1996) 74 P&CR 19 the claimants had taken assignments of protected underleases at illegal premiums. They sought to recover their loss from their solicitors. Meanwhile it had become lawful to charge premiums on the assignment of the leases and so the tenants had suffered no loss if the date for assessment was not the date of the assignments but the date of trial. The Court of Appeal upheld the judgement that taking the latter date reflected the overriding compensatory rule. ***Amerina v Barling*** (1993) 69 P&CR 252 was a case involving the granting of an option to buy shares which was granted by solicitors contrary to the instructions of the claimants. It was held by the Court of Appeal that the loss should be measured by the difference between the value of the shares with and without the option at the date it was granted: the circumstances did not require the taking of a later date. ***Wapshott v Davies Donovan*** (1995) 72 P&CR 244 concerned the purchase of flats with a defective title. The Court of Appeal held that the purchasers' losses were to be assessed at the date of the purchase. These cases were concerned with the application of the breach or acquisition date rule and do not particularly assist me as to whether a valuation basis is normally appropriate when a lease has been granted at too low a rent.

183. The first question is whether the valuation method is appropriate. If it is appropriate, then the second question is as to the date of the valuation and whether post transaction events may nonetheless be taken into account. But the two questions may not be independent. For what has happened after the transaction may affect the answer to the first question. It is clear that where property is acquired as a result of negligent advice, whether the advice comes from a surveyor, solicitor or other professional, the usual method of measure of loss is the difference in value between the purchase price paid and the value as properly described at the date of the purchase. As to the purchase of an interest in land, I refer to the many cases concerning land already cited. As to choses in action I refer to the *Smith New Court* case, cited above, – shares. As to chattels I refer to the case of the Houghton urns, ***Thompson v Christie, Manson & Woods*** [2005] EWCA Civ 555 at paragraphs 124 and 132 to 139. There the Court of Appeal made clear that matters affecting value which come to light or into being after the transaction are not to be taken into account: that is the consequence of the breach or transaction date rule.

184. The granting or acquisition of a lease is the granting or acquisition of an interest in land. If it is a long lease, it is often the case that the main consideration will be a premium payable for its grant or transfer, the rent payable over its term being secondary. In that case the position is unlikely to be different from that where the purchase is of a freehold, and a valuation at the transaction date is likely to provide the basis of assessment of damages in a claim against a professional advising on the purchase negligently. But where the main consideration for the grant of the lease is the covenant to pay rent, the position may be different. In the *County Personnel* case Bingham LJ held that in the circumstances of the case it was inappropriate to use a valuation basis of assessment. Sir Nicholas Browne-Wilkinson V-Ch held that the valuation basis of assessment was inappropriate because the tenants were not buying an asset having a capital value.

185. I was not cited any case where the claim was against a professional adviser for negligence resulting in the sale of property at an undervalue - as the words *'sale of property'* are usually understood. If a surveyor advises his client to sell land for a sum of money which is too low, no one would doubt that the damage was the difference between the price which should have been obtained and the actual price. Likewise if a lease is granted for too small a premium. As to rent, suppose the rent is £1,000 per annum over 20 years when the surveyor should have advised and obtained a rent of £1,200, is the measure of loss 20 times £200, £4,000, discounted for early receipt of part and compensated by interest for late receipt of part, or is it the difference in market value of the two leases, prima facie to be assessed as at the date of the lease, plus interest? (If it is the market value, the value of the land reverting to the owner at the end of the lease will be the same in each case, and is immaterial.). Put in different terms, is the lease to be treated as equivalent to the sale of an interest in land, with the "*purchase price*" being the value of the tenant's covenants, in particular as to rent, over the period? That was the basis of the award of damages in *Inter-Leisure* in respect of the negligent rent review provision.

186. The justification for the valuation at transaction date basis where the claimant is a purchaser is that he has paid too much. He is entitled to be compensated in the amount of his over-payment. What happens subsequently is irrelevant. It is the purchaser's misfortune that apparently vendors do not commonly agree to reduce the price by the full amount of repairs which a survey may find to be necessary: that is not the fault of the surveyor and the additional cost to which the purchaser is put is not to be attributed to the surveyor. I think that there is a strong argument that it

is artificial to apply a similar line of reasoning where a tenant takes a lease, or a land owner grants a tenancy at a rent which is too high in the first case or too low in the second. In the case of the land owner he is not acquiring a capital asset in the sense of the cases but an income stream over the period of the lease. He should be entitled to compensation on the basis of a calculation of how much lower his income has been and will be than it should have been and should be. I accept, of course, that the land as leased will have a capital value, and the land as it should have been leased will have a different capital value, namely in each case the market value: but on this way of looking at the problem the market values are not the appropriate basis on which to assess loss. This approach is the approach of Sir Nicholas Browne-Wilkinson V-Ch in *County Personnel*. However the reason why Bingham LJ, with whom Stephen Brown LJ agreed, declined to apply the diminution in value rule in that case was that in that case its application would involve a speculative and unreal exercise involving a negative value. He did not take the position that the rule simply did not apply at all. After giving the matter anxious thought I have concluded that, in a case where the complaint is of negligent advice to a tenant as to rent, I would be bound by the majority decision to hold that the damages are to be assessed on the basis of the values at transaction date unless there are circumstances particular to the transaction which make that inappropriate.

187. Is there a distinction to be drawn between the grant of a lease as here and the taking of a lease as in ***County Personnel***? I do not think that for the purposes of this debate there is. Accordingly I should hold that a valuation basis is to be applied to the assessment of damages here and the transaction date rule applied, unless the circumstances show that to do so would not accurately reflect the overriding compensatory rule (as stated by Lord Blackburn). Accordingly I hold that on this the *Inter-Leisure* case was rightly decided.

188. In ***County Personnel*** Bingham LJ held that the diminution in value rule should not be applied because the valuation exercise was speculative and unreal, reflecting the substantial negative value of the underlease. As I have stated, no consideration has been given to the difficulties of comparative valuations in the present case. Such valuations would involve three stages: first the assessment of the likely income under the leases that have been obtained, second the assessment of the income under the leases that should have been obtained, and third the comparative valuations of the Estate's interest in such leases. The first two exercises have to be carried out in the action in any event. The second is very difficult because it involves assessing the car park income over the period of the leases. It seems to me that the valuation exercises would also be difficult but if it was decided to sell the land such an exercise would have to be carried out. So I do not think that there are any special considerations in this case which mean that a valuation basis should not be applied.

189. Since the conclusion of argument I have been referred by counsel to the recent decision of the House of Lords in ***Golden Strait Corporation v Nippon Yusen Kubishka Kaisha*** [2007] UKHL 12, [2007] 2 WLR 691. The appeal concerned the damages to which the owners of a vessel were entitled following the repudiation of a time charter. The cause of difficulty was that the charter contained a clause entitling the charters to cancel in the event of war between any two or more of a number of countries including the United States, the United Kingdom and Iraq. At the time of the repudiation such a war involving Iraq was a possibility only. The issue was whether the invasion of Iraq by the United States and the United Kingdom should be taken into account to cap the damages that might be recovered. The owners submitted that the quantification of damages was to be made at the date of the repudiation – the breach date rule, and that later events were irrelevant. The charters submitted that the outbreak of war should be taken into account. It was accepted that they would have cancelled the charter if it was still then subsisting. Their Lordships were divided as to the outcome. The majority, Lords Scott, Carswell and Brown held for the charterers. Lords Bingham and Walker would have held for the owners and the breach date rule. I have not found anything in the decision which suggests that I should not follow what I perceive to be the ratio of the majority in *County Personnel*. Lord Bingham stated in paragraph 13 of his opinion that *County Personnel 'was a claim against solicitors whose negligent advice had saddled the plaintiffs with a ruinous underlease, from which the plaintiffs had had to buy themselves out.*' He continued *'The ordinary diminution measure of damage was held to be wholly inapt on the particular facts.*' It was not referred to in the other opinions. Nor was there further reference to the cases concerning surveyors' and solicitors' negligence in relation to the acquisition of property.

190. I next have to decide whether the market value of the claimants' reversion should be assessed at the dates of the leases or at some later date. Mr Lamb accepted on behalf of Strutt & Parker that it was possible that I might consider that a date after the dates of the leases was appropriate. No submissions were made by Mr Speight on this aspect, but it was implicit that he contended for the date of trial. The dates which in my view I should consider are the dates of the leases, the date on which the claimants became aware that they had a claim against Strutt & Parker, and the trial date.

191. The cases establish that, unless there is a reason for holding that the choice of the breach or acquisition date would not satisfy the primary rule as to putting the wronged party in the same position as he would have been in without the wrong, that date should be taken. There are three possible reasons for taking the second of the three dates,. The first is that until Mr Ashworth was written to on 7 January 2005 he remained the Estate's adviser and was under a continuing duty to the Estate. But Mr Ashworth's continuing duty has not affected the claimants' situation. Second, the claimants were until then ignorant that the leases might be unsatisfactory. I am doubtful if this can carry much weight: for it would not, I think, assist a purchaser complaining of a negligent survey that he had only discovered the defects in the house after some passage of time. The third is that the passage of time has enabled some greater certainty as to what the progress of the Airport is and what a turnover rent would bring in. This would be a reason for taking the date of the trial, which would enable the assessment to be made on the basis of the most up-to-date information. While that is tempting, it is a temptation to be resisted because post-transaction events cannot affect the value at the

transaction date: *Thompson v Christie, Manson & Woods*. That is not to say that they cannot give rise to separate claims, such as for consequential losses, which it may be appropriate to award to give effect to the overriding principle. In *Inter-Leisure* Mr Harvey declined to take the transaction date because it was only later that the market fell and the low rent which gave rise to the claim was fixed on the review. There is no equivalent feature here.

192. In my judgment, if the valuation basis of loss applies, as I have held that it should, there is no justification for taking dates later than the transaction dates. There is nothing that has happened, or that has not happened, which requires the taking of a later date to satisfy the overriding rule as to compensation.

193. It may be helpful to record that the date on which the claimants were informed that the rents were too low was touched on at the end of Mr Fitzgerald's cross-examination by Mr Speaight, but no documents were referred to and no particular date was mentioned. Mr Fitzgerald wrote to Mr Ashworth to say that the Estate had decided to appoint a new adviser on 27 January 2005. The letter before action was dated 17 June 2005.

N. Other quantum issues

194. **Passenger numbers** I accept Ms Congdon's evidence here. The purpose for which figures are produced is an important element in the assessment of their likely accuracy as a prediction of what will actually happen. I thought that Ms Congdon best took account of this. The relevant table is Table 1 to her report. The figures in the YAL column should be taken up to 2015 and thereafter figures half way between those in the YAL column and those in the Rowson column. None of these figures have been subjected to a substantial discount as opposed to a modest discount to reflect the possibility that for ecological or other reasons air travel will not continue to grow over the next 20 years but might actually shrink. The evidence did not support such a discount.

195. **Car park capacity** Information from BIA (D4.3742) is that Fields A and B currently have 918 and 454 spaces less about 20 spaces lost. That gives a total of 1352. On the BIA Master Plan 2006 a total of 1414 is given. There is no explanation for the difference save that at the south end of Field A there is some space which is not currently used. The claimants assessed that this could provide a further 30 spaces to give a total of 1402 spaces. It seems to me that there must have been a reason why these spaces were not provided when the car park was surfaced as it now is. It might relate to the angle of Field A into which they would be fitted. The application for planning consent made in respect of parking on Field C on Airport land made on 12 February 2007 shows that the spaces will be gained on Field A by the joinder with Field C. I consider that I should accept the figure in the Master Plan as reliable and accept that the number of spaces will increase when Field C is joined. Contrary to the suggestion of Strutt & Parker I do not consider that the joinder will result in a loss of spaces. It appears that Field A only came into substantial use by passengers after the 2003 works were completed, that is, in April 2003. Field B came into use in August 2005.

196. The Master Plan shows Field C as providing 670 spaces in 2007/8. The application for planning consent refers to the addition of just under 700 spaces. If 'just under' 30 spaces are attributed to Field A that goes some way to resolve the problem as to the number of spaces on Field A, as I have suggested.

197. **Planning – Field C** In my view, and contrary to the view of Mr Warner, the planning expert called on behalf of Wilsons, there have always been good prospects for obtaining planning consent to use Field C for car parking. That is because it is the obvious site for the further parking space the Airport will need and it is immediately adjacent to A and B which are in use as a car park. As the land is Green Belt, 'very special circumstances' must be shown, but the circumstances are indeed unusual and special. That was my reaction when I first thought about the question, and since then the planning application has surfaced and it now appears that this part of the application will be approved without difficulty. I consider that the chances in 2001 of Field C getting planning consent for parking when it was needed were 75 per cent in favour, and they are now 95%.

198. **Decking** I do not consider that there is any realistic prospect of decking being constructed on Fields A, B or C. That is my view in respect of single story decking – i.e. decking sufficient to carry cars on a first storey. The case is even stronger against a second deck. First, BIA has no need of a decked car park: its plans do not require one. Second, there is cost: the evidence was that no provincial airport has a multi-storey car park save for short stays. The third is that planning consent would not be granted. The visual effect of a construction of two storeys and over a large area would be very considerable. Need could not be shown and Green Belt considerations would prevail. I am unpersuaded by Mr Shrubsall's contrary evidence, but accept that of Mr Warner and Mr Montgomery. There is a further point, that, while the decking was being constructed, the area in which it was being constructed could not be used and an alternative would have to be provided elsewhere.

199. **The inflation of car park charges** Mr Stuart gave evidence, which I accept, that the car park industry used the figure of 5% per annum to predict the upward rise of parking charges. That is ahead of inflation as inflation now stands. Mr Theophilus broadly agreed with the figure. If it remains ahead of inflation, its adoption would mean that car parking got more and more expensive in real terms, to which there would be a growing resistance. I think that it is appropriate to take a slightly lower figure to take account of that possibility, namely 4.5%.

200. **Operating costs of car parks** The figures produced by Mr Stuart as to the likely operating costs were broadly agreed by Mr Theophilus. I should accept them.

201. **Amortisation of BIA's capital costs in connection with car parks** In his letter dated 24 July 2001 Mr Rippon-Swaine stated that it was BIA's usual practice to depreciate capital car park expenditure over 25 years. As there was evidence that a car park would require resurfacing in a far shorter time, that is surprising. It was also the evidence that shorter periods were usual – Mr Theophilus suggested 10 years and Mr Kerr 5 years. It has occurred to me that Mr Rippon-Swaine gave such a long period to justify the long lease that he was requesting: but this was

not investigated at the trial. Nonetheless, in the light of the letter, it should be taken it that, if BIA had agreed a turnover lease, the capital costs would have been spread over 25 years for the purpose of calculating the turnover to be split. BIA could hardly have suggested any other period and the longer period was to the Estate's advantage.

O. The status of the Airport Road

202. The status of the Airport Road was the subject of research only in the month or two before the trial began. I have dealt with the issues arising in connection with breach of duty on the basis that at the relevant time all parties believed that the Airport Road was a private road owned by BIA with no right of public access along it, and that there was no duty on Mr Ashworth to suggest to the contrary or to suggest that the position be investigated further than it then had been. On that basis the actual position regarding the road's status does not arise as an issue which I need determine. However, I heard full argument upon the point and it is possible that it will arise on an appeal: so I should deal with it.

203. The claimants sought to establish that there was a public right of way along the Airport Road and thus that passengers using the car park on the Estate's land could access the Airport directly from the car park by using, in effect crossing, the road, alternatively via the B road, Parley Lane, and then up the Airport Road. The basis on which they finally sought to do so was the creation of a public right of way along the Airport Road and beyond by an inclosure award made on 9 January 1805 pursuant to the private Inclosure Act for Holdenhurst & Christchurch (42 Geo. III Ch.43). A map attached to the award shows a road or lane running along the line of the Airport Road and continuing on after where the Airport Road now ends. It is numbered 240 and is referred to in the award as being created as a public road. The private Act did not include a power to create highways and the claimants rely on section 8 of the Inclosure (Consolidation) Act 1801. However, the private Act did not incorporate powers from the general Act but seems to have set out its own powers. So it was submitted on behalf of Strutt & Parker that on the available material the powers of the commissioners appointed by the private Act as regards highways are not clear. The workings of Inclosure Acts are an esoteric subject which I should approach with caution. I will say no more than that a reading of the 1801 Act suggests that the powers are expressed so as to be available to commissioners regardless of whether they are incorporated by the private Act. I will proceed on the basis that such a right may have been provided by the inclosure award. I should add that I do not consider that the limited evidence given by Lord Malmesbury as to the existence before the war of a public right of way with vehicles taken by itself was sufficient to establish the existence of such a right.

204. By Regulation 16 of the Defence (General) Regulations 1939 It was provided that:

16(1) A Secretary of State, …, may by order provide for the stopping up or diversion of any highway passing through ….. any premises used or appropriated for use in His Majesty's service... .

On 10 February 1942 an order was made by the Secretary of State for Air stopping up highways consisting of five footpaths in the parish of Hurn. No copy of the Order has been located and its terms are deduced from the subsequent order of 1948, to which I will come. One of five footpaths lay on the line of the Airport Road and the old highway 240 shown on the map of 1805. The description of the highway as a footpath raises a doubt as to whether it was until then a highway with the right of the public to pass along it with vehicles. I should mention that Lord Malmesbury's evidence included the statement that prior to the construction of the runway the road was used as a means of access to Pussex Common and Hurn Common and at all times since the 1930s the tenants of Pussex Farm obtained access via the Airport Road. That evidence falls far short of what would be needed to establish a general public right of way for all kinds of use as existing prior to the stopping up order.

205. Section 15 of the Requisitioned Land & War Works Act 1945 provided:

15(1) ……. Where any highway has been stopped up or diverted in the exercise of emergency powers, the Minister of War Transport may, if he is satisfied that it is necessary or expedient to do so, by order authorise the permanent stopping up or diversion of the highway.

Subsection (2) provided various powers designed to alleviate the effect of such an order. I questioned why, if an order stopping up a highway had been made under Regulation 16, a further order was required. Counsel could not provide any explanation based on the wording of the powers. The explanation may be that it was considered that action taken under the emergency powers should be reviewed when the emergency was over. Alternatively there may have been a provision in the emergency powers which has not been identified, which provided for their effect to be temporary. In any event, on 31 August 1948 the Stopping up of Highways (Hampshire) (No.3) Order 1948 was made. It provided;

Whereas by virtue of an Order made on the 10th day of February by the Secretary of State for Air ….. the highways consisting of five footpaths within the Parish of Hurn … were stopped up.

And whereas the said highways have not ceased to be so stopped up

……

1. The permanent stopping up of the said highways is hereby authorised.

The Schedule describes the first highway to be stopped up as:

The footpath extending in a northerly direction from a point on the Hurn-East Parley road [i.e. Parley Lane, the B road] approximately 700 yards west of Hurnbridge Farm for a distance of approximately 550 yards to is junction with the footpath from Pussex Farm to East Parley.

That describes the position of the Airport Road.

206. The submission on behalf of the claimants is that the 1948 Order did not of itself extinguish any public right of way along the Airport Road but authorised the highway to be stopped up. That, it is submitted, required the road to be physically stopped up at its junction with Parley Lane. That would have required either a physical barrier so no one could pass along it, or to have a person on duty at the road junction admitting only those who were authorised, i.e. those who had business with the airport. It was submitted on behalf of Strutt & Parker that the effect of making the 1948 order, and the preceding 1942 order, was to extinguish public rights immediately: it was a legal rather than a physical process.

207. Mr Kevin Farrelly presenting the submissions for the claimants drew my attention to the power contained in section 46(1) of the Housing Act 1936, for a local authority to "*extinguish*" any public right of way over land purchased by them under Part III of the Act, and to section 23(1) of the Town & Country Planning Act 1944 which gave the Minister power to extinguish any public right of way over acquired land He drew a contrast with section 116 of the Highways Act 1980 which provides for the stopping up and diversion of a highway. Where a diversion is authorised it shall not authorise any "*stopping up*" until the new part to be substituted has been completed to the satisfaction of two justices and a certificate has been signed by them and transmitted to the clerk of the applicant authority. Section 118 provides for the stopping up of footpaths and bridleways which are no longer needed by a "*public path extinguishment order*". It is plain from the wording of the section, in particular subsection (6A), that the making of the order extinguishes the right without more. Mr Farrelly sought to distinguish between a stopping up order which, he submitted authorised a stopping up and required to be put into effect to have effect, and an extinguishment order which has immediate effect. However, as section 118 refers to both stopping up and extinguishment it may be that it was drafted on the basis that there is no distinction in law and so on the basis that the effect of the making of a stopping up order was ordinarily to extinguish the public rights without more.

208. Chapter 9 of Highway Law by Stephen Sauvain Q.C., third edition, is headed *'Extinguishment and Diversion of Highways'*. After reference to the powers given by the Highway Act 1835 for stopping up and diversion, which are the origin of section 116 of the Highways Act 1980, it is stated under *'the effect of stopping up'* that *'A stopping up order only extinguishes the public rights in question'*. This was relied on for support by Mr Edwin Johnson Q.C. who presented this part of Strutt & Parker's closing submissions. It does not seem to me that this statement is directed to the issue which I have to determine. It seems to me to be making the point that public rights and not private rights are extinguished.

209. I was referred to ***Rolls v St George the Martyr, Southwark, Vestry*** (1880) 14 Ch D 785. There the plaintiff had made a new street over his land and obtained a stopping up order from magistrates in respect of one old street and a diversion order in respect of part of another. The Vestry contended that as it was the body in which the highways were vested, the plaintiff must purchase them from it before he could use the land. It was held that the plaintiff could use the stopped up part of the one street and the diverted part of the other, subject, in the latter case, to obtaining a certificate that the new street was in order, on the ground that when the streets ceased to be highways the vestry's rights in them ended. The case was not concerned with whether it was necessary for a physical stopping up to have occurred to deprive the vestry of its rights. Thesiger LJ referred at pages 805 and 806 to physical stopping up but not in such terms as provides help here.

210. *The* ***King v the Inhabitants of Milverton*** (1836) 5 Ad & El 841 was concerned with an indictment against the inhabitants of Milverton in Somerset for failing to repair three highways which the magistrates had ordered to be stopped up. Among other points raised it was argued that nothing had been done in execution of the order so that Coleridge J asked *'Do you contend that there must be a physical stopping of the roads? ……. Suppose the soil is sold to an individual who choses to keep it open, would the public right over it continue? It is usual to put up a notice that the passage over the land is closed, but the proprietor might omit doing so.'* Counsel answered that on the wording of the relevant statute, something must be done. The Crown was not called upon to argue this point and no decision was given on it. The head note suggests the use of by *"semble"* that it appears that it was the view of Lord Denman CJ and Coleridge J that it was not necessary for an actual stoppage to be made for an order to have effect.

211. Mr Johnson relied on a dictum from ***The Queen v Phillips*** (1866) LR 1 QB 648. In the course of an ex tempore judgment Blackburn J stated at page 660: *'Two things are contemplated by the statute, the completely stopping up of a road, and the diversion of it. In the first instance, the question is, do the inhabitants in vestry assent, are the justices satisfied that it is unnecessary, and do the jury on appeal find it unnecessary? If all these agree, the road is at once stopped up.'*

Blackburn J was here in the process of drawing a contrast with the position where a diversion is involved and the new road has to be certified before the stopping up order may have effect. The use of *'at once'* can be read as meaning in contrast with that situation rather than that no actual stopping up need occur. So I find little help in the authority.

212. Lastly I was referred to ***Bailey v Jamieson*** (1876) 1 CPD 329. This was an action for trespass to land which had been a highway, but was alleged to be one no longer because the ways leading to it had been stopped up by order of the magistrates. The court held that the land had ceased to be a highway because, by reason of the stopping up orders it had become inaccessible at both ends. The following passage was at page 332 was relied on:

'Although there are no cases precisely in point, there have been some which will to a certain extent assist us, where it has been argued that a road one end of which has been lawfully obstructed ceased to be a highway, as in ***Wood v Veal*** *5 B & Ald 454 and* ***Rex v Downshire (Marquis)*** *4 Ad & E 698. The conclusion to which the Court came in those cases was that the stoppage of one end did not make a road cease to be a common highway; for, though it thereby became a cul de sac, the public still might have a right to go over it to the end and back. ……. To constitute a highway there must be*

some notion of a passage which begins somewhere and ends somewhere, and along which the public have a right to drive or walk from its beginning to its end. Here, that notion is entirely absent.'

Although the passage refers to a lawful obstruction, I do not think that in its context the reference helps me: the court did not have to consider whether any physical obstruction was necessary to give effect to the order.

213. Here the order of 1942 was made in war time and the airfield was in use by the RAF. The Airport Road was part of the requisitioned land. It is plain that entry was only permitted to authorised persons. Whether there was a physical barrier such as a bar to be lifted by a guard is not known. If I assume for a moment that it is necessary for a road to be stopped up, I do not think it necessary that there be a physical barrier: that might be inconvenient to the owner of the land and impede his use of it, and it might interfere with private third party rights. It is incidental that both of those factors exist here. In my view, on the basis of the assumption I am making, it must be sufficient that the owner of the land asserts his right to bar the public from it. That plainly happened at the time of the 1942 order and it is also plain that it has happened since the 1948 order. As to the latter I refer to BIA's letter to Lord Malmesbury dated 8 January 1980, which refers to a private arrangement with a farmer, Mr Lucas, permitting him to use the Airport Road. The 1948 order also stated 'and whereas the said highways have not ceased to be so stopped up'. (It was a requirement for the making of the order imposed by section 20(2) of the 1945 Act that the highway should not have 'ceased to be temporarily stopped up'.) So, making the assumption I have mentioned in favour of the claimants, I would hold that the rights in whatever highway existed at the time of the 1942 Order were extinguished following it. Had any rights survived, or been capable of revival, they were extinguished following the 1948 Order.

214. I do not find the question whether any actual 'stopping up' is necessary straightforward. The claimants' point is that the legislation refers to the authorisation of stopping up rather than referring to the making of an order stopping up – which would be the appropriate words if the order itself was to have the effect of stopping up and extinguishing the highway. I have come to the tentative view that no actual stopping up of any kind is necessary. I was initially impressed with the practical difficulties which might follow from the need for a physical barrier. But those are removed by the view I have taken in the previous paragraph. But on any view any actual stopping up need only be temporary, and temporary in the extreme, because, once it occurs, on the claimant's case the order takes effect and the highway is extinguished immediately. The bar could then be removed. That would be absurd. I also think it likely that section 118 of the Highways Act is not intended to alter the law relating to stopping up orders in this respect, and that the use of the term 'extinguishment order' is intended simply for clarity. I see no reason why there should be a difference in this respect between a stopping up order under section 116 and an extinguishment order under section 118. So I deduce that Parliament proceeded on the basis that a stopping up order took effect to extinguish rights in a highway immediately it was made.

215. Lastly I must mention the application made to the Deputy Prime Minister by the claimants' solicitors by letter dated 1 February 2007 for an order under section 9 of the Land Powers (Defence) Act 1958 revoking the 1948 stopping up order. I need not make any finding as to its chances of success, but it seems a very long shot.

P. Strutt & Parker's claim against Wilsons and Mr Fitzgerald

216. Strutt & Parker's claim against Wilsons and Mr Fitzgerald is advanced on the basis that, if Mr Ashworth was in breach of his duty in connection with the negotiation of the leases, then Mr Fitzgerald was also in breach of his duty to the Estate as a solicitor. The claim to contribution only arises if Strutt & Parker are liable. But Mr Fitzgerald was either in breach of his duty or he was not. His liability is in no way conditional on Mr Ashworth's liability. Nonetheless the facts are such that it is difficult to see how Mr Fitzgerald could possibly be in breach of his duty if the facts did not give rise to a breach of duty on the part of Mr Ashworth.

217. The formulation of the claim against Wilsons gave rise to considerable difficulty. Claims were advanced at the start of the case which have since been abandoned leaving as the only claim that formulated in the preceding paragraph. It was only at the second attempt and immediately prior to Mr Fitzgerald's entry into the witness box that Mr Lamb produced a document saying what it was alleged that Mr Fitzgerald should have done but did not do. The main allegations in respect of the 2000 lease were that Mr Fitzgerald should have advised that a turnover rent should have been pursued and in the alternative that the Estate should seek to run the car park itself or through a third party operator. No claim for contribution arises there as I have found that Mr Ashworth was not in breach of his duty in respect of that lease. The allegations made against Mr Fitzgerald in respect of the 2002 lease were broadly the same with the addition of the allegation that he should have questioned the season ticket rent review term and advised a break clause. The allegations in respect of the 2003 lease were the same. The only allegations which I need consider are those relating to the turnover rent and the season ticket rent review provision in relation to the 2002 lease. 2003 follows from 2002.

218. The essence of Mr Fitzgerald's defence is that he was acting as a solicitor and not as a surveyor or commercial adviser, so the matters relied on did not fall within the ambit of his duty. A number of authorities were cited. As is stated in Jackson & Powell on Professional Liability, 6th Edition, paragraph 11-170: *'A solicitor is not a general adviser on matters of business (unless he specifically agrees to act in that capacity). Thus he is not generally under a duty to advise whether, legal considerations apart, the transaction he is instructed to carry out is a prudent one, … .'*

The authorities show that the manner in which the line is drawn is very much dependent on the facts of the situation. In ***Reeves v Thrings & Long*** [1996] PNLR 265 Bingham MR stated at 275:

*'As Salmon LJ pointed out in **Sykes v Midland Bank Executor and Trustee Co. Ltd** [1971] 1 QB 113 at 125H: "…. It is quite impossible to lay down any code setting out the duties of a solicitor when advising about a lease. A great deal depends upon the facts of each particular case."*

So it is with any other transaction. It will always be relevant to consider what the solicitor is asked to do, the nature of the transaction and the standing and experience of the client. Thus on the facts here Shepherd was not retained to advise on the wisdom of offering the price Mr Reeves had informally agreed to pay, on the development potential of The Close Hotel or on the chances of obtaining planning permission.'

219. Mr Fitzgerald's position was that he was a solicitor and was the partner with responsibility for the handling of the Estate's matters within Wilsons; that Mr Ashworth was retained by the Estate to advise on matters involving the Airport and to negotiate with BIA; and so one was retained to give legal advice, and one was retained to give commercial or business advice: Mr Fitzgerald was not retained to check the advice given by Mr Ashworth.

220. The closing submission made on behalf of Strutt & Parker was brief:

'In relation to the 2000 lease Peter Fitzgerald was familiar with the concept of a turnover rent. He knew that the only alternative to obtaining such a rent was to go down the Earl Car Parks Route. If Strutt & Parker should have advised the Estate to take that course then so should Peter Fitzgerald.

By 2002 in addition … there was the added feature of the season ticket rent review. It is not suggested that Peter Fitzgerald had any difficulty in understanding its effect…… . If Strutt & Parker should have advised the Estate to obtain a commercial rent review, a turnover rent or to go down the Earl Car Park Route then so should Peter Fitzgerald.

221. In my view these submissions fail to grapple with the point that Mr Ashworth was retained to give commercial advice and Mr Fitzgerald was retained to give legal advice. It fell within the expertise of Mr Ashworth to know that a turnover rent was appropriate. It was not within the expertise of Mr Fitzgerald. Likewise Mr Ashworth was in a position to have informed himself as to the facts relating to season tickets and the appropriateness of the clause: Mr Fitzgerald was not. In each case Mr Fitzgerald was entitled to assume that Mr Ashworth had done his job. I would accept that a situation could have arisen in which it became the duty of Mr Fitzgerald to question commercial advice given by Mr Ashworth because it was obviously wrong. But that did not arise.

222. In ***County Personnel v Pulver*** (cited above) the solicitors had accepted instructions to negotiate the underlease. They agreed a term whereby the rent was increased in proportion to any increase in the head lease rent. They had failed to investigate the position under the head lease and to advise their clients. Here, in contrast, it was Mr Ashworth's job to investigate the proposed term as to season ticket rent reviews: it was not Mr Fitzgerald's.

223. ***Clarke v Iliffes Booth Bennett*** [2004] EWHC 1731 was relied on on behalf of Strutt & Parker. There solicitors were acting for the vendor of land. The contract provided for an option to be exercised not later than three months after the property was released from the Green Belt pursuant to a planning enquiry concerning the local plan. The vendor believed that would happen on publication of the report, whereas it would not happen until the local authority adopted the plan. There was no provision in the contract for the index-linking of the sale price. It was held that the solicitors were negligent in not ascertaining whether their client's belief was correct: paragraph 52 of the judgment. This is a decision which turns upon its particular facts, and it is of no assistance in the present case.

224. Mr Lamb suggested in response to the application made at the start of the trial to dismiss the claim against Wilsons that a journey through the documents would show the involvement of Mr Fitzgerald and why Wilsons should be liable if Strutt & Parker were liable. That exercise was carried out in the cross-examination of Mr Fitzgerald. I do not consider that it advanced Strutt & Parker's case in any way: Mr Fitzgerald was not shown to have stepped outside the ordinary role of a solicitor on any occasion. In particular he was not shown to have had any role in the negotiation of the commercial terms of the leases.

225. There is a further reason why the claims should fail in respect of the 2002 lease. Mr Fitzgerald was on sabbatical from 1 May to 1 August 2002. It was on 2 May 2002 that Mr Ashworth sent heads of agreement to Mr Rippon-Swaine. The terms had been approved by Lord Malmesbury at the end of April, but Mr Fitzgerald had not been involved: Day 9, page 98. He was back in his office on 5 August. The lease had by then been drawn up. On about 9 August he was asked to sign a consent form for the Land Registry and did so. He did not read the terms of the lease until sometime afterwards, perhaps years.

226. The claim by Strutt & Parker against Wilsons and Mr Fitzgerald therefore fails. The contingent or accessory claim by the claimants fails also.

Q. Contributory negligence

227. Strutt & Parker allege that the claimants were themselves negligent and contributed to such loss as they have suffered by failing to forfeit the 2002 and 2003 leases. The ground on which it is alleged that forfeiture could have been obtained is non-payment of rent in respect of both leases and by the unlawful use of Field C in respect of the 2003 lease.

228. On 8 June 2005 Mr Fitzgerald wrote to BIA concerning the operation of the rent review provision under the 2002 lease on 8 July 2005. This initiated a process of negotiation which lasted until a letter from Manchester Airport Group dated 19 May 2006 made proposals for the rent under the 2002 and 2003 leases. It also proposed compensation for the use of Field C as an overflow car park for a period in the summer of 2005 without planning consent having been obtained. After some delay the proposals in the letter were accepted. Meanwhile no rent was being paid. The claimants' advisers were aware that if they missed an opportunity to forfeit the leases this would

create a difficulty as regards their claim against Strutt & Parker. Counsel was instructed to advise as to the possibility of forfeiting the 2003 lease. In his opinion dated 20 December 2005 Mr Jonathan Karas advised on the limited information available to him there was very significant doubt whether vacant possession would ultimately be obtained. But his opinion makes clear that his instructions were incomplete and he suggests further enquiries and the taking of advice from a planning consultant.

229. It is clear that an action to forfeit the leases for non-payment of rent would have been hopeless. BIA would simply have tendered the rent, and in the circumstances the Estate would have been at risk on costs.

230. Forfeiture for breach of covenant would have involved serving a notice under section 146 of the Law of Property Act 1925 and establishing first a breach of covenant and then that BIA had failed within a reasonable time to remedy the breach and to make reasonable compensation in money. I will assume that a breach of covenant could be established. Nonetheless it would have been easy for BIA to avoid forfeiture, and it would have hopeless for the Estate to pursue it.

231. Strutt & Parker's submissions were focussed on the reliance that might be put on Mr Karas' opinion. They did not face the legal difficulties of obtaining forfeiture against a solvent and reputable tenant. The allegation of contributory negligence fails.

R. Strutt & Parker's counterclaim for fees

232. Mr Ashworth's invoice dated 4 May 2005 was headed 'To professional services from 1 May 1998 to date'. The Estate had paid a number of bills relating to that period which could have been read as covering Mr Ashworth's services. His explanation was that they covered only Mr Fortescue's services and that he was simply dilatory in charging for his own. The Estate does not accept that they are not being charged twice, at least in respect of some matters. I am not in a position to resolve the dispute.

S. Conclusions

233. My main conclusions are as follows. I find that Mr Ashworth was in breach of his duty to the Estate in respect of the negotiation of the 2002 and 2003 leases. I find that if he had fulfilled his duty the most likely outcome would have been that the Estate would have agreed with BIA a rent of 10 per cent of turnover on top of a base rent of £9,000 in respect of Field A. I do not find that Mr Ashworth was in beach of his duty in respect of the 2000 lease. I do not find that there was contributory negligence on the part of the Estate. I find that Mr Fitzgerald was not in breach of his duty to the Estate, and the claims against him and Wilsons fail. I hold that the claimants' damages are to be assessed on the basis of valuations carried out as at the transaction dates.

Anthony Speaight QC & Kevin Farrelly (instructed by Stockler Brunton) for the Claimant
Timothy Lamb QC, Edwin Johnson QC & John Gallagher (instructed by Williams Holden Cooklin Gibbons LLP) for the 1st Defendant
Michael Douglas QC (instructed by Simmons & Simmons) for the 1st & 2nd Third Party