Scope of duty, "moral turpitude" and adverse inferences: Melia v Tamlyn & Son Ltd [2024] EWHC 3002 (Ch)

The MBS checklist was applied in a claim against a firm of chartered surveyors arising from ultimately disastrous planning advice. The judgment touches on several issues of relevance to professional negligence practitioners: standard of care, the use of expert evidence, scope of duty, the relevance of misconduct by the claimant, and the interplay between witness recollection, documentary evidence and the absence of relevant evidence.

Summary

- The judgment illustrates the limits of the *Gestmin* principle: the primacy of documents depends on their proper interpretation and the reasons for discrepancies between documents and witness evidence.
- The court was prepared to draw adverse inferences from a failure to call a crucial witness when there was no good reason for his absence;
- The MBS test was applied as a "cross check" despite the judge's clear conclusion that the clear purpose of the contract was to prevent the loss that occurred;
- "Moral turpitude" was reflected by a reduction in recoverable damages at the final stage of the MBS test;
- The judge was not constrained by the parties' approaches to the assessment of quantum, instead inviting further submissions on his own approach.

Facts

The Claimants engaged the services of the Defendant firm of chartered surveyors in connection with the conversion of an outbuilding on their rural property into a separate home. The work was undertaken by Mr Venton, who assisted with the planning application, preparing schedules of work and project management. Planning consent for a change of use was granted, including a condition that the existing structure should not be demolished or replaced. Notwithstanding that condition, Mr Venton produced a scheme for the demolition of the existing building and the construction of a similar, but slightly larger, building. The Claimants asserted that Mr Venton advised them that once consent for a change of use had been granted, the Council would not object if the building was demolished and rebuilt, provided the replacement building was sufficiently similar.

Works were halted partway following a (coincidental) visit by a planning officer. Mr Venton then assisted the Claimants with application for retrospective planning permission, in which false statements were made about the scope and nature of the work carried out and about the state of the original outbuilding. That application was refused.

The Claimants brought proceedings, alleging that Mr Venton had been negligent in advising them, effectively, that the Council would not enforce the planning condition, and in advising them to make false statements in support of the retrospective planning application.

The issues

The Defendant's case was that the Claimants had at all material times been aware that the building they intended to construct would breach the planning condition, and they had unlawfuly conspired with Mr Venton to deceive the Council with a sham planning application

with which they had no intention of complying. Accordingly, it was argued that the claim should be dismissed as being fundamentally based on illegality. Contributory negligence was alleged.

The Claimants insisted that they had relied throughout on Mr Venton's advice, and that his advice had been that, notwithstanding the planning condition, the new building would be accepted by the Council. They had not, they said, had any intention of demolishing the original Outbuilding until Mr Venton suggested it.

Conflicts of fact

The Defendant relied on a letter purportedly sent by Mr Venton to the Claimants warning of the risks of proceeding in breach of the planning permission. Mr Melia was cross-examined on the footing that he had consistently pressured Mr Venton to depart from the terms of the planning permission. The Claimants denied ever having received the crucial letter, though there was some undisputed correspondence which took a more circumspect tone than the advice the Claimants said they had relied upon. Mr Melia's evidence was that Mr Venton consistently took a far more formal and cautious approach in letters than he did in his face-to-face advice, whilst encouraging the Melias to rely on the assurances he gave in person. Mr Venton himself was not called.

Resolving disputes of fact

The judge, HHJ Berkley, found as follows:

- Mr Melia's evidence was accepted. *Gestmin SGPS SA v Credit Suisse UK Ltd* [2015] EWHC 3560 and the line of authority emphasising that documentary evidence is usually to be preferred to imperfect witness recollection did not assist the Defendants because
  a) this was not a case in which the difference between the documents and the Claimants' evidence could be put down to faulty memory: it was a distinct part of the Claimants' case [para 86]. The thrust of the Claimants' case was that Mr Venton's approach was to "play the system", and omitting the more dubious aspects of his advice from the written record was of a piece with that; and
  b) the facts which could be ascertained from the undisputed documents were distinguished from the "partisan and sometimes contentious gloss" which the Defendant sought to put on them [para 87]. The interpretation to be put on a document, in other words, itself forms part of the factual matrix which the court has to determine from the evidence as a whole.
- The crucial letter had been "concocted" by Mr Venton in a dishonest attempt to cover up his own wrongdoing. Mr Venton had given a series of implausible explanations for the inability to produce either the metadata or a record of the letter being printed. There was no reference to the letter in any of the correspondence surrounding the date when it was allegedly sent; it was inconsistent with the other contemporaneous documents
- The judge drew adverse inferences from the Defendant's failure to call Mr Venton to give evidence [para 111]. He and Mr Melia were to only persons with knowledge of many of the disputed events, and there was no good explanation as to his unavailability.

- It was no answer to say that the Claimants themselves could have called Mr Venton: they had put in complete evidence in relation to the disputed issues (from Mr Melia) and, in an adversarial jurisdiction, were under no obligation to call or summons Mr Venton [para 110].

Extent of liability

Standard of care, scope of duty and quantum were also in dispute. The judge held that:

- Mr Venton was expected to act with reasonable skill and care in the areas in which he professed expertise, which extended to advising on the prospects of obtaining planning consent and the options available, and to design aspects of such project. He rejected the submission that Mr Venton was thereby being held to the standard of an expert planning lawyer with detailed knowledge of planning law.
- No expert evidence had been adduced, but the judge found that certain breaches of *commission* were self-evident: Mr Venton should not have advised that the Council would overlook a breach of the planning conditions.
- The position was more nuanced in relation to alleged breaches of *omission*. Whilst some allegations were simply the obverse of the allegation that Mr Venton had given positive advice that was negligent, advice as to the timing of any application to vary the planning consent, or the possible interpretations of planning law, were matters for expert evidence.

The losses claimed included wasted building costs, the costs of the second planning application and the diminution in the value of the Claimant's property reflecting the loss of the benefit of the original planning consent and the blight of the threat of enforcement action. He analysed the scope of the Defendant's duty as follows.

- The MBS analysis was not necessary in every case involving standard duties owed by professionals to their clients: *URS Corp Ltd v BDW Trading Ltd* [2023] EWCA Civ 772
- Taking the contract as a starting point, the purpose of the advice included bringing a lawful building project to fruition so as to avoid enforcement action which would undermine the entire project and its expenditure [para 167].
- That included advice as to whether and to what extent the Claimants could depart from the planning consent during the construction phase, because that was an inherent part of the supervision of the building phase itself [para 168]. In any event, by giving advice that the Claimants could depart from the planning consent he took it upon himself to widen his duties [para 169].
- Applying the MBS checklist as a cross-check [para 170 onwards] he reached the same conclusion. Interestingly, however, he took the Claimants' "moral turpitude" into account at point 6, reducing the recovery of costs following the Council's discovery of the breach by 50% to reflect the Claimants' conduct in knowingly advancing a dishonest application for retrospective consent.

The judge's conclusions on quantum were rendered academic because an application for retrospective permission was granted between the hearing and the handing-down, but his approach is nonetheless of interest. He concluded that:

- It was artificial to assess damage on the basis that "but for" the negligence, the Claimants would, at the time when the building was halted, have had a partially-erected compliant building. It was not possible to restore the Claimants to that position, because the original Outbuilding had gone and with it the rationale for the

planning consent. It did not take account of the loss of the planning consent and with it the additional utility and value of the land [paras 195-199];

- The correct calculation was to compare the value of what the Claimants now had (money expended in achieving a devalued site with interest accruing on the build costs) with the value of what they should have had had Mr Venton not been in breach of his contractual duties (a more valuable site having expended the build costs but without mortgage interest, because the mortgage would have been repaid by the sale of the original house) [paras 205-206];
- The correct valuation date was February 2018, which was the notional completion date of a compliant project. The loss of mortgage interest ran from the notional date of sale of the house, April 2018.
- He was unable to assess quantum because neither valuation expert had provided a valuation on the correct basis, so he invited further submission as to how that should be resolved.
- Contributory negligence was not part of his decision because he had conducted a contractual analysis (and taken the Claimants' conduct into account within the scope of duty analysis). However, had contributory negligence been the basis of the decision the same reduction would apply [para 215].

Alice Nash
Hailsham Chambers