Negligent Valuations and the Margin for Error

The law on negligent valuations has gone awry. Unjustifiably, it has diverged from the general law of negligence. *Bratt v Jones* [2025] EWCA Civ 562; [2025] 4 W.L.R. 59 stops the rot and makes a welcome suggestion as to how a future court could put things right.

The case arose from an option enabling a developer to acquire land from Bratt for 90% of its market value. Jones was contracted to value the property. He valued it at £4.075m. The developer paid Bratt 90% of that sum.

But Jones had made a mistake. He had misunderstood an expert's report, leading him to double-count certain costs of developing the site, depressing his valuation. The true value of the property was closer to £4.7m.

Bratt sued Jones for breach of contract and the tort of negligence. At first instance, the claim failed. The judge found that the permissible margin for error was plus or minus 15% of the true value. Jones' valuation – 14.15% below the true value – fell within that permissible bracket so he could not be in breach of duty.

The Court of Appeal (Vos M.R., Jonathan Baker and Snowden L.JJ.) upheld this result, dismissing four grounds of appeal. Grounds 2-4 challenged the finding that the valuation fell within the permissible margin for error; these grounds were fact-specific points on which this note has no comment. Ground 1 was a point of principle and is this note's concern. In Ground 1, counsel for Bratt argued that "if a valuation falls outside the permitted margin or bracket, then that is determinative as to liability unless the valuer can prove that he was not negligent" (at [33]). As a result, "the claimant does not need additionally to satisfy the *Bolam* test by showing that the valuer's methodology was negligent in any particular respect" (at [33]). The Court rejected this argument. It took itself to be bound by its previous decision in *Merivale Moore Plc. v Strutt & Parker* [2000] P.N.L.R. 498, [1999] 2 E.G.L.R. 171 to require proof that *both* the valuation fell outside of the bracket *and* that the valuer fell below the *Bolam* standard (at [48]).

Ground 1 was unusual in that its success was neither necessary nor sufficient for Bratt's claim to succeed. Counsel accepted it was not sufficient (at [33]) because the trial judge had found that the valuation fell within the acceptable bracket. But nor was it necessary because the trial judge had said that, if the valuation had fallen outside the bracket, then Bratt had successfully proved that the valuer fell below the *Bolam* standard: [2024] EWHC 631 (Ch); [2024] P.N.L.R. 20 at [244]-[245]. Put another way, the facts of the case were that the valuer fell below the *Bolam* standard but the valuation was within the bracket, while Ground 1 concerned the inverse fact pattern: a valuation outside the bracket and without proof that the valuer fell below the *Bolam* standard. A more timid and less interesting judgment would have refused to address Ground 1 on the basis that it was irrelevant to the result of the case.

Having dismissed Ground 1, the Court then (obiter) cast doubt on the suggestion that falling outside the bracket was a precondition for liability (at [49]-[56]). Counsel had effectively agreed this "pre-condition approach" (at [51]). But the Court noted that it was contrary to obiter dicta of Lord Hoffmann in *Lion Nathan Ltd. v CC Bottlers Ltd.* [1996] 1 W.L.R. 1438; [1996] 2 B.C.L.C. 371 P.C. and *SAAMCO* [1997] A.C. 191; [1996] 3 All E.R. 365 H.L. In *Lion Nathan*, Lord Hoffmann said that whether a valuation "was negligent or not depends

upon whether reasonable care was taken in preparing it" and not whether it was within "the limits of foreseeable deviation" (at 1445C-F).

The Court in *Bratt* also noted counsel's argument that the precondition approach created a "logical fallacy", though there was some confusion about what this fallacy was. The Court of Appeal said that the "logical fallacy in question is that a claimant can, on the basis of *Merivale Moore*, fail even if the valuers were in breach of their *Bolam* duty, if their valuation fell within the acceptable bracket" (at [49]). This is just a statement of the precondition approach and, without further elaboration, it does not describe a logical fallacy. But in the same paragraph, the Court cited the first instance decision, where counsel described a fallacy arising from the inverse fact pattern. Counsel's argument was that a valuation could only end up outside the bracket if the valuer was negligent in preparing it. "But, if that is the case, it cannot, as a matter of logic, be open to the valuer to show that, notwithstanding, he exercised reasonable skill and care": [2024] EWHC 631 (Ch) at [67]. This does describe a logical fallacy, as it suggests that it is redundant to demand proof of both the valuation falling outside the bracket and the valuer falling below the *Bolam* standard, since the former seems to be conclusive proof of the latter.

The Court of Appeal concluded that "it seems to us that this is not the appropriate case in which to resolve the 'logical fallacy' question, since it calls into question the correctness of the decision in *Merivale Moore* that can only be determined (in another case in which it arises directly) by the Supreme Court" (at [50]).

This note argues that the Court was correct to dismiss Ground 1, refocus on *Bolam*, and cast doubt on the precondition approach. To explain why, it is necessary to place the valuation cases into the broader context of other negligence cases. Generally, whether a defendant is in breach of their duty of care is determined by examining the quality of their conduct, and not the result of that conduct. The test is whether the defendant failed to act as a reasonable person: *Blyth v Birmingham Waterworks Co* (1856) 11 Ex. 781 at 784; 156 E.R. 1047 at 1049. So, in a road traffic accident, breach of duty is determined by quality of the driver's conduct (were they driving too fast? were they on the phone?) and not the result (were the vehicles involved written off or merely scratched?). The *Bolam* test adds that a professional acts as a reasonable person where they act in accordance with a practice accepted as proper by a respectable body of opinion in their profession: *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582; [1957] 2 All E.R. 118 Q.B.. Again, this examines the quality of the defendant's conduct rather than its result.

Of course, the result of the defendant's conduct can be evidence as to its quality. The most extreme form of this argument is *res ipsa loquitur* but softer forms of this argument are also possible: the result that the collision wrote off the vehicles involved could be evidence that the driver was going too fast. But, so far as breach of duty is concerned, that is all the result is: evidence of the quality of the defendant's conduct.

Not every defect in the quality of the defendant's conduct amounts to negligence. The reasonable person is only human and so sometimes acts suboptimally. As a result, some suboptimal behaviour is a mere "error of judgment" falling short of negligence: e.g. *Wooldridge v Sumner* [1963] 2 Q.B. 43; [1962] 2 All E.R. 978 C.A.

Originally, valuation cases followed all of these principles from the general law of negligence. The font of the margin for error is *Singer & Friedlander Ltd v John D. Wood &*

Co. [1955-95] P.N.L.R. 70 at 74-75; [1977] 2 E.G.L.R. 84 at 85-86 Q.B., where Watkins J. said:

> "The way in which a valuer should conduct himself so as to fulfil his duty … varies according to the complexity or otherwise of the task which confronts him. … the valuer, having gathered all the vital information, is expected to be sufficiently skilful so as to enable himself to interpret the facts, to make indispensable assumptions and to employ a well-practised professional method of reaching a conclusion; … .
>
> If a valuation is sought at times when the property market is plainly showing signs of deep depression or of unusual buoyancy or volatility, the valuer's task is made more difficult than usual. … Pinpoint accuracy in the result is not, therefore, to be expected … . There is … a permissible margin of error, the 'bracket' as I have called it. What can properly be expected from a competent valuer using reasonable skill and care is that his valuation falls within this bracket. The unusual circumstances of his task impose upon him a greater test of his skill and bid him to exercise stricter disciplines in the making of assumptions without which he is unable to perform his task; and I think he must beware of lapsing into carelessness or over-confidence when the market is riding high."

Consistent with the general law, the focus here was on the quality of the valuer's conduct and not the result. Read in context, the point of the "margin for error" was that valuations are difficult and so a valuer cannot be faulted simply because their result was not perfect. A difference in result was *insufficient* for negligence.

However, through a series of ambiguous dicta, the law on valuations became corrupted. This culminated in *Merivale Moore*, where the Court of Appeal said that falling outside of the bracket was "*necessary*" for liability and so the court should apply the *Bolam* test "if, but only if" the valuation fell outside the bracket (at 515-16, emphasis added). On this view, breach of duty requires proof that both the valuation fell outside the permissible bracket and that the valuer fell below the *Bolam* standard. Breach of duty depends upon both the quality of the the defendant's conduct and the result.

Ground 1 in *Bratt v Jones* can be understood as an attempt to develop this heresy even further. It was the opposite of the general law, in that it called for breach of duty to be determined by the result of the defendant's conduct rather than its quality. The Court in *Bratt* was entirely orthodox in emphasising the quality of the defendant's conduct rather than the result, and thus rejecting Ground 1 and doubting the precondition approach.

In fact, the Court was mistaken to think that *Merivale Moore* is binding authority for the precondition approach (at [48]). Certainly, *Merivale Moore* does say that falling outside of the permissible bracket is a pre-requisite for liability (at 514-15). But on the facts, the property was unusual and so there was "effectively no evidence as to the proper bracket" (at 519). Consequently, the bracket played no role in the majority's reasoning to the result. The endorsement of the precondition approach was therefore obiter rather than ratio.

Instead, *Merivale Moore* was reasoned as follows. The valuer was alleged to have made two errors: overestimating potential rental income and underestimating yield. In relation to the rental income, there was a disparity between the valuer's estimate and the correct value. However, a majority of the Court held that this disparity was not enough to prove negligence,

absent evidence that the valuer had adopted a negligent practice (at 519-20, 528). A difference in result was *insufficient* for negligence. In relation to the yield, the Court held that the valuer was negligent, not because their estimate was too low, but because they had failed to qualify their estimate with the caveat that the property was unusual and so the estimate less reliable (at 521-22). On both grounds, then, the majority determined breach of duty by looking to the quality of the valuer's conduct and not its result. The suggestion that falling outside the bracket was *necessary* for liability was therefore obiter. As a result, the Court in *Bratt* was wrong to suggest (at [50]) that jettisoning the precondition approach requires a Supreme Court decision overruling *Merivale Moore*.

The precondition approach also produces arbitrary distinctions. If the valuer falls below the *Bolam* standard and this produces a valuation right on the top edge of the permissible bracket, then the precondition approach dictates that this is not negligent. But if the valuation is one penny higher, then it falls outside the permissible bracket and so is negligent. A single penny being the only difference, these cases are materially alike and it is arbitrary to treat them differently. By contrast, if the precondition approach were rejected, then breach of duty were determined (as in the general law) solely by *Bolam* and the quality of the defendant's conduct. In both cases, the valuer would be liable.

Another arbitrary distinction is revealed by contrasting the results in *Merivale Moore* and *Bratt*. In *Merivale Moore,* the valuer was held liable for negligently failing to caveat their figure for yield. In other words, *Merivale Moore* establishes that where the claimant can prove some other breach of duty, separate from providing the wrong number, then the claimant can sue on that breach and the precondition approach does not stop them. Why, then, did this not apply in *Bratt*, where it was proven that the valuer negligently misunderstood the costs of developing the property ([2024] EWHC 631 (Ch) at [244]-[245])?

Sometimes bad arguments are put forward to say that valuations are exceptional and so justifiably governed by exceptional rules, compared to other negligence cases. One bad argument is that a client cares not about their valuer's methods and only about the result, and so the valuer assumes a duty to reach a result in the permissible bracket and not a duty to act carefully in reaching that result: e.g. *Arab Bank Plc. v John D. Wood Commercial Ltd.* [2000] 1 W.L.R. 857; [2000] Lloyd's Rep. P.N. 173 C.A. at [23]; *K/S Lincoln v CB Richard Ellis Hotels Ltd.* [2010] EWHC 1156 (TCC); [2010] P.N.L.R. 31 at [149]-[150]. This seems unreal. A client would be rightly aggrieved if their valuer picked a number out of a hat, even if that number happened to fall within the permissible bracket. Such a valuer would have failed to do what they had been paid to do, wronging their client.

Another bad argument is that a reasonable valuer could reach any result within the permissible bracket and so, unless the valuation falls outside the bracket, the claimant suffers no loss (at [49], [56]). On this view, the bracket is relevant, not to breach of duty, but to quantification of damages. In *Bratt*, the Court observed (at [56]) that this is inconsistent with the Privy Council's advice in *Lion Nathan*. There, Lord Hoffmann explained that damages are assessed by comparing the claimant's current position and the position they would be in, but for the valuer's negligence. The latter is "assessed on the basis of the most probable outcome, which in the absence of contrary evidence, is that if the [valuer] had taken proper care, he would have got it right" (at 1448B). Damages are therefore assessed by reference to the figure the valuer would have reached but for the breach, and not by reference to the edge of the permissible bracket. This is again consistent with the general law. *Durham Tees Valley Airport Ltd. v bmibaby Ltd.* [2010] EWCA Civ 485; [2011] 1 Lloyds L.R. 68 held that, where

the defendant had a discretion to decide how to perform, then the relevant counterfactual was how the defendant actually would have performed but for the breach, and not necessarily the performance most favourable to the defendant.

One point in favour of the precondition approach is that, where the valuation falls inside the permissible bracket, there is a clear-cut rule that the claim fails. This offers certainty, making it easier for lawyers on both sides to advise their clients on whether to fight or settle, and for clients to organise their affairs accordingly. Nevertheless, the certainty offered by the precondition approach can be overstated. Even under the precondition approach, there can be difficult factual disputes over the correct value of the property and the width of the permissible bracket (as Grounds 2-4 in *Bratt* show). If the valuation falls outside the bracket, the question of whether the valuer fell below the *Bolam* standard still arises.

Properly understood, the "margin for error" or "permissible bracket" is no more than a reminder that valuations are difficult, reasonable valuers can reach different results, and so different results are insufficient to prove negligence. The margin for error was not supposed to confer a privilege to fall below professional standards, so long as the result happens to land in the right ballpark. The Court of Appeal in *Bratt* was therefore correct to dismiss Ground 1 and correct to doubt the precondition approach.

The better argument for Bratt would have been to challenge the trial judge's adherence to the precondition approach, and instead insist on the application of *Bolam*. The first instance judge had found that, if he had been required to apply *Bolam*, then the valuer fell below that standard: [2024] EWHC 631 (Ch) at [244]. This should have been enough to conclude that the valuer was in breach of duty and award Bratt £495,000.

The Court's dismissal of the appeal was impeccable. But the precondition approach produced the wrong result.

RORY GREGSON
Associate Professor, Faculty of Law, University of Oxford
Fellow and Tutor in Law, Merton College, Oxford