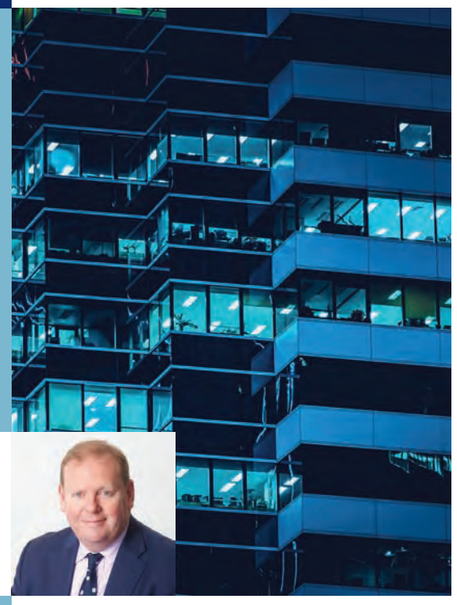
STANDARD LIFE V BDP: AN EXTRAPOLATION TOO FAR?



This important recent decision of the Court of Appeal concerned a fundamental point of principle: is it permissible for a party to plead allegations of professional negligence by way of extrapolation? In dismissing the appeal against the first instance judge's refusal to strike out the claim, it was held that such a claim was viable, and that on the facts of the case the claim was adequately pleaded.

By Vincent Moran QC

Counsel for BDP at first instance and in the Court of Appeal.

The dispute arose out of the development of a mixed-use retail and residential project at Parkway, Newbury in West Berkshire in which, at the time of contract award, the design was not sufficiently developed to be used as the basis of a tender. As a result, over 50% of the contract value was made up of provisional sums, 98.5% of which were undefined. Unsurprisingly, therefore, a large number of variations, referred to as CAIs and CVIs, were issued during the works. Some of these were instructions issuing the detailed design as it was completed by the design team. However, many were just general day-to-day instructions which did not change the works at all. Others were simply passing on client-led variations.

In its pleadings the Claimant/Respondent (Standard Life, the owner of the development) relied upon (i) a conventional claim (what the Court of Appeal described as "the Detailed Claim") for damages against the Defendant/Appellant (BDP, one of the architects for the development) for extra costs associated with 122 specific variations connected with four specific categories of work, and (ii) an unconventional claim, said to be derived from the above 122 variations (described as the "Extrapolated Claim"), for damages in respect of extra costs incurred as a result of a further 3,482 Variations (including ones arising from completely different categories of work than those connected to the Detailed Claim).

The Extrapolated Claim totalled as against BDP approximately £16.3m in direct costs ("the Extrapolated Variations Claim") and £3.7m in loss and expense ("the Extrapolated Loss and Expense Claim") and therefore made up the majority (about £20m) of the overall claim (of about £32m) then advanced against BDP. Of note is that (i) there were a total of 3,604 Variations issued on the Project, (ii) Standard Life, however, had only even looked at and analysed 156 such Variations before pleading its case, (iii) by its own admission, Standard Life had carried out no analysis at all (at any level of detail) of the remaining Variations, asserting that it would be disproportionate to expect it to do so, (iv) it had pleaded a conventional case of professional negligence (i.e. explaining what conduct was being criticised and how BDP should have acted to discharge its duties) in relation to only 122 of the 156 Variations, which it had in fact investigated, and (v) for the other Variations that had been included in the claim (i.e. the 3,482 that formed the basis of the Extrapolated Claim), *there was no variation specific pleaded case as to why BDP were alleged to have been at fault whatsoever* - there was simply a list of the relevant Extrapolated Variations appended to the Particulars of Claim.

Standard Life therefore advanced the Extrapolated Claim on the basis of *unexplained variation specific conduct* in connection with the 3,482 variations on which it was based, by reference merely to alleged pleaded defaults associated with the 122 variations that made up the Detailed Claim (which were often *connected with other totally different categories of work*), and without alleging any clear systemic breach of contract/duty to link the two parts of its claim.

The specific issue of reliance upon extrapolation to plead a construction claim (albeit in a defects case and not in a professional negligence context) had been addressed previously by the TCC in *Amey LG Limited v Cumbria County Council* [2016] EWHC 2856 (TCC). In this case the Court drew a distinction between cases involving allegations of systemic breaches extending over a wide variety of individual defects and cases which are in practice a number of individual claims for individual defects (or similar) (see paragraph 25.104). It was only the former that were considered as appropriate to claim by way of extrapolation. The use of sampling to assess the true factual extent of an already properly pleaded series of systemic breaches and/or defects is also, of course, common in TCC cases (e.g. defective welds in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC) or fire stopping defects in *Zagora Management Limited & Others v Zurich Insurance Plc & Others* [2019] EWHC 140 (TCC)).

In its appeal BDP argued, however, that the present case was very different to these cases and that the pleading of the Extrapolated Claim did not satisfy the essential requirements of a viable pleading in accordance with the CPR and the well known dicta in *Pantelli Associates Ltd v Corporate City Developments No2 Ltd* [2010] EWHC 3189 (TCC); [2011] PNLR.12. BDP's essential point was that a defendant has a right to know the case which it has to meet and there was no possible way BDP could understand the detail of its alleged negligent conduct in relation to the variations that made up the Extrapolated Claim - since no specific particulars of breach or causation in respect of them had been pleaded.

Standard Life's case was summarised at paragraph 12 of the judgment as follows:

> *In essence, Standard Life say that, in circumstances where:*
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> - *BDP's personnel worked on all the significant aspects of the project, performing the same basic functions;*
> - *The underlying causes of the additional cost which have been investigated appear, again and again, to be the provision of late/inadequate/inaccurate/incomplete/uncoordinated information by BDP;*
> - *BDP have not provided any positive case to suggest any other cause of the additional cost. It cannot be Costain's responsibility, because otherwise BDP would not have approved the additional payments to them;*
> - *It would be disproportionate to analyse each of the remaining 3,437 variations in the same way as the 167;*
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> *they can extrapolate their analysis of the 167 variations which make up the Detailed Claim across all the other (unexamined) variations, so as to give rise to the Extrapolated Claim. That is the inference which they ask the court to draw.*

The Court of Appeal accepted Standard Life's case and dismissed BDP's appeal by finding that the approach to the pleading was proportionate and enabled BDP to know, in general terms, the case it had to face:

> 40. *The question for this court is whether a claimant can, in effect, go back a step, and plead a claim at the outset on the basis of sampling and extrapolation. Standard Life say that it is legitimate for a claimant to plead the sample in detail, identify the links between the sample and the pool of all the allegations, and explain how and why any findings on the sample would give rise to liability for the whole or part of the pool.*
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> 47. *In short, both Amey and ICI show that, as a matter of pleading, in an appropriate case, a claimant can plead an extrapolated claim. Both cases also show that at trial, such claims can be particularly difficult to establish.*
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> 52. *I should also make one other thing plain at the outset. What matters is whether the Extrapolated Claim passes the relatively low hurdle raised by the CPR at r.3.4(2)(a) and (b), and r.24.2. Whether or not such a claim is more likely than not actually to succeed at trial is irrelevant. Nothing I say in this Section of the judgment should be taken as indicating any views about the likely success or failure of the Extrapolated Claim at trial. All that matters is whether it is an abuse of process, or whether it fails to disclose reasonable grounds for bringing a claim, or whether it has no real prospect of success, any of which would mean that it should be struck out now.*
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> ...
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> 55. *There was a dispute as to whether proportionality was a relevant consideration at the first stage of the test under r.3.4(2). I accept Mr Moran's submission that, certainly in the vast majority of cases, proportionality will only be relevant at the second stage (the exercise of discretion) and not at the first. That was a general point I made in Cable v Victoria.*
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> 56. *But Cable v Victoria was not dealing with claims of this nature, where at least a part of the pleaded claim is put forward on an extrapolated basis because, so it is said, it would be disproportionate to require Standard Life to plead out a case on each of the remaining 3,437 variations. For the reasons explained by the judge at [127]-[129], proportionality is a real concern here. If it would be far too time-consuming and costly for Standard Life to do what they have done in schedules 1-4 for all the 3,437 variations, is proportionality a relevant consideration when considering whether the claim is an abuse of process?*
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> 57. *It seems to me that it is. It would be artificial for the court to ignore questions of proportionality in an already heavily pleaded case like this. Moreover, that view is confirmed by the terms of the overriding objective (and its express reference to proportionality), which must apply generally to the pleading of claims. So it is necessary then*

to ask: is it proportionate and in accordance with the overriding objective for Standard Life to plead the Extrapolated Claim in this way? If it is, then provided that BDP can understand the case that they have to meet, and that case has a real as opposed to fanciful prospect of success, it cannot be said that the Extrapolated Claim falls foul of r.3.4(2) or should be struck out.

58. In my view, the Extrapolated Claim is a proportionate way of addressing the 3,437 un-investigated variations. Like any other step taken to save costs, it may make the claim more difficult to establish at trial, but that is an inherent part of the trade-off which any claimant has to negotiate, between saving costs by not doing things which, if money were no object, it might have done, and maintaining a realistic prospect of ultimate success.

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63. For the reasons set out below, in respect of the Extrapolated Claim, I consider that BDP are fully aware of the case that they have to meet. They may not like it, and they may consider that it is likely to fail for many of the reasons they advanced to the judge and to this court, but there can be no doubt that they can understand the Extrapolated Claim and how it is advanced.

...

67. By way of the Extrapolated Claim, Standard Life therefore argue that it is a reasonable inference that these same problems (of late, inadequate, inaccurate, incomplete or uncoordinated design or over-certification) were not limited to the variations which they have investigated concerning the residential fit-out, structural steelwork, roofing and cladding. Standard Life would say: why should it when BDP had the same team working across this project, dealing with all aspects of the design? Having analysed the sample, and having returned results which they allege repeatedly demonstrate the same generic defaults on the part of BDP, Standard Life say that it is a reasonable inference that the same proportion of variations on the other elements of the work were equally the result of the same defaults.

Importantly, it was found that there was no need for Standard Life to explain why BDP are alleged to have acted negligently specifically in relation to the subject matter of the Extrapolated Claim:

69. Contrary to Mr Moran's submissions, this is not a case in which the court will consider what he called 'the apples' in schedules 1-4, and then be asked to draw an inference as to 'the oranges' which make up the remaining variations. Instead the court is being asked to draw an inference from one group of variations, which have been investigated, to another group, which have not. They are all the same CAIs and CVIs.

...

73. Mr Moran's essential point did not really engage with very much of this: it was instead much more basic. He submitted that nobody knows anything about the 3,437 variations, because they have never been investigated. Thus, he said, the Extrapolated Claim cannot be advanced by way of any analysis or evidence because there has never been any such analysis or evidence. This led him on to an unrestrained attack on the pleadings, particularly that at Appendix B, which he described as "gobbledegook". He seemed particularly upset over the use of the expression "mutatis mutandis" in that part of Standard Life's explanation of the Extrapolated Claim.

74. For the reasons that I have given, I do not agree with that analysis. But in my view, this complaint missed the point. If Standard Life are right, there would be no need to investigate those individual variations, because they are entitled to ask the court to draw the inference that 81.7% of those un-investigated variations were due to BDP's default.

Essentially, therefore, it was found that a viable inference as to the basis for the alleged liability could be drawn (for the purposes of the strike out application at least) from the Detailed Claim (based on merely 122 CAIs/CVIs) and applied to the Extrapolated Claim (consisting of a further 3,437 other CAIs/CVIs).

Exactly why this was considered viable (not least because the CAIs/CVIs included in relation to the Extrapolated Claim related to other kinds of work) was not really developed in the judgment, as the Court merely commented that "*They are all the same CAIs and CVIs...*" (see paragraph 69).

But the Court appears to have concluded that because the subject matter of the Extrapolated Claim was, in its broadest sense, the same as the Detailed Claim (i.e. the reason why various variations were instructed and BDP's responsibility for the same) there was a sufficient conceptual and factual nexus between the two elements of the claim to permit an arguable inference – at least at the pleadings stage.

It is also not entirely clear how this approach and conclusion sits easily with the Court of Appeal's prior confirmation (at paragraphs 39 and 40) of the well-known summary of the requirements of a viable pleading in a professional negligence case in *Pantelli*. Ordinarily this has been interpreted to mean that a defendant needs to know (and a claimant needs to plead) what conduct is being criticised and what the defendant ought to have done differently to discharge its duty *in relation to each allegation of negligence*. Permitting the Extrapolation Claim in principle means that all that BDP knows about how exactly it is alleged to have acted negligently in relation to the individual variations is that it is alleged that BDP provided late/inaccurate/uncoordinated design information to the same extent and value as may be established by reference to the specific (but different) varied work in the Detailed Claim. In other words, it was held that for the purposes of satisfying the requirements of a viable and sufficiently particularised professional negligence claim, it was sufficient that BDP understood merely that Standard Life intended to infer the same kind and extent of default in relation to the variations that made up the Extrapolated Claim as may be proven in a conventional way (by reference to specific expert evidence addressing specific alleged defaults tied to specific individual variations) in the Detailed Claim.

As a final point, the Court of Appeal was also not impressed with the argument that permitting such extrapolated claims would open the door to unmeritorious overinflated claims seeking to place unfair commercial pressure on defendants:

88. Mr Moran spent some time during his oral submissions, particularly his submissions in reply, warning this court that, if they did not allow his appeal, it would open the floodgates to numerous claims in which claimants avoided pleading out the detail on which they rely, but sought instead to shortcut some or most of that material by advancing claims of the kind pleaded by Standard Life here. He painted an apocalyptic picture of defendants being cheated of the right to know the case they had to meet, and of being found liable to pay damages on a basis that they never understood.

89. It goes without saying that, in line with the views expressed above, I consider that these warnings were significantly over-stated. It is trite but true that whether or not a particular claim has been properly pleaded is a question of degree, turning on the specific facts of the particular case in question. Moreover, it is quite wrong to suggest that, if this appeal is dismissed, it will somehow lead to defendants being found liable on a basis that they did not understand. I have already explained how, on the basis of this claim, BDP know precisely how the Extrapolated Claim is put and have a number of potentially strong arguments as to how and why such a claim must fail. If those arguments were ultimately unsuccessful at trial, BDP might be aggrieved, but they would not be able to say that they did not understand why they had been found liable for the Extrapolated Claim.

It will be interesting to see to what extent the Court of Appeal's decision in this case is in fact in due course relied upon in the construction claim world as a short cut to the pleading of extrapolated professional negligence claims, perhaps overinflated for commercial or tactical reasons. Given the unusual facts and pleading in the Standard Life case, however, it is considered unlikely that this decision will lead to a flood of similar claims, at least not without renewed attacks by defendants and their insurers on the viability of the related pleading. Overly ambitious claimants should perhaps take notice of the eternal truth that much, as always, will depend upon the facts of any particular case (and the content of the relevant pleading) and that in this case Standard Life's Detailed Claim (which formed the bed rock of the extrapolation exercise it contended for) was, at least, itself a significant one and based on an extremely long, detailed and conventional pleading.