

CAN A PROFESSIONAL NEGLIGENCE CLAIM BE PLEADED BY EXTRAPOLATION?

- In *Standard Life Assurance v Gleeds and Others* a number of the defendants applied to strike out certain parts of the claim against them on the basis that it was calculated by impermissible extrapolation from an analysis of only a small part of their work.
- The claimant argued that the extrapolation method was a valid and permissible calculation of the damages and that it would be disproportionate for them to plead every aspect of their case separately.
- The Court refused to strike out the extrapolated part of the claim, agreeing that it would be disproportionate for the claimant to plead each individual component of the claim separately, and endorsing the use of sampling as an acceptable way to plead a case.

WHAT'S IT ABOUT?

Standard Life Assurance Limited (**Standard Life**) entered into a building contract for a mixed retail and residential development in Berkshire. The contract price was £77.4 million, but the amount paid in the final account exceeded this figure by £69 million. Standard Life's claim included £38.1 million in damages for professional negligence against the design team (including the contract administrator and the architects) (**Design Team**).

The Design Team applied to the Court to strike £25.2 million off the claim, alleging that the claim had no reasonable prospect of success and was unsupported on the basis that Standard Life had used an unrepresentative sample to calculate the quantum. The primary part of the £38.1 million claim was based on the value of 3,604 contract administrator instructions (**CAIs**) and confirmations of verbal instructions (**CVIs**) issued by the contract administrator and over 250 delay notices issued by the contractor.

Of the 3,604 variations, 167 had been analysed and particularised in full. Standard Life alleged that:

"negligent performance of the same kind, mutatis mutandis, as that which has been identified in both Standard Life's analysis and the analysis of Buro 4 (the project manager) as the cause of the substantial majority of the CAIs and CVIs analysed was also the cause of the balance of all variations on the project"

Standard Life added that it was *"reasonable and proportionate to prove its case by reference to representative samples"*. However, the defendants argued that *"it is unprecedented and wrong to allow a claim for professional negligence to proceed by sampling and extrapolation"*. The defendants alleged that the claim was distorted by the selection of particularly high value variations and that Standard Life exaggerated the cost and time it would take to fully investigate each claim separately and that it would not be disproportionate to do so.

Mr Moran QC, for the Fourth Defendant, gave the example of ten houses built by a developer in exactly the same way, where all ten suffer from exactly the same defects. It would be permissible for the Court to try the claim in respect of one of the ten houses and draw the inference, absent any distinguishing feature, that the same result follows in the case of the other nine. That would be an example of permissible extrapolation, Mr Moran accepted.

Mr Justice Kerr rejected the defendants' submissions that they did not know the case they had to meet (due to the fact it was based on extrapolations) and whilst the judge noted that there was likely *"wheat as well as chaff"* in the extrapolated claims, it was also likely that significant parts of the extrapolation were valid. On that basis, the judge refused to strike out the extrapolated claims or give summary judgment.

WHY DOES IT MATTER?

This case is an example of the Court accepting that a small sample of evidence of professional negligence can be inferred, when appropriate, to prove a wider claim. The amount of court time and cost that would be incurred if the claimant in this case had to particularise and plead every single aspect of their claim were noted to be disproportionate. That said, the judge gave directions that allowed the defendants the opportunity to choose some of the examples to be used in the sample to ensure the sample was representative of their work as a whole.

It is still unclear, however, whether a case for sampling would be successful if brought by an Employer/Contractor in a case concerning defects in the works. The facts of this case, and the regularity of the defects (i.e. being contained in CAIs and CVIs as opposed to defects in the works), resulted in the Court endorsing the approach to sampling in this instance and probably makes such a case more suitable for sampling and extrapolation. However, we consider that it is likely that a Court would apply this approach to a sampling case involving defects especially in occupied developments. The approach by the Court in allowing the defendants to be involved in the selection of the sample is also an interesting one and one which seems likely to be followed in future, for example, with the defendant's instructed experts being involved in choosing the areas to inspect.

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