Neutral Citation Number: [2021] EWCA Civ 1793

Case No: A1/2021/0371

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
MR JUSTICE KERR
[2020] EWHC 3419 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/11/2021

Before :

LADY JUSTICE MACUR
LORD JUSTICE COULSON
and
LORD JUSTICE BIRSS

- -

Between :

BUILDING DESIGN PARTNERSHIP LIMITED	**Appellant**
- and -	
STANDARD LIFE ASSURANCE LIMITED	**Respondent**

- -
- -

Vincent Moran QC & William Webb (instructed by **Vinson & Elkins RLLP**) for the **Appellant**
Jonathan Selby QC & Callum Monro Morrison (instructed by **Mayer Brown International LLP**) for the **Respondent**

Hearing Dates : 12 & 13 October 2021

- -

Judgment Approved

LORD JUSTICE COULSON :

1 INTRODUCTION

1. The use of sampling and extrapolation is not uncommon in the Business and Property Courts (particularly the TCC) as a way of corralling evidence and keeping trials within proportionate limits. The essential proposition is that, if the sampled allegations are found, on the balance of probabilities, to be properly representative of the pool of allegations as a whole, then a detailed investigation into the sample can be extrapolated into a result in respect of the pool.

2. The issue here is whether, as a matter of principle, a claimant can go one step further and plead its original statement of case on an extrapolated basis, without pleading a detailed case on each of the allegations in the pool. What the claimant ("Standard Life") sought to do in Part B of its claim was to make a series of specific allegations against the defendant ("BDP") arising out of a detailed investigation of 167 variations, and then extrapolate the results of that investigation across the remaining 3,437 variations, without investigating, much less pleading out, a detailed case in relation to those remaining variations.

3. BDP sought to strike out that part of the claim and/or obtain reverse summary judgment against Standard Life on the basis that such a pleading was an abuse of process and/or disclosed no reasonable grounds for bringing such a claim. By a judgment dated 15 December 2020, Kerr J ("the judge") refused to strike out the claim or give summary judgment. Instead he made various case management orders which are referred to in greater detail below. BDP seek to appeal against that decision.

4. It should be noted that, partly as a result of the judge's orders, Standard Life's case has now changed significantly, and the proportion of the Part B claim made up of the extrapolated claim has been significantly reduced. Although I refer below to that changed case, where relevant, the next Section of this judgment primarily focuses on the original statement of case, since that gave rise to both BDP's application and the judgment against which they seek to appeal.

2 THE FACTUAL BACKGROUND AND THE PLEADED CASE

5. The underlying claims concern a mixed retail and residential development in Newbury, Berkshire ("the project"). Standard Life were the developers and employers. They engaged Costain Ltd to carry out the building works. The contract price was £77.4m, although just over half of this comprised provisional sums.[1] BDP were the contract administrators and leaders of the "design team". Although there are pleaded claims against the other two members of the design team, namely Sutton Griffin Architects and Cundall Johnston & Partners LLP (both of whom joined in with BDP's strike out application and the early stages of this appeal), BDP were the only appellants who appeared before this court.

6. Standard Life eventually paid £146.4m to settle Costain's final account. That was almost exactly twice the contract sum. Standard Life blame BDP for the bulk of what

[1] That meant that this was even less of a 'fixed price' contract than most building contracts: the greater the proportion of provisional sums, the greater the risk of price fluctuations.

they consider to be an unjustified and avoidable overspend. These proceedings address Standard Life's claims against BDP and others arising out of the overspend on the project.

7. Part A of the claim, said to be worth about £20m, is concerned with the procurement of the building contract itself. Part C of the claim, said to be worth £11.5m, concerns Standard Life's separate claim against Buro Four Project Services Limited in relation to a contract between Standard Life and their tenant, Marks and Spencer PLC, concerned with a distinct part of the project. BDP's application to strike out did not concern Part A, and Part C does not relate to them in any event. Hence, we are only concerned with Part B of Standard Life's claim.

8. Part B concerns variations and loss and expense. Of the final account sum paid to Costain, £50.3 million was made up of: a) £28.4m paid in relation to variations to the building contract; and b) £21.9m paid in relation to Costain's claims for loss and expense due to delay and disruption caused by these variations. I note that there are two kinds of variation in play: Contract Administrator Instructions ("CAIs") and Confirmations of Verbal Instructions ("CVIs"). BDP signed the CAIs and approved the CVIs for payment. The bulk of the £28.4m paid in respect of variations relates to CAIs.

9. I turn to the detail of Standard Life's pleadings in respect of both variations and loss and expense. Since the judge correctly observed that an analysis of the pleadings "is not for the faint hearted", it is perhaps wiser to summarise the effect of the pleadings, rather than embarking on a detailed analysis of its constituent parts.

10. What I shall call "the Detailed Claim" against BDP can be usefully described as having three limbs. Limb one is based on an analysis of 167 variations, out of a total of 3,604. Out of that 167 variations, 122 have been particularised and pleaded as giving rise to a claim in professional negligence against the design team. Those claims are for late, inadequate, inaccurate, incomplete and uncoordinated design information. The 122 variations arise under four of the elements of the work on the project, namely the residential fit-out, secondary steelwork, cladding and roofing. BDP's portion of this claim comes to around £3m. Limb two is a claim against the design team for around £6.1m of loss and expense incurred by Standard Life as a consequence of their breaches. Once combined with limb three (Standard Life's claim against the design team for lost rent and professional fees), the Detailed Claim gives rise to a direct claim of around £13m in damages against BDP alone. All three limbs of the Detailed Claim are pleaded in a traditional manner. So far, so standard.

11. The total value of the 167 variations analysed is £3.7m. What I shall call "the Extrapolated Claim" has two interlinked elements and operates in this way. In the first element Standard Life allege that, on their analysis of the 167 variations, the design team were culpably responsible for 83.1% of them. So Standard Life extrapolate that percentage across the remaining 3,437 variations which they have not investigated, and pursue a further claim of £23.6 million (83.1% x £28.4 million) against the design team in respect of the remaining variations. Standard Life then apply a similar analysis to calculate what each member of the design team is individually responsible for. It worked out that BDP was responsible for approximately £3m (81.71%) of the £3.7m which made up the Detailed Claim. Thus, it claims against BDP £19.3m, being 81.71% of the £23.6m claimed against the design team as a whole.

12. In essence, Standard Life say that, in circumstances where:

- 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;

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.

13. Standard Life apply the same methodology in relation to the second element of the Extrapolated Claim, namely the loss and expense claim. They worked out that, of the £21.9m it paid to Costain on account of loss and expense, the design team was responsible for approximately £10.7m. After stripping out the £6.1m which had been claimed against BDP in the Detailed Claim, a sum in the region of £4.6m was left. Standard Life then adopted the same approach towards apportionment between the members of the design team: i.e. they claim £3.7m odd (or 81.71% of the £4.6m) from BDP.

14. Thus the Extrapolated Claim gives rise to a total damages claim against BDP of over £20m, bringing the full amount of the claim against BDP to around £33m. It is the Extrapolated Claim to which BDP now object.

15. The primary pleading before the judge was the draft amended particulars of claim, dated 26 October 2020. It is not a model of clarity. However, Standard Life advertise the Extrapolated Claim early on at paragraphs 8-13, which I have reproduced at *Appendix A*.

16. Schedules 1-4 plead in detail the claims against BDP arising out of the 122 variations, spread over residential fit-out (schedule 1), structural steelwork (schedule 2), cladding (schedule 3), and roofing (schedule 4). The core allegations against BDP underpinning the detailed claim are that the design information was late and/or inadequate and/or inaccurate and/or incomplete and/or uncoordinated, as well as over-certification. Those allegations are divided into categories A-E and each are identified, sometimes in combination, in respect of each of the separate 122 allegations in schedules 1-4.

17. Under the heading 'Causation, Loss and Damage', the pleading makes plain that various items have been stripped out of the sums paid to Costain on their final account in order to calculate the damages claim. It is asserted as follows:

> "182.From this figure, Standard Life has deducted all costs arising from its own instructions and matters for which the Design Team was not responsible, namely £16,024,920.72. Having deducted this sum, Standard Life claims the balance from the Design Team and is supported in this approach by:
>
> (1)Costain's substantiation of its claims and the bases for those claims, which went unchallenged by the Design Team;
>
> (2)The fact that Costain's claims were certified, agreed and paid to the extent that they were;
>
> (3)Standard Life's own analysis, which doing the proportionate best it can on the information it has available reveals systemic and recurrent failings by the Design Team as the dominant or effective cause of:
>
> (a)the variations it has analysed; and
>
> (b)the claims for loss and expense which it has settled (subject to the qualifications herein).
>
> 183.In the premises, absent any explanation from the Design Team, Standard Life avers that it is fair and reasonable to extrapolate this cause to the remaining variations on the project and the remaining loss and expense certified and paid.
>
> 184.Standard Life reserves the right to contend that it was entitled to assume that BDP would only certify claims after investigating them adequately. To the extent that any party asserts that any sum was wrongly or over-certified, then Standard Life will contend that any overpayments made to Costain were caused by a negligent failure by BDP, in its capacity as Contract Administrator, adequately to investigate and then reject Costain's entitlement (contrary to clauses 7.1 and 7.15 of Schedule 1 to BDP's Appointment)."

18. At paragraph 188, Standard Life note that 83.1% of all CAIs and CVIs that they had analysed were caused by the negligent performance of the design team, and 16.9% were caused by non-design team issues. They say at paragraph 190 that this suggests that, prima facie, the negligent performance by the design team was the cause of the significant volumes of additional/varied work on the project. They then say this:

> "192. In the absence of any acceptable alternative explanation from the Design Team and with the above provisions in mind, Standard Life will invite the Court to draw the reasonable inference that, on the balance of probabilities, all variations aside from those which arose from non-Design Team issues were caused by the negligent performance of the Design Team."

19. A similar but separate exercise is then done in relation to the loss and expense claim at paragraphs 195A-201. This alleges that it was only the delays in Year 2 and Year 4 that were caused by the design team.

20. The summary of the claims begins at paragraph 219. The "Primary Claim", which includes both the Detailed Claim based on schedules 1-4, and the Extrapolated Claim, is made against the design team as a whole in the total sum of £38,063,107.16. The

Detailed Claim only is put at £12,885,682.60. As previously noted, the claims against BDP are slightly less because there are some elements of the overall claim which are not claimed against BDP.

21. There are two other parts of the pleadings to which reference should be made. First there is a lengthy list of all of the CAIs and CVIs on all the other work packages not identified in schedules 1-4. The list was actually prepared by Costain and Gleeds, the project's quantity surveyor, before the proceedings had commenced. It simply lists all the variations and identifies a figure in the final account where appropriate. Although these are therefore the variations that are the subject of the Extrapolated Claim, it became clear that the list included items that could never have been BDP's responsibility in any event. That was a point that the judge made in his case management directions and, since his order, Standard Life have stripped out from the claim all the variations which could not have been BDP's responsibility.

22. The other relevant pleading is Standard Life's response to the request for further information made by BDP and the other two design team defendants. What was sought was detail about the Extrapolated Claim, including particulars of the alleged negligent performance, and all facts and matters relied upon in support of the contention that it was fair and reasonable to make the extrapolation contended for and/or that it was reasonable to infer that 83.1% of the variations arose out of the design team's negligence. I set out the answer to that request in full in *Appendix B*.

23. On any view, this was a clumsy suite of pleadings which, although it was advancing a difficult case, made matters worse by not making that case crystal clear. I am sure that, if Standard Life had their time over again, they would plead the Extrapolated Claim with much greater clarity. However, like the judge, this court is not concerned with matters of elegance and style: it is concerned with fundamental issues as to alleged abuse of the process and the advancement of hopeless or indecipherable claims.

3 THE JUDGMENT, THE ORDER AND THEREAFTER

24. Having received the Further Information, on 31 July 2020, BDP sought an order under CPR 3.4 (2)(a) and (b) striking out the Extrapolated Claim and/or seeking reverse summary judgment. The matter was heard by the judge on 11/12 November 2020 and, as noted above, his judgment was dated 15 December 2020. It is at [2020] EWHC 3419 (TCC).

25. In that judgment, the judge analysed much more of the pleadings than I have, and went on to identify the relevant law at [65]-[96]. He summarised the parties' contentions at [97]-[101]. The section dealing with his reasoning and conclusions is at [102]-[133]. In those paragraphs, the judge accepted that there were parts of the Extrapolated Claim which could not support the inference sought because, for example, it was alleged that work had been badly done in areas where one or more of the defendants had no responsibility at all ([102]-[103]). The judge went on to make various case management orders in respect of those parts of the Extrapolated Claim which were unsustainable.

26. However, the judge did not accept that the Extrapolated Claim itself should be struck out. In his careful observations, the judge said:

"104. I do not accept, however, the more generalised criticisms of the amended particulars. I do not agree with the defendants that the pleading is vague and incoherent. It is not a tidy pleading, but it is a genuine and partly successful attempt to treat with professionalism a daunting amount of detail in a manner that is comprehensible, cogent and complete. It is hard work to get through it, but that is in part because of the nature of the facts.

105. Nor do I accept that the manner of the pleading is such that it attempts to reverse the burden of proof. That contention misunderstands the jurisprudence on cases of *res ipsa loquitur* and other cases (falling short of *res ipsa loquitur*) where inferences are drawn from primary facts and an evidential burden may arise to produce rebuttal evidence or suffer the inferences to be drawn. If the evidential burden is then not met, the burden of proof is discharged, not reversed.

…

107. I do not accept that the pleading is bad because it alleges professional negligence without the support of expert opinion. The pleaded breaches of professional duties are detailed: see sections F and G of the amended particulars and the narrative in schedules 1-4. It is plain that expert assistance has helped to inform those parts of the amended particulars and those schedules. There is no doubt that expert evidence will form part of Standard Life's case at trial. It does not have to be deployed at the earlier pleading stage.

108. I also reject the criticism that the claim as now advanced is an abuse of process because it attempts to gain improper advantage by putting forward a claim which the claimant knows it cannot properly particularise. The factual position here bears no resemblance to that in the *Nomura* case. There, the claimant by definition could not know what its own case was because it would only have a case at all if held liable to a third party.

109. Here, by contrast, the claim is admittedly good (for present purposes) in relation to £12.9 million of pleaded losses. The vice is the more venial one of artificially inflating the claim by including losses based on impermissible inferences. That is indeed a fault, but not one that comes close to an abuse of the court's process. The fault must be viewed in the light of everyone's duty to observe proportionality and make litigation of this kind manageable, which is not easy.

110. Next, I reject the submission that these defendants do not know the case they have to meet. It takes some hard work to discern what the case is, as I have found myself, but once that is done the meaning of the pleaded case is clear enough. The defendants, like myself, have studied and understood the pleading, challenging though the exercise is. They have worked out what the case they have to meet is, the better to pour eloquent scorn upon it in these applications.

111. The pleaded allegations of breach of duty are clear and unremarkable. No separate complaint is made about their adequacy; rather, the defendants warn against introducing new and unpleaded breach of duty allegations at trial. The extrapolation case, as currently pleaded, does not expand the allegations of breach of duty.

…

118. Pausing there to take stock, the court is faced with a pleaded case which, admittedly, is arguable in relation to the non-extrapolated parts of the claim, quantified at £12.9 million; with no further breaches of duty relied on in support of the extrapolated part of the claim, quantified at £38.1 million, a difference of £25.2 million. In principle, those parts of the balance of £25.2 million where the inference cannot reasonably be justified, should be excised from the pleading now, so that these defendants are not required to deal with them at trial.

119. However, these defendants have not demonstrated that every part of the extrapolated case is necessarily bad and unfit for trial. They have pointed to specific examples of instances where it is necessarily bad. But if a judge were to go through line by line, with a fine tooth comb, each and every part of the extrapolation exercise, it is likely that the judge would find parts of the extrapolation case that are fit for trial.

120. In my judgment, it is likely that there is "wheat" as well as "chaff" in that part of Standard Life's claim comprising the extrapolated balance of £25.2 million of claimed losses. I accept that I make that judgment partly as a matter of impression. I have not done the exercise just mentioned of going through each item line by line. I was not invited to do so. It would take weeks and would be disproportionate. But, without doing the exercise, my judgment is that significant parts of the extrapolation exercise are likely to be valid."

27. The judge thereafter identified certain other factors which supported that conclusion. As to proportionality, he said:

"127. My unwillingness to dispose of the whole of the extrapolation claim summarily now is also informed by the following other considerations. First, I reject these defendants' dismissal of proportionality as a concern. It is a very real concern. Mr Selby may well be right that they would have complained of disproportionality had Standard Life spent millions of pounds analysing every variation and delay notice and then unleashed an "avalanche" of documents.

128. I agree with Standard Life that the whole of the claim would be in practice untriable if each and every variation had to be tried separately. That would not be fair on other litigants as it would take up too much of the court's resources. The experience of the court and the parties in

the *Amey* case shows how important it is for case management in advance of trial to keep the scope of the trial within practical limits."

28. The judge put into effect these parts of his judgment by an order dated 18 January 2021. Amongst other things, this order obliged Standard Life to replead their case to remove the unsupportable allegations and to generally 'clean up' their pleadings. It also allowed BDP to select up to 80 further variations for consideration as part of the Extrapolated Claim, and permitted the two other members of the design team to identify a further 40 variations each. This was in order to increase the number of variations being investigated in detail.

29. BDP sought permission to appeal the decision not to strike out the Extrapolated Claim or grant them reverse summary judgment. I granted permission to appeal on 16 March 2021, on the basis that the appeal raised issues of principle which might usefully be the subject of appellate guidance.

30. Pursuant to the judge's order, Standard Life provided an amended Part B particulars of claim in July 2021. They have recently served a re-amended version which sets out their up to date position. This latest version shows a considerable shift from the pleadings considered by the judge. Standard Life have now analysed a further 110 variations, to take the total of those variations which they have investigated to 277. Out of that, a total of 174 (up from 122) are being pursued against the design team. Of that increased number, apparently only 16 give rise to further claims for negligence or breach of contract against BDP.

31. More significantly still, the reassessment exercise carried out following the judge's order has meant that, instead of comprising the bulk of Standard Life's Primary Claim, the Extrapolated Claim is now a very small part of it. The Primary Claim against BDP has reduced from £32,896,623.62 to £20,467,173.56. Of that, the Detailed Claim is said to be worth £19,191,227.51 (or roughly 95% of the total); that is the value of the claim referable to the specific variations which have been thoroughly analysed. Thus, only the difference of £1,275,946.04. (about 5% of the total) is now claimed by way of the Extrapolated Claim.

32. Mr Moran argued that this change in emphasis did not affect the points of principle that arise on this appeal. I agree with that. He also suggested that this is the exercise that Standard Life should have done in the first place. There may be some force in that submission, too. However, I cannot help but think that the present position has been reached as a result of the judge's careful case management directions and the further burdens which he imposed on Standard Life to 'clean up' their pleadings. I return to the relevance of that aspect of the case, and in particular whether the judge's exercise of his discretion can be impugned, in Section 7 below.

4 APPLICABLE LEGAL PRINCIPLES

4.1 The Relevant Parts of the CPR.

33. Any application of this kind must be determined by reference to the overriding objective at CPR 1.1. This provides:

"1.1

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
(b) saving expense;
(c) dealing with the case in ways which are proportionate –
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders."

34. The application to strike out and/or for reverse summary judgment was made under CPR 3.4(2) which provides as follows:

"(2) The court may strike out a statement of case if it appears to the court –
(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
(c) that there has been a failure to comply with a rule, practice direction or court order."

35. Practice Direction 3A gives some useful guidance as to how r.3.4(2)(a) might work in practice by giving examples of cases which might fall under that rule. These include:

i) Those which set out no facts indicating what the claim is about;

ii) Those which are incoherent and make no sense;

iii) Those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim.

36. Also of relevance to BDP's application is r.16.4(1)(a) which provides:

"**16.4**
(1) Particulars of claim must include –
(a) a concise statement of the facts on which the claimant relies;"

37. In *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015; [2020] 4 W.L.R. 110, confirming the decision in *Asturion Fondation v Alibrahim* [2020] EWCA

Civ 32; [2020] 1 WLR 1627, this court confirmed that an application under r.3.4(2) had to satisfy a two-stage test. I said at [63]:

> "First the court has to determine whether the claimant's conduct was an abuse of process. Secondly, if it was, the court has to exercise its discretion as to whether or not to strike out the claim. It is at that second stage that the usual balancing exercise, and in particular considerations of proportionality, becomes relevant."

38. Mr Moran was at pains to point out that, in addition to the application to strike out, BDP had also made an application for reverse summary judgment. The approach to such twin applications was summarised in *Global Asset Inc v Aabar Block SARL* [2017] EWCA Civ 37; [2017] 4 WLR 163 at [17]. In a case of this kind, CPR 3.4(2) and CPR 24.2 should be taken together and a common test applied. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing a claim and should be struck out. The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91. In essence, the court is determining whether or not the claim is "bound to fail": see *Altimo Holdings v Kyrgyz Mobil Tel Limited* [2012] 1 WLR 1804 at [80] and [82].

4.2 The Basic Ingredients of a Pleading

39. On this topic, Mr Moran referred to a decision of mine at first instance in the TCC, *Pantelli Associates Ltd v Corporate City Developments No2 Ltd* [2010] EWHC 3189 (TCC); [2011] PNLR.12. In that case, I had regard to CPR 16.4(1)(a) and the meaning of the phrase "a concise statement of the facts on which the claimant relies". At [11] I said:

> "11. CPR 16.4(1)(a) requires that a particulars of claim must include "a concise statement of the facts on which the claimant relies". Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated. Those are 'the facts' relied on in support of the allegation, and are required in order that proper witness statements (and if necessary an expert's report) can be obtained by both sides which address the specific allegations made."

40. I should stress that, although this summary was part of a judgment in a professional negligence claim, it is not to be read as if it were confined to such claims. These are the basic ingredients of any statement of case against any defendant.

41. The other side of the same coin is that pleadings should not be vague and unparticularised, and if they are, they are liable to be struck out: see the judgment of Teare J in *Towler v Wills* [2010] EWHC 1209 (Comm). In that case, Teare J said:

> "18. The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies; see *Spencer v Barclays' Bank* 30 October 2009 per Mr. Bompas QC at paragraph 35. The Amended Particulars of Claim are, perhaps, concise but they are not clear or coherent. The transactions which the Defendant is alleged to have conducted in the name of the company without disclosing his conflict of interest and which have caused loss have not been clearly identified. The Further Information could perhaps have cured these defects but it has not done so. The particular transactions cannot be identified with ease. Moreover, additional claims, not foreshadowed or pleaded in the Amended Particulars of Claim, appear to have been added. They have no place in the Further Information since they had not been pleaded in the Amended Particulars of Claim. Further, evidential material has been added in such a way as to make comprehension of the Further Information difficult."

4.3 Pleading Extrapolated Claims

42. As I have already said, it is not in issue that, in an appropriate case, sampling and extrapolation is an appropriate tool by which the parties and the court can organise the evidence and try the issues in a proportionate way. It is worth noting that, in this case, with in excess of 3,500 variations potentially in issue, the court would inevitably have dealt with the claims by way of sampling and extrapolation, however the claims had been pleaded. Indeed, the same is true even of the 122 variations which are the subject of the detailed claim in schedules 1-4. The need to keep costs to a proportionate level would have meant that only some of the 122 variations would themselves be fully explored in the evidence.

43. 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.

44. Two recent authorities appear to support this principle. The first is the decision of HHJ Stephen Davies, sitting as a judge of the High Court, in *Amey LG Ltd v Cumbria County Council* [2016] EWHC 2856 (TCC). In that case, one element of Cumbria's counterclaim concerned claims for patching and surfacing roads which were supposed to be maintained by Amey. The judge explained at [1.17] that Cumbria had adopted a particular methodology to plead and advance this part of their claim:

> "1.17. The majority of the patching and surfacing claims are pleaded on the basis that Cumbria has examined a sample number of patching and

> surfacing undertaken by Amey, discovered various breaches of contract in relation to a number of those samples, and put forward its proposals for remedial works and costs by reference to those defective samples. Its claim is then pleaded and presented on the basis that the conclusions in relation to those defective samples can be extrapolated pro rata to the entirety of the works of similar nature undertaken by Amey over the contract period. It seeks to support that approach by expert statistical evidence. There is, not surprisingly, a significant dispute between the parties as to whether or not that is an appropriate course to take, which I shall of course need to resolve in this judgment."

45. The judge had no difficulty in principle with the pleading of such an extrapolated claim. However, he rejected that claim on the evidence because it was based on a 95% confidence rate across the whole of the works, and that crucial element of the case had not been made out. He also noted at [25.10] that the patching claim was based entirely on extrapolation; there was no alternative pleaded claim for non-extrapolated damages (the equivalent here of the Detailed Claim).

46. Similarly, in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (No.2)* [2017] EWHC 1763 (TCC); 173 Con LR 137, the claimants' claim in relation to the allegedly defective welding was advanced by an analysis of 412 welds out of a total of over 28,000. Again, there was no difficulty with the pleading of such a claim. However, the claim again failed at trial, this time because, as Fraser J explained at [77], the sample was not representative of all the welds, because it had already been limited to welds which had been identified to ICI as being defective. In other words, as the judge put it, the 412 was already a subset of a wider total of welds that had been determined to be defective, and so the extrapolation exercise was flawed from the outset.

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.

5. DID THE JUDGE ADOPT THE CORRECT TEST?

48. Mr Moran's first submission was that the judge erred in failing to follow the two stage test set out in *Cable v Victoria,* namely: i) Was there an abuse? ii) If so, what as a matter of discretion should be done about it? He said that, instead, the judge treated the application to strike out and/or for reverse summary judgment as one which called for a unitary case management decision. In consequence, he submitted that the judge led himself into error.

49. I do not accept that criticism. I acknowledge at once that the judge does not expressly set out the two stage test, but I am in no doubt that that was the path that he followed.

50. I have set out at paragraphs 26-27 above some of the relevant passages in the judgment. It is quite clear from those passages that the judge satisfied himself that the Extrapolated Claim was not an abuse of process and that BDP knew the case that they had to meet. In particular the judge rejected the submission that the pleading was "vague and incoherent" at [104]; he rejected the suggestion that the claim was an abuse of process at [108]; that even with the impermissible inferences which the original pleading had invited, he found it did not "come close to an abuse of the court's process" at [109];

and he rejected the submission that BDP did not know the case they had to meet at [110]. In those circumstances, he found that the pleaded claim did not fall within r.3.4(2)(a) and (b), so questions of discretion did not strictly arise.

51. In those circumstances, I am satisfied that the judge applied the correct test. The next question is whether, in respect of the first stage of the test, the judge reached the wrong conclusion.

6 DID THE JUDGE REACH THE WRONG CONCLUSION?

6.1 General

52. Although this was an evaluative decision by the judge, which in turn would usually mean that this court should afford him a wide degree of latitude (see *Todd v Adams and Chope (t/a Trelawny Fishing Co)* [2002] EWCA Civ 509; 2 All ER (Comm) 97 at [129]), I can see some force in Mr Moran's submission that whether or not the pleading of the Extrapolated Claim was an abuse of process or disclosed no reasonable grounds for bringing the claim there was, at least on the facts of this case, a more binary question: Is it a legitimate way of pleading such a claim, or not? In those circumstances, I have considered this issue by way of a review of the relevant factors and principles, and their application to the Extrapolated Claim as pleaded. That approach is also appropriate given the absence of any appellate authority on the pleading of extrapolated claims.

53. 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.

6.2 Are Extrapolated Claims Permissible In Principle?

54. Section 4.3 above identifies two authorities which indicate that, as a matter of pleading, extrapolated claims are permissible in principle. I agree with the conclusions of the TCC judges in those cases. Extrapolated claims are permissible in principle. The issue is whether, on an analysis of the facts of this case, the Extrapolated Claim is impermissible.

6.3 The Relevance of Proportionality

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*.

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?

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.

59. I consider that this conclusion as to proportionality can be tested by comparing what has been done with what Mr Moran argued should have been done. Mr Moran submitted that, in order for BDP to understand this claim, Standard Life would need to plead out each of these variations, so that BDP can see what is being alleged against them, item by item, 3,437 more times. Any sampling exercise thereafter (for the purposes of, say, the expert evidence and the trial) should only be permitted once the entirety of the pool of variations has been pleaded out in the same detail as we have in schedules 1-4.

60. Such an exercise would plainly cost as much, if not more, than the sums at stake in the action itself. On a pro rata basis, the necessary pleadings and schedules would fill another 60 odd lever arch files[2], which would doubtless be prepared and then, save in one or two instances, never looked at again. On the face of it, that would not be a sensible or proportionate exercise to require Standard Life to undertake.

61. For these reasons, I consider that, on the facts of this case, the Extrapolated Claim was a proportionate way of dealing with the 3,437 uninvestigated variations. But as noted in paragraph 57 above, that would still count for nothing if BDP did not know or understand the case they have to meet, or if the Extrapolated Claim had no real prospect of success.

6.4 Do BDP Know The Case They Have To Meet?

62. This is not an action which raises novel points of law. It is a standard claim for damages for negligence and breach of contract, supported by detailed schedules. However, if a

[2] Claims in respect of 167 variations fill 3 lever arch files. Twenty times that number of variations would fill 60 files.

defendant like BDP has no way of understanding what it needs to do in order to defend itself against a defined part of that claim (in this case, the Extrapolated Claim), then that part is likely to be found to be an abuse of process. Accordingly, whether or not BDP know the case they have to meet in respect of the Extrapolated Claim becomes the critical issue.

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.

64. The starting point, of course, is the Detailed Claim, set out in schedules 1-4. BDP do not suggest that they do not fully understand that claim. Across four major elements of the work, 167 variations have been analysed and, on Standard Life's case, 83.1% of those variations give rise to a claim of breach of contract and/or negligence against the design team. BDP are said to be responsible for the lion's share of those variations.

65. Moreover, BDP are well aware of the particular defaults alleged against them in respect of each and every item in schedules 1-4. The allegations are, singularly or in combination, concerned with late, inadequate, inaccurate, incomplete or uncoordinated information or over-certification. Repeatedly, those are the defaults on the part of BDP said to give rise to these additional costs. Each item in schedules 1-4 is set out in almost interminable detail.

66. The CAIs and CVIs which lie at the heart of schedules 1-4 were part of the system operated by BDP across the whole project. As a process, there is nothing to distinguish the variations on the residential fit-out from the variations to, say, the floor slabs, the brickwork or the blockwork. Moreover, some of the underlying themes behind the Detailed Claim, such as BDP's failure to coordinate the design information, and their failure to keep proper records, plainly cut across all aspects of the project. The late release of drawings would have impacted, not only on the particular aspect of the work dealt with in the drawings themselves, but on other parts of the project which were dependent on a certain degree of progress on one package before progress could be made on another. That is how construction sites work.

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.

68. Standard Life also point to the fact that BDP were the leaders of the design team throughout and must therefore be taken to have a more detailed knowledge than anyone else of the detail of these variations and how they came about. They also assert that, although the detailed complaints about the design information were made to BDP at the

time that the works were being carried out, BDP have never set out any sort of positive case exculpating themselves. Although of course that could be said to be BDP's right, if that assertion is correct that feature of the history allows Standard Life now to say that, in the absence of a positive defence, the plausibility of the Extrapolated Claim is further strengthened.

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.

70. I am not persuaded by Mr Selby's argument that the sheer number of CAIs and CVIs is itself demonstrative of negligence: there may be reasons why there were so many that do not reflect on the design team or BDP at all. But that does not ultimately matter. I am persuaded that there is nothing on their face to distinguish the variations which are the subject of schedules 1-4, with the variations which are not, save that the former have been thoroughly investigated and the latter have not. They were all issued by the same people, on the same project, in the same circumstances, namely an atmosphere of increasing costs and widespread concern about the control of the process. Thus the inference which Standard Life seek to draw about responsibility for the variations as a whole is at least reasonably arguable.

71. That also answers Mr Moran's related point that the Extrapolated Claim is so thin, so speculative, that it is bound to fail. The claim may face various hurdles, some of which Mr Moran identified in his eloquent submissions, but it is quite impossible for this court to conclude, at the pleading stage, that the Extrapolated Claim is bound to fail.

72. Just as the judge did, therefore, I consider that Standard Life have made out their case that the inference on which the Extrapolated Claim depends has a realistic prospect of success. Although Standard Life's original pleading of the Extrapolated Claim left rather a lot to be desired, I consider that it contained the necessary basic ingredients as set out in Section 4.2 above.

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.

75. That may be a very big 'if'. Nobody suggests that the Extrapolated Claim will be straightforward to prove. It is perhaps not a coincidence that, in both of the cases where an extrapolated claim was pleaded, the claims failed at trial. That may well be the fate

of the Extrapolated Claim in this case. But it cannot be said that BDP do not know what the Extrapolated Claim involves, nor what they need to do to defeat it. Indeed, at least some of the latter exercise is already in train, as evidenced by the numerous points that BDP were taking on this appeal.

76. On a related point, Mr Moran suggested that, because of the general nature of the Extrapolated Claim, it would not, as Lord Oliver put it in *Wharf Properties v Eric Cumine Associates (No. 2)* [1991] 52 BLR 1, PC, provide an appropriate "agenda for trial". There was a suggestion that the Extrapolated Claim was akin to what is sometimes called a 'global claim', with all the difficulties of pleading and proof that such claims involve. But, for the reason that I have already given, I consider that there is a clear agenda for trial: an analysis of the individual allegations in schedules 1-4, and then a consideration of the Extrapolated Claim by reference to the arguments noted above.

77. Putting the same point another way, I should also refer to another global claim case, *Bernhard's Rugby Landscapes Limited v Stockley Park Consortium Limited* [1997] EWHC (TCC) 374; 82 BLR 39. At [131], Judge Humphrey Lloyd QC said:

> 'In other words a global claim in the sense used in argument is the antithesis of a claim where the causal nexus between the wrongful act or omission of the defendant and the loss of the plaintiff has been clearly and intelligibly pleaded. However that nexus need not always be expressed since it may be inferred. As Lord Oliver emphasised in *Wharf Properties* there must be a discernible nexus between the wrong alleged and the consequent delay (or money) for otherwise there will be no "agenda" for the trial."

This observation could also be applied to the present case. In my view, there is a 'discernible nexus' between the Detailed Claim and the Extrapolated Claim. If it is not express, it is certainly capable of being inferred.

78. Finally, for completeness, I should say that, although the judge suggested at [89]-[90] that the Extrapolated Claim might be capable of being advanced by reference to the principle of 'similar fact' evidence, Mr Selby was clear that he did not put his case on that basis. I think that is wise; it would give rise to complexities which, if Standard Life are right about the basis of the inference they ask the court to make, are wholly unnecessary.

79. For all these reasons, therefore, I am confident that BDP know the case they have to meet in respect of the Extrapolated Claim, and that the claim has a real, rather than a fanciful, prospect of success. That therefore resolves the principal issue on this appeal in favour of Standard Life. However, in deference to both leading counsel, it is appropriate to deal briefly with the other submissions that were made in respect of the first stage of the test under r.3.4(2).

6.5 Can Extrapolation Ever Be Used To Plead Professional Negligence Claims?

80. Mr Moran appeared to suggest that professional negligence actions were in their own special category and that, in effect, extrapolated claims of this kind could never be part

of a professional negligence case. He said that sampling and extrapolation was only really appropriate in case of systemic failure, where what was essentially the same defect arose across a project or a product. He said that both *Amey* and *ICI* were such cases.

81. I do not accept that distinction as a matter of principle. In my view there is nothing special or different about professional negligence actions which would mean that extrapolated claims could never be pleaded as part of such claims. What I said in *Pantelli* about what a defendant is entitled to know (paragraph 39 above) applies to any type of claim, not just a professional negligence claim. Moreover, on the particular subject of expert evidence (which *Pantelli* was particularly concerned with), BDP accept that Standard Life have the necessary expert evidence to advance schedules 1-4. The Extrapolated Claim arises directly out of those schedules and therefore directly out of that expert evidence. Accordingly, it is not right to say the Extrapolated Claim is unsupported by expert evidence.

82. I accept that, on the basis of the present pleading, the 3,437 variations lying behind the Extrapolated Claim are and may well remain largely uncharted territory (subject to the judge's orders as to further sampling). But, whilst that might strengthen Mr Moran's argument at trial that the Extrapolated Claim should fail in its entirety, it does not demonstrate that the Extrapolated Claim is in some way inappropriate in a professional negligence claim, much less an abuse of process.

6.6 Does The Extrapolated Claim Put Unfair Commercial Pressure On BDP?

83. Mr Moran complained that allowing this claim to proceed in this way would put unfair commercial pressure on BDP. The argument was, I think, that because a large claim has been made without any investigation into the 3,437 variations, BDP will have no option but to settle the claim, because of the risks that the Extrapolated Claim might succeed, and/or the costs that BDP will incur investigating the 3,437 variations themselves.

84. I do not agree. Since they know how it works, it is for BDP to assess the risks presented to them by the Extrapolated Claim. Moreover, against the particular background of this case, that could hardly be said to be unfair. BDP, as the leaders of the design team, ordered these variations and subsequently approved them for payment. They therefore know much more about the individual variations than Standard Life could ever do. That is always the downside when a hands-off developer brings claims against those on whom they were relying to run the project on a day-to-day basis.

85. Furthermore, I accept Mr Selby's related submission that, if Standard Life had pleaded out all the remaining 3,437 variations at the outset, so that vast costs had been incurred by the time of the first CMC which could not be the subject of the cost budgeting regime, BDP would have protested long and loud. They would doubtless have argued that Standard Life had frontloaded the costs to put commercial pressure on them to settle the claim. They cannot have it both ways.

86. Mr Moran also suggested that there was further unfairness to BDP because the general nature of the Extrapolated Claim meant that it was impossible for them to pass it on to their sub-consultants by way of a Part 20 claim. Again I disagree. It can be passed on as it is, to stand or fall on the extrapolated basis advanced by Standard Life. If the

Extrapolated Claim succeeds, the court may have to undertake a rough and ready apportionment as between sub-consultants, but that is no different, say, to the calculation of a percentage deduction for contributory negligence. If the Extrapolated Claim fails but it was found to be reasonable for BDP to have joined the sub-consultants, the costs risk of such Part 20 claims will remain with Standard Life.

87. In my view, therefore, the Extrapolated Claim does not give rise to unfair commercial pressure on BDP. I think the alternative course might well have done.

6.7 Will Refusing The Appeal "Open The Floodgates" To Inadequately-Pleaded Claims?

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.

90. It is also worth remembering that this is not a case where the claimants' pleading has been jotted down on the back of an envelope. As I have said, the original pleadings already fill 3 lever arch files, and are the result of a detailed investigation into 167 variations. It cannot be said that, in some way, Standard Life have taken a lazy or minimalist approach to their claims.

91. But there is a wider point, and it goes to the premise on which Mr Moran's 'floodgates' attack was founded. He appeared to assume that a construction case in which every last detail was pleaded out extensively on all sides was the optimal mode of presentation, and that anything less was somehow an inferior short-cut, risking potential injustice for all defendants in such proceedings.

92. I profoundly disagree with that assumption. The days of the court requiring parties in detailed commercial and construction cases to plead out everything to the nth degree are over. It is not sensible; it is not cost-effective; it is not proportionate. The parties, with the assistance of the court if they cannot agree, are duty bound to find a way of trying out the principal issues between them in a sensible and proportionate way. Of course, in certain types of construction dispute, it will be necessary to investigate what Lord Dyson once called "the grinding detail" of such claims, but that investigation should only ever be commensurate with the overriding objective. Pleading out every

last detail at the outset of the proceedings should not be regarded as the paradigm method of framing such disputes, particularly if there are more proportionate alternatives which still enable the defendant to know the case that it has to meet.

93. Accordingly, although I do not accept that, in some way, the refusal of this appeal will open the floodgates to poorly-pleaded claims, I should say that, if the dismissal of this appeal results in the production of more proportionate and cost-effective pleadings in construction cases, I for one would welcome such a development.

6.8 Conclusion

94. For all the reasons set out above, I would therefore determine that BDP have not made out the first stage of the two stage test set out in *Cable v Victoria*.

7. EXERCISE OF DISCRETION

95. In view of that conclusion, it is perhaps unnecessary to consider further the judge's exercise of his discretion. However, if we assume for a moment that the above analysis is wrong, and the pleaded claim is an abuse and fails to set out reasonable grounds for bringing the Extrapolated Claim, it is necessary to consider the judge's exercise of his discretion.

96. As we have seen, the judge addressed the difficulties with the pleadings by exercising his discretion and making a series of case management directions. In consequence of those case management directions, both directly and indirectly, a number of things have happened. First, the value of the Primary Claim against BDP has significantly reduced. It was £32,896,623.62; it is now £20,467,173.56. Secondly, the claim in respect of the variations which have been investigated (the Detailed Claim) has increased in value, from £12,834,287.81 to £19,191,227.51. This has meant that the value of the Extrapolated Claim (which forms part of the Primary Claim) has reduced significantly. It was £20,062,335.07. It is now £1,275,946.04.

97. Accordingly, the judge's exercise of his discretion, in refusing to strike out the claim, but making various case management orders directed at improving Standard Life's pleadings, has had a radical impact on this claim as a whole. Instead of the Extrapolated Claim being worth double the Detailed Claim based on the individual variations, it is now worth around 5% of that Detailed Claim.

98. I take the point which Mr Moran makes that, since these changes were based on the investigation of only another 110 variations, of which only 16 more are alleged against BDP, this is something which Standard Life ought to have done much sooner. But that cannot lessen the impact of the judge's careful orders, and Standard Life's compliance with them.

99. The reason for the second stage in the test under r.3.4(2) is because courts, quite properly, regard the striking out of a claim, or the giving of a reverse summary judgment, as being a last resort. If a claim can be saved in some way, then the court would much rather achieve that end, provided it is in accordance with the overriding objective, than rigidly following a process which would ensure that the claim would never be heard.

100. In the present case, the judge exercised his discretion in making the various orders that he did. I appreciate that he did that in the belief that this was not an abuse of process but, even assuming that he was wrong in that belief, there is nothing to say that he would not have made precisely the same orders to 'save' the Extrapolated Claim. In my view, the proof of that pudding is in the eating: the judge's careful exercise of his discretion has achieved (or helped to achieve) a result in which just 5% of the overall value of the claim is referable to the Extrapolated Claim.

101. I have already said that these cases are, in many ways, a matter of degree. As a matter of degree, the fact that the Extrapolated Claim is now such a small part of the overall value of the claim as a whole (just 5%) is plainly a highly relevant consideration to the exercise of any discretion. For example, in *Amey*, one of the problems with the extrapolated claim was that it took a handful of claims worth very little and multiplied them into significant sums. Here, the opposite is now the case, with the Extrapolated Claim being now a small part of the overall whole.

102. Thus, if (which I do not accept) the judge should have found against Standard Life under the first stage of the r.3.4(2) test, I would uphold the exercise of his discretion as being, not only open to him, but one that has helped to achieve a perfectly sensible and appropriate result.

103. Accordingly, if my Lady and my Lord agree, I would dismiss this appeal.

LORD JUSTICE BIRSS

104. I agree with the judgment of my Lord, Coulson LJ. I only wish to add one further point. The variations on which the extrapolation was based were not a random sample. They were the higher value variations. The case was not advanced on the basis that the extrapolation was supported by statistical confidence or random sampling, rather the inference was put on a wider basis. Kerr J accepted it as arguable on that wider basis and so have we. Statistics may, in a proper case, add weight to a case based on extrapolation, just as the absence of statistical rigour may weaken it, but there is no general rule that the only extrapolation which can be permitted must be statistical in nature.

LADY JUSTICE MACUR

105. I agree with both judgments.

Appendix A

"8. Absent any contradictory explanation from the Design Team, which has been sought but not yet given, and for the reasons set out below, Standard Life asserts that all additional/varied work and all events causing delay and disruption – and thus loss and expense claimed by Costain and certified by BDP – were caused by the negligence of the Design Team, subject to the following two provisos:
(1)all variations which Standard Life itself instructed; and
(2)all Costain claims related to matters for which the Design Team was not responsible, have been omitted from the claim and are taken into account in Section H below.

9. After the abovementioned deductions, £23,624,113.15 of additional/varied work, £10,728,735.13 of contractor's loss and expense, £3,438,299.25 of additional professional fees and Standard Life staff costs and £271,959.63 of lost rental income are properly attributable to the negligent performance of the Design Team, resulting in a total claim value of £38,063,107.16.

10. Standard Life will rely if necessary upon the following facts and matters not hitherto disputed by the Design Team:
(1)Costain's assertions that its claims arose from failure by the Design Team to provide timeous and adequate information;
(2)The events cited by Costain in its delay substantiation documents as establishing significant entitlement to extensions of time;
(3)BDP's certification and Gleeds assessment of 91-93% of Costain's monetary claims as good; and
(4)Buro 4's analysis, which indicated that (i) Standard Life's own instructions accounted for only 10% of additional/varied work and (ii) the negligence of the Design Team lay behind at least 49% of additional/varied work on the project.

11. In support of the above and in any event, Standard Life asserts that the following four components of the Development were significantly varied and suffered significant delay and disruption:
(1)Residential fit-out;
(2)Structural steelwork;
(3)Cladding; and
(4)Roofing.

12. In order to substantiate its claim, Standard Life has analysed CAIs and CVIs accounting for 55.8% of the total value of additional/varied work which arose in connection with each of these four components – £3,701,036.76 in total. The need for 83.1% of this additional/varied work was consequent upon the negligent performance of the Design Team, with a cost to Standard Life of £3,075,643.26 Standard Life will refer to and rely upon Schedules 1 to 4 hereto.

13. Based on this analysis, Standard Life will invite the Court to draw the reasonable inference that, on the balance of probabilities, all variations bar those arising from the matters set out at paragraphs 88(1) and 8(2) above, for which Standard Life does not contend Design Team liability, were caused by the negligent performance of the Design Team."

Appendix B

"**Response**:
1. As to Request 1:

(i) The particulars sought are already sufficiently pleaded at paragraphs 8 to 13, 175 to 177, 182 to 184 and 187 to 192 of Part B POC and Schedules 1 to 4 thereto. In summary, Standard Life alleges 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 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 (subject to the provisos at paragraphs 8, 182 and 193 of Part B POC). Particulars of that negligent performance are given at paragraphs 175 to 177 of Part B POC and Schedules 1 to 4 thereto.

(ii) To the extent that this Request calls for evidence or disclosure – prior to service of Defences, witness statements and expert reports – it is premature and is not reasonably necessary or proportionate to enable the Fourth to Sixth Defendants to know the case they have to meet. Without prejudice to that, it is sufficient for the Fourth to Sixth Defendants to understand that the facts and matters upon which Standard Life will rely in support of the extrapolation/inference are those set out at paragraphs 10 to 12 and 182 of Part B POC. In summary, in circumstances where no Defendant has yet provided any explanation whatsoever for any variation on the project in response to Standard Life's complaints, the factors which support the reasonableness of Standard Life's approach include:

a. The fact of the variations and Costain's assertions in respect of the same, which remain unchallenged by the Fourth to Sixth Defendants.

b. The current absence of any explanation by any Defendant as to why these variations came about other than for the reasons asserted.

c. Buro 4's analysis of July 2014, with which the Fourth to Sixth Defendants have been provided and which included a schedule of all CAIs with a 50 monetary value/cost attached to them, together with Buro 4's conclusions on a large sample of the top 147 CAIs by value, equating to £14,605,474.

d. The impracticability of analysing every variation, given the enormous time and cost entailed. From the analysis it has undertaken so far, Standard Life estimates that it would take roughly 7,280 hours (i.e. 10 months) and would cost approximately £1,965,600 in expert fees to review all of the 3,604 CAIs/CVIs that were issued by BDP on the project, the majority having a monetary value below £5,000.

e. The fact that there are many viable ways of sampling, on which sound conclusions can be reached on the balance of probabilities.

In consequence of the above, Standard Life avers that it is reasonable and proportionate to prove its case by reference to representative samples. Insofar as the Fourth to Sixth Defendants or any of them have observations to make about Standard Life's approach, then Standard Life will consider

other approaches or further sampling, if reasonably required, in the light of those observations and the Defences yet to be served.

(iii) The Response to Request 1(ii) above is repeated.

(iv) This relates to matters of law, in respect of which Standard Life will make submissions at trial.

(v) As to Request 1(v)(a) to (e), this is a premature request for evidence and is not reasonably necessary or proportionate to enable the Fourth to Sixth Defendants to know the case they have to meet. Without prejudice to the foregoing and without any waiver of privilege, Standard Life's approach has been to employ systematic sampling by cost/value within a stratified sampling frame. In other words, the population under scrutiny (i.e. all variations on the project) has been divided into sub-populations (i.e. project components such as Residential Fit-Out, Secondary Steelwork etc.). From those sub-populations, the four headline project components which form the subject of Schedules 1 to 4 POC were selected for analysis based on the total cost/value associated with each, as a proportion of Costain's final account. Thus, the 6 most costly project components in Costain's final account, by reference to both variations and loss and expense, were the following:

Project component	Total cost
(1) M&S:	£9,370,353.74
(2) Residential Fit-Out:	£4,331,594.54
(3) Roofing:	£3,562,453.50
(4) M&E:	£2,396,036.06
(5) Cladding:	£1,706,504.70
(6) Secondary Steelwork:	£1,645,145.89

Owing to constraints on the availability of documentation at the start of the sampling process, Standard Life began by analysing variations which arose in connection with Residential Fit-Out, Secondary Steelwork, Roofing and Cladding. Standard Life has therefore analysed variations arising from 4 of the 6 mostly costly project components. Whilst the Costain loss and expense claims associated with M&S form part of the claim pleaded at Part C POC, Standard Life's pleaded analysis will, if not accepted by the Fourth to Sixth Defendants, consider those further variations in the more costly project components including M&S.

Within each sub-population (project component), individual variations have been selected for analysis systematically, by prioritising those of highest value, in order to cover the maximum extent of the variation account by value in the shortest possible time. This common-sense approach has necessarily been constrained by the limited information available to Standard Life in its position as Employer and in circumstances where it relied upon professional project management. It is confirmed that the total value of CAIs and CVIs analysed – as set out at paragraphs 12, 188 and 194

of Part B POC – represents all variations which Standard Life has analysed to date…”