Neutral Citation Number: [2020] EWHC 3419 (TCC)

Case Nos: HT-2019-000306; HT-2020-000022

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Rolls Building
Fetter Lane,
London, EC4Y 1NL

Date: 15/12/2020

Before :

MR JUSTICE KERR

- -

Between :

STANDARD LIFE ASSURANCE LIMITED	**Claimant**
- and -	
(1) GLEEDS (UK) (a firm)	
(2) BURO FOUR PROJECT SERVICES LIMITED	
(3) SHEARER PROPERTY ASSOCIATES LIMITED	
(4) BUILDING DESIGN PARTNERSHIP LIMITED	
(5) CARTER JONAS LLP	
(6) CUNDALL JOHNSTON & PARTNERS LLP	**Defendants**

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- -

Jonathan Selby QC and Callum Monro Morrison (instructed by **Mayer Brown International LLP**) for the **Claimant**
Vincent Moran QC and William Webb (instructed by **Vinson & Elkins RLLP**) for the **Fourth Defendant**
Joanna Smith QC and Michael Wheater (instructed by **BLM LLP**) for the **Fifth Defendant**
Piers Stansfield QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Sixth Defendant**

Hearing dates: 11 and 12 November 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE KERR

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time of hand-down is **10am on 15 December 2020**

Mr Justice Kerr

Introduction

1. There are before me three defendants' applications to strike out certain parts of a claim, or for summary judgment dismissing those parts of that claim. The claim is brought by the claimant (**Standard Life**) against (among others) the fourth, fifth and sixth defendants (respectively, **BDP**, **SGA** (Sutton Griffin Architects, the relevant predecessor of the fifth defendant) and **Cundall**). The three applications to strike out or dismiss parts of the claim were brought on 31 July 2020 by each of BDP, SGA and Cundall.

2. All amounts of money stated below are approximations except where otherwise indicated. Standard Life's claim arises from these defendants' involvement in a building contract (**the building contract**) in which the main contractor was Costain Limited (**Costain**). The building contract was for a mixed retail and residential development in Newbury, Berkshire. The contract price was £77.4 million, though £39.9 million of that price comprised provisional sums.

3. Standard Life's pleaded case is that it paid £146.4 million to settle Costain's final account in June 2014. That amount included £50.3 million made up as follows: £28.4 million in respect of variations to the building contract, of which £25.8 million arose from *contract administrator instructions* (**CAIs**) and £2.6 million from *confirmations of verbal instructions* (**CVIs**); and £21.9 million in respect of contractor's loss and expense arising from delay and disruption.

4. The essence of the complaint against Standard Life is that much of the quantum of its £38.1 million claim for damages against these defendants for alleged professional negligence is calculated by impermissible extrapolation from an analysis of a relatively small part of their work. The defendants say Standard Life has failed to plead a case against them supporting any award of damages in respect of all but £12.9 million of the £38.1 million claimed.

5. They contend, in short, that the claim for the balance of £25.2 million is an abuse of process, has no reasonable prospect of success and is unsupported by a pleading disclosing a reasonable cause of action. That part of the claim should therefore, they contend, be struck out or, alternatively, summary judgment in favour of these defendants should be given on their defence against it.

6. Standard Life contends that its plea of negligence against these defendants is good in law and fact; that the extrapolation method used to calculate its losses is valid and permissible; that it would be disproportionate and absurd to require it to plead and prove its case separately in respect of each and every individual component of the claim; that these defendants know the case they have to meet; and that it is open to Standard Life to quantify its claim for loss and expense by advancing a "global" claim recognised on good authority.

Facts

7. The claim against these defendants is "Part B" of Standard Life's overall claim, also comprising Parts A and C. Part A (in which £20 million is claimed) arises from

performance of the first to third defendants in connection with procurement of the building contract. Part C (a claim of £11.5 million) concerns the second defendant's performance regarding a contract between Standard Life and Marks & Spencer plc relating to a part of the site subject to a compulsory purchase order. A case management conference for all three parts of the action is listed for 17 February 2021. A 12-week trial of the whole action is listed in late 2022.

8. The building works comprised Blocks A-H which would become shops, with an underground car park. A further separate block called "M&S" would house a Marks & Spencer store. Blocks A-G would also include 184 dwellings. BDP was the contract administrator, architect and lead consultant for the development. SGA was also engaged as an architect in the development or parts of it (not including Block F) until February 2010, when its functions were taken over by BDP. Cundall was the structural, mechanical and electrical engineer.

9. Collectively, these three defendants are referred to in the documents as **the Design Team**. Under the terms of their respective appointments which were eventually put into writing, they had varying obligations to report and provide relevant information to Standard Life. BDP's obligations as contract administrator and lead consultant were the most extensive and included obligations to provide monthly reports and, broadly, to report on progress of the works including cost increases and delays.

10. The building contract was concluded on 26 August 2008. Works started the following month. In February 2010, SGA's retainer was terminated. Standard Life's case, strongly disputed by these defendants, is that they carried out their work negligently, resulting in Standard Life having to pay to Costain substantially more money than it would otherwise have had to pay. In oral argument, Mr Jonathan Selby QC, for Standard Life, used phrases such as "shambolic" and "all at sea" to describe their performance.

11. These alleged breaches of duty are described in more detail in the statement of Mr Jonathan Stone, Standard Life's solicitor, who produced contemporary documents showing Standard Life's expressions of dissatisfaction with the performance of the Design Team, especially BDP. Mr Selby showed me, for example, minutes of a meeting with BDP on 16 November 2010, a report from the second defendant project manager (**Buro Four**) dated 17 December 2010 and a detailed letter to BDP of 17 May 2011.

12. In these documents, Standard Life and Buro Four did indeed reproach BDP and the Design Team with many perceived shortcomings. For example, the letter of 17 May 2011 included the following:

> "Change Control
>
> Despite our attempts to have a managed change control process, BDP continue to make design changes with significant cost impact with little or no regard to their cost and minimal back checking to the cost plan allowances.
>
> The drafting of CAI'S has and continues to be a significant concern. Instructions issued are inadequately detailed, vague and leave SLI exposed to risk. Other members of the team have had to continually check and in some instances draft CAI's on behalf of BDP."

13. Practical completion of the whole of the works was certified in June 2013. On 16 June 2014, Standard Life concluded a settlement agreement with Costain. It included a provision whereby Costain agreed to assist Standard Life with any disputes against third parties by giving Standard Life access to Costain's resources; but any request for such assistance had to be made within a reasonable time and in any case not later than 31 December 2014.

14. In July 2014, Buro Four carried out an analysis – subsequently relied on in Standard Life's pleaded case - of the work of the Design Team. It consisted of a five page spreadsheet itemising certain high value CVIs and CAIs and classifying them as arising from a "design team issue" or a "client issue".

15. There was a "comments" column but in the majority of cases Buro Four had inserted in that column the words "[n]o comment without reviewing drawing history". According to Buro Four's analysis, of the 100 or so CVIs and CAIs considered, representing an estimated total net additional cost to Standard Life of £14.6 million, 49 per cent had arisen because of a "design team issue", 10 per cent from a "client issue" and 41 per cent were "unclassified".

Procedural History

16. This litigation started some five years later on 28 August 2019 when Standard Life issued its claim. I need not set out in detail how its case was originally pleaded on 31 January 2020, since it now relies on draft amended particulars of claim. Some of the amendments are opposed, while others are amendments to the very paragraphs these defendants seek to strike out; but it was agreed that I should approach the defendants' applications *de bene esse* by reference to the draft amended particulars of claim, to which I am coming shortly.

17. It is sufficient to state that the original particulars of claim relied on extrapolation from a small selected sample of CAIs and CVIs analysed by Standard Life; the same method later used in the draft amended particulars. Before any draft amendment, a joint request for further information was served by these defendants on 9 April 2020. Standard Life responded to that request on 7 May 2020.

18. The defendants asked for particulars of the alleged negligent performance said to have caused "the balance of 87% of all variations that this aspect of the claim is based upon". These were the variations which had not been analysed and in respect of which extrapolation was relied on. Of 3,604 variations, 167 had been analysed and 122 (or, SGA says, 118) of those particularised in schedules. Particulars were also sought of what matters justified the extrapolation based on drawing reasonable inferences from the 122 variations that were particularised.

19. Standard Life answered that it:

> "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."

20. Standard Life also relied on Buro Four's analysis done in July 2014; on the impracticability of analysing each and every one of the 3,604 CAIs or CVIs, most having a value lower than £5,000, because of the enormous amount of time and cost that would require; and on the absence of any innocent explanation from any of these three defendants.

21. Standard Life added that it was in those circumstances "reasonable and proportionate to prove its case by reference to representative samples" and that if observations were made by the defendants it would "consider other approaches or further sampling, if reasonably required, in the light of those observations and the Defences yet to be served".

22. Standard Life explained that it had focused on CAIs and CVIs in four work areas, corresponding to four schedules to the particulars of claim: residential fit-out, secondary steelwork, cladding and roofing. The answer went on to explain:

> "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.
>
> …
>
> 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. ….
>
> 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 … represents all variations which Standard Life has analysed to date."

23. There was then a more detailed explanation of the analysis that had been undertaken within each of the four "headline project components". Standard Life then repeated its offer:

> "insofar as the Fourth to Sixth Defendants or any of them have observations to make about Standard Life's approach to sampling, 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."

24. BDP served its defence on 29 May 2020, giving a clear indication that it regarded Standard Life's extrapolation as impermissible and that part of its case was liable to be struck out. In a later answer dated 19 June 2020 to a request for further information from SGA, Standard Life added, among other things:

> "Standard Life's common-sense approach of prioritising the most costly project components is (i) unbiased and (ii) has the obvious practical advantage of covering the maximum extent of the variation account by value in the shortest possible time, both of which increase the representativeness of the sample. Whilst no sample can ever be totally representative, Standard Life avers that Schedules 1 to 4 constitute a sample of the performance of both the Design Team in general and SGA in particular that is sufficiently representative to prove Standard Life's case on the balance of probabilities."

25. Cundall served its defence on 26 June 2020, also forewarning of an application to strike out (among other parts of the claim) the part of Standard Life's case based on its chosen extrapolation method. SGA followed suit on 9 July 2020. Each of these defendants also included in their defences denials of the specific allegations against them. It is unnecessary to go through the detail of those pleaded defences.

26. The three applications now before me were then issued, all on the same day, 31 July 2020, supported by witness statements. BDP filed a statement from its solicitor, Mr Nicholas Henchie. He recognised that much of the terrain would be occupied by legal submissions, but complained of a reversal in the burden of proof, commenting that the extrapolation claim was "based upon a demand that BDP prove that certain variations were not caused by its negligence without telling BDP which variations are being referred".

27. He criticised "poor pleading", expressed scepticism about whether Standard Life had analysed the evidence properly and supported that by noting a recent broad request by Standard Life for extensive disclosure from BDP. There was also a stern critique of Standard Life's "other losses" claim for additional loss and expense through delay and alleged negligence, of which more shortly.

28. There were similarly critical witness statements from Mr Gary Wicks and Ms Caroline Hall, solicitors for SGA and Cundall respectively. They contained complaints about the pleaded case in negligence similar to those advanced by BDP and added further points specific to their respective clients.

29. Thus, Mr Wicks pointed out that SGA could not be held responsible for the consequences of any negligence committed after February 2010, when it had ceased to be a part of the development; yet "the majority of the CAIs and CVIs on which Standard Life relies were issued after SGA's involvement in the Development ceased." Standard Life's further information about this had been lacking; it was not acceptable to attribute losses occurring after SGA's departure to design defects that occurred before its departure, without explaining why.

30. For Cundall, Ms Hall also developed the theme that Standard Life had in its extrapolation claim attributed to Cundall responsibility for losses arising from matters in which Cundall had no involvement, stating for example:

> "Standard Life makes a claim for loss of expense against Cundall based on the value of variations for which Cundall is alleged to be responsible, notwithstanding that the loss

> and expense is not alleged to have been caused by these variations. Accordingly, there is no pleaded link between alleged cause and effect in relation to Standard Life's claim for loss and expense."

31. As the hearing of those applications approached, on 23 October 2020 Standard Life produced its draft amended particulars of claim, the pleading now before me. As already explained, the parties agree that I should *de bene esse* consider the three applications on the basis that Standard Life's pleaded case is to be found in those draft amended particulars, even though many of the amendments are opposed and may have to be considered at a future hearing.

32. Other witness statements were filed on behalf of the parties, after service of the draft amended particulars of claim. I do not find it necessary to go through that evidence since it travels much of the same ground as the parties' submissions, which I will address later in this judgment.

The Pleaded Claim Now

33. The draft amended particulars of claim, Part B (**the amended particulars**) begin in the usual way by introducing the parties, the building contract and the building works. The facts said to constitute breaches of duty are pleaded in some detail in section F. The duties said to have been thereby breached are set out in section G. There is a lot of detail. Thus far, there is no particular difficulty with the claim as set out in the amended particulars.

34. However, to understand Standard Life's pleaded case on causation of loss and damage, you have to do more foraging than usual. It is necessary to link together seven documents, all relating to Part B of the overall claim: (i) the amended particulars (ii) the 14th annex to them entitled Particulars of Losses (iii) the "Part B Quantum Spreadsheet" breaking down Standard Life's **primary claim** and its **alternative claim** and (iv)-(vii) four schedules numbered 1-4 to the amended particulars.

35. The four schedules explain in spreadsheet format Standard Life's breakdown and analysis of the 122 variations it has particularised, complete with a narrative of the alleged negligence in each case. The numbering of the four schedules corresponds to the four work areas examined, namely residential fit-out (Schedule 1), secondary steelwork (Schedule 2), cladding (Schedule 3) and roofing (Schedule 4).

36. A judge needs to understand those seven documents just to reach the starting point of the journey towards a decision whether the three applications before me are well founded. Together, they occupy about 550 pages, much of it in dense close type. It is not an exercise for the faint hearted. I am grateful to Mr Vincent Moran QC, for BDP, for comforting me in opening with the observation that it is "not as bad as it looks". I will attempt a bald summary.

37. The primary claim in Part B is for £38.1 million. The alternative claim is for £12.9 million. The primary claim is based on the value of 3,600 CAIs and CVIs issued by BDP, combined with the value of over 250 delay notices issued by Costain, nearly doubling the contract period to 246 weeks and causing Costain to claim contractor's

loss and expense. The combined value of those liabilities of Standard Life is put at £50.4 million.

38. Standard Life holds the Design Team responsible for those losses, absent any contradictory explanation, except where Standard Life itself required a variation or where Costain's claims "related to matters for which the Design Team was not responsible" (amended particulars, paragraph 8(2)). Applying those deductions reduces the claim from £50.4 million to £38.1 million, of which the lion's share, £34.3 million, represents the cost of additional varied work and contractor's loss and expense claims. The rest is for additional professional fees and loss of rental income, which I need not consider further here.

39. The first part of the primary claim is the claim arising from additional liability to Costain arising from CAIs and CVIs (**the variations claim**). Its calculations start with an examination of variations affecting the four chosen work areas, residential fit-out, secondary steelwork, cladding and roofing. Standard Life examined 55.8 per cent in value of the "total value of additional/varied work which arose in connection with each of these four components" (amended particulars, paragraph 12). That total value is calculated at £3.7 million.

40. Standard Life attributes to the negligence of the Design Team 83.1 per cent of that total value, i.e. £3.1 million. To support that figure, Standard Life relies on Schedules 1 to 4 (paragraph 12). The calculations in those schedules do, indeed, contain an explanation of the (disputed) negligence said to have caused losses in that amount. The lengthy narrative in the schedules is not, for present purposes, said to be insufficiently particularised to go to trial.

41. Based on that analysis, Standard Life (paragraph 13) invites the court "to draw the reasonable inference that, on the balance of probabilities, all variations bar those … [where Standard Life required the variation or where Costain's claims related to matters for which it accepts the Design Team was not responsible] … were caused by the negligent performance of the Design Team". This extrapolation causes the figure of £3.1 million to be increased to £23.6 million.

42. Standard Life seeks (amended particulars, paragraph 194) to apportion responsibility as between these three defendants; each is "jointly and severally liable for the proportion of the variations analysed in Schedules 1 to 4 in which each is implicated", but "[n]o double recovery is sought". The proportions are (implicitly, subject to an overall cap of 100 per cent) 81.71 per cent for BDP, 36.3 per cent for SGA and 17.94 per cent for Cundall.

43. The second part of the claim is for additional liability of Standard Life to Costain arising from the latter's 250 plus delay notices (**the loss and expense claim**). Standard Life starts from the proposition that the delay notices were properly served and its additional liability to Costain consequent on them was not to be questioned because the validity of the notices was verified and affirmed by the first defendant (**Gleeds**), without objection from any of the Design Team.

44. The loss and expense claim is for £10.7 million. This is calculated in the following way. Standard Life avers, first, that it paid Costain £6.1 million "in respect of loss and expense as a result of the Design Team's breaches of duty relating to the

Residential Fit-Out Works, Secondary Steelwork, Cladding Works and Roofing Works" (amended particulars, paragraph 195A).

45. Standard Life cites the relevant Costain delay notice reference numbers and seeks an apportionment of liability as between the three Design Team members on the same joint and several basis with a maximum 100 per cent cap and no double recovery. On that basis, BDP is held liable for 100 per cent of the £6.1 million, SGA for about 34.8 per cent and Cundall for about 52.4 per cent.

46. Thus far, for present purposes there is no difficulty with the loss and expense claim. However, Standard Life goes on to claim a further £4.6 million against the Design Team as part of its primary claim. It wishes to include in its claim loss and expense items above and beyond those incurred in the four chosen areas of work where variations have been analysed. The basis of that additional claim is explained in the amended particulars at paragraphs 196-202.

47. The additional claim of £4.6 million is based on an assessment done by Gleeds in 2014 of how and where delays were caused for the purposes of verifying Costain's entitlement to additional payments. At the risk of over-simplifying, Gleeds concluded that delays occurred predominantly during particular periods when particular types of works causing "bottlenecks" were being carried out. As a result of that evidence, Standard Life excises certain matters from its loss and expense claim (amended particulars, paragraph 200(2)).

48. The exclusions are, briefly, certain losses and expenses incurred due to delays during years 1 and 3 of the contract; and some losses and expenses incurred in respect of (i) works done in relation to the Marks & Spencer store (**the M&S works**); (ii) public highways works done by agreement with the local highway authority under section 278 of the Highways Act 1980 (known as **section 278 works**); (iii) certain works relating to introducing John Lewis to Block A; and (iv) works described as "shop tenant fit-out works and waste clearance".

49. At paragraph 201 of the amended particulars, the reader's attention is invited to Annex 14 "for a full explanation and breakdown of the Costain claims or parts of the same which are omitted from the claim on the above bases". It is to Annex 14, therefore, that one must look to find out how the figure of £4.6 million is calculated, after taking account of and deducting the excluded matters.

50. Paragraph 1 of Annex 14 confirms that Standard Life makes "reasonable deductions for (i) its own instructions, (ii) periods of critical delay for which Gleeds determined that the negligent performance of the Design Team was not to blame and (iii) costs associated with elements of the Development in which the Design Team was not implicated". Details of the figures and what they relate to, by reference to Costain's delay notices, are then given at paragraphs 2 and 3 (the latter being a very long paragraph with many sub-paragraphs).

51. The arithmetic and the reasoning are not easy to follow because Annex 14 does not include a headline figure representing the total amount of deductions from the initial figure of £21.9 million which is the total pleaded amount of Standard Life's liability to Costain founded on the 250 plus delay notices (see amended particulars paragraph 5(2): "Costain issued more than 250 Delay Notices … such that the Building Contract

period almost doubled to 246 weeks, occasioning £21,949,989 in Costain claims for loss and expense").

52. That headline figure representing the sum of the deductions allowed by Standard Life must be £11.2 million, being the difference between the initial £21.9 million and the total loss and expense amount claimed in the primary claim, £10.7 million. Thus, the deductions appear to be of a little over half the amount of Standard Life's liability to Costain in respect of the latter's delay notices.

53. In paragraph 4 of Annex 14 (in its draft amended form), Standard Life states:

> "After the above deductions ... the total contractor's loss and expense occasioned by the Design Team amounts to £10,476,779.57. As required by the express terms of the Building Contract insurances at 0.978% and head office overheads at 4.73% are then added to this figure, giving a total of £10,728,735.13 which Standard Life claims from the Fourth to Sixth Defendants in full."

54. As for apportionment of liability as between the Design Team members for the full £10.7 million comprising the primary claim for loss and expense, which again must be on a joint and several basis and subject to a cap of 100 per cent with no double recovery, the summary table itemising the elements of the primary claim in monetary terms shows that the apportionment is 92.1 per cent to BDP, 35.4 per cent to SGA and 37.5 per cent to Cundall.

55. In addition, there is a separate apportionment calculation, on the same basis, in respect of the "extrapolated" balance of £4.6 million claimed. That is found at paragraph 201 of the amended particulars. The apportionment attributes liability to BDP for 81.7 per cent, to SGA for 36.3 per cent and Cundall for 17.9 per cent. An explanation for that apportionment, as far as it goes, can be found at the end of Annex 14, at paragraph 5 (with my emphasis in bold):

> "In the absence of any more granular breakdown from Gleeds or the Design Team and unless and until further information is provided, responsibility for causing additional/varied work represents the only reasonable metric by which Standard Life can apportion liability for the balance of the loss and expense amongst the Design Team. Standard Life therefore claims the value of each Costain claim in which the Design Team is implicated from each of the Fourth to Sixth Defendants **in proportion to the percentage of additional/varied work for which the relevant member of the Design Team is responsible. which is broken down in the table at Tab 5 of the Part B Quantum Spreadsheet**. In respect of each claim, Standard Life seeks to recover a total amount of no more than the sums assessed in Gleeds' Final Account."

56. That brings us to the Part B Quantum Spreadsheet and specifically tab 5 thereof. It is a two page spreadsheet which does enable an astute reader with better eyesight than mine and a better mathematical brain to discern with a reasonable degree of clarity how the "extrapolated" amount of £4.6 million, forming part of the overall primary loss and expense claim of £10.7 million, is made up.

57. Part I (the letter I) of the amended particulars contains an arithmetical account of the primary claim and the alternative claim in the form of two single page tables containing the figures I have mentioned above, showing the bare bones of how the figures of £38.1 million (the primary claim) and £12.9 million (the alternative claim)

are calculated. The two tables are a convenient reference point for anyone wanting to understand how the claims are made up and broken down.

58. Certain other parts of the amended particulars need to be mentioned. By paragraph 184 of the draft amended particulars, Standard Life "reserves the right to contend that it was entitled to assume that BDP would only certify claims after investigating them adequately"; and contends as follows:

> "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)."

59. And at paragraph 185, Standard Life contends as follows:

> "Further, insofar as any member of the Design Team asserts in these proceedings that a particular CAI, CVI, DN [*delay notice*] or claim either (i) arose from matters other than a breach of duty by the Design Team, or (ii) would have arisen in any event, irrespective of the Design Team's performance, Standard Life reserves the right to respond in full to all facts and matters raised in relation to that CAI, CVI, DN or claim."

60. It is also necessary to refer to paragraphs 218A (the first time appearing; that paragraph appears twice in error) to 218D within Part H of the amended particulars. They state as follows:

> "218A. BDP's breaches of duty in relation to poor record-keeping (set out more fully [*various paragraph number references*] above), have hindered Standard Life's ability to particularise its claims in the manner in which BDP, Sutton Griffin and CJP allege in their Defences and/or Requests for Further Information that Standard Life should particularise those claims: see, for example, paragraph [*various references to the RFIs and Defences*].
>
> 218B. To the extent that claims made in these proceedings against each of BDP, Sutton Griffin and CJP are lost or otherwise diminished for the want of particularity alleged by each or any of the Part B Defendants in their Defences and/or Requests for Further Information, then Standard Life's opportunity to have pursued and/or compromised those claims against each of the Part B Defendants and the Court's opportunity to assess those claims will have been diminished or otherwise lost and/or contributed to by BDP's breaches of duty in relation to poor record-keeping (set out more fully at paragraphs 175(5) to (8) above) and Standard Life will seek damages from BDP in respect of such lost opportunities, such damages to be assessed at trial.
>
> **H7. Design Team's failures to warn about completeness of design**
>
> 218C. As a result of BDP's, Sutton Griffin's [*SGA's*] and CJP's [*Cundall's*] breaches of duty set out at [*various paragraphs*] above, Standard Life was progressively misinformed and lost the opportunity to:
>
> (1) tender the said works packages competitively on the basis of complete information;
>
> (2) make informed decisions when appraising and selecting tenders, since the tenders received were based on incomplete information and therefore (a) did not

> accurately reflect likely outturn costs and (b) created subsequent opportunities for tendering subcontractors to increase their costs;
>
> (3) seek to reduce costs;
>
> (4) carry out value engineering; and/or
>
> (5) work with Costain to re-sequence Costain's works in order to mitigate delay and disruption.
>
> 218D. For the avoidance of doubt, Standard Life relies upon the collective impact of each of BDP's, Sutton Griffin's and CJP's individual failures to warn in the course of the project, not only in relation to [*various elements of the building works*] but also in relation to the project as a whole."

61. The plea at paragraph 218B is then repeated within section I of the amended particulars, at paragraph 229A, which I need not set out.

62. Such is my attempt to understand and briefly describe the case pleaded in the amended particulars and the six other documents that need to be read with it in order to understand Standard Life's case as currently presented to the court. Whatever the merits of the applications to strike out or for summary judgment in respect of the primary claim (to which I am coming), the presentation could usefully be simplified and made less intractable.

63. These defendants do not object to the alternative claim for £12.9 million going to trial. They object to any trial of the full primary claim for £38.1 million. That amount comprises the £12.9 million, plus the extrapolated £25.2 million. These defendants object to that £25.2 million part of the claim going to trial. The £25.2 million is the sum of the extrapolated part of the variations claim - £20.6 million – and the extrapolated part of the loss and expense claim - £4.6 million.

64. To give effect to their position, these defendants now seek to strike out, or be granted summary judgment in respect of, the following paragraphs in the draft amended particulars of claim: 194, 201, 202, 219(1) and 218A (the second time occurring). Those extracts from the draft amended particulars are set out in full in the annex to this judgment.

Relevant Law

65. The parties' disagreement was not so much about what the applicable legal principles are but about how they fall to be applied in this case. As a starting point, I was reminded by Mr Moran that the overriding objective in CPR 1.1 requires me to deal with the case justly and not only at proportionate cost. I accept that proposition from which, as expected, no one dissented.

66. A court can strike out a claim or part of it if it appears to the court that the statement of case or part of it discloses no reasonable grounds for bringing the claim (rule 3.4(2)(a)) or is an abuse of process or otherwise likely to obstruct the just disposal of the proceedings (rule 3.4(2)(b)). These two grounds cover statements of case that are "unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and

other cases which do not amount to a legally recognisable claim ...” (White Book 2020, vol. 1, paragraph 3.4.1).

67. Ground (a) (no reasonable grounds for bringing the claim) includes cases where the claimant cannot hope to win, which therefore deliver no possible benefit to the claimant but only waste resources; and cases where the pleaded facts would not if proved establish liability; but not cases where the claim lies in a developing area of law, because decisions in novel areas of law should be based on actual findings of fact; nor where the court cannot properly decide liability without oral evidence (White Book 2020, vol. 1, paragraph 3.4.2 and cases there cited).

68. Examples of claims falling within ground (a) given at paragraph 1.4 of Practice Direction PD 3A include a claim where money is said to be owing, without saying why; where the facts alleged are “incoherent and make no sense”; and claims where proof of the facts alleged would not establish liability. The focus is on the facts alleged, not on the evidence (*Royal Brompton Hospital NHS Trust v. Hammond* [2001] EWCA Civ 550, per Clarke LJ at [108]).

69. By CPR rule 16.4(1)(a) particulars of a claim must include “a concise statement of the facts on which the claimant relies”. The facts must “be pleaded in such a way as to allow the defendant to know the case that it has to meet” and must “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” (per Coulson J, as he then was, in *Pantelli Associates Ltd v. Corporate City Developments Number Two Ltd* [2010] EWHC 3189 (TCC), [2011] PNLR 12, at [11])).

70. Where professional negligence is alleged, the breach of duty allegation normally requires the support of expert evidence that the defendant’s performance fell short of what was reasonably required and in many cases that will include evidence that it fell outside the ambit of what a respectable body of opinion within the relevant profession would support. As Butler-Sloss LJ observed in *Sansom v. Metcalfe Hambleton and Co* [1998] PNLR 542 (at 549B), the court:

> “should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party) without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard”.

71. As for ground (b) (abuse of process or likelihood otherwise of obstructing the just disposal of the proceedings), abuse of process means “using that process for a purpose or in a way significantly different from its ordinary and proper use of the court process” (*Attorney General v. Barker* [2000] FLR 759, DC, per Lord Bingham LCJ, at [19]). That was said in the context of the “vexatious proceedings” test in section 42 of the Supreme Court Act 1981 (as it then was), but will serve well enough for the purposes of CPR rule 3.4(2)(b).

72. A statement of case which is “unreasonably vague or incoherent” will satisfy the test in CPR rule 3.4(2)(b), as Teare J observed in *Towler v. Wills* [2010] EWHC 1209 (Comm), at [16], in the context of a garbled pleading by a litigant in person. As Teare J explained at [18], a pleading that is vague and incoherent does not properly inform

the other party of the case it has to meet and disables that party from pleading properly in response, disclosing relevant documents and preparing witness statements.

73. On the other hand, a pleading may not be struck out merely because it is untidy or includes some irrelevant issues. To show a likelihood that a pleading will obstruct the just disposal of the proceedings, their just disposal must be impeded to a high extent: per Jackson J, as he then was, in *Atos Consulting Ltd. v. Avis Europe plc* [2005] EWHC 982 (TCC), at [18]. As he went on to explain later in the same paragraph:

> "A court will not strike out a statement of case merely because that statement of case would generate some untidiness in the pleadings. A court will not strike out a statement of case merely because one will end up with a bundle of pleadings, some parts of which are redundant. A court will only strike out a statement of case pursuant to the second limb of rule 3.4 (2)(b), if the statement of case is such as to prevent the just disposal of the proceedings or, alternatively, such as to create a substantial obstruction to the just disposal of the proceedings. It seems to me that if one has a somewhat untidy bundle of pleadings or statements of case, counsel and the judge will rapidly become familiar with which parts of those pleadings are redundant and which parts are relevant."

74. Bad drafting is not enough, unless it is so bad that the particulars of claim "fail to reveal to the defendant, or to the court, the case the defendant can expect to meet at trial" (White Book 2020, vol. 1, paragraph 3.4.3.7). Other forms of abuse of process include vexatious proceedings, attempts to re-litigate issues, collateral attacks on earlier decisions, pointless and wasteful litigation and proceedings brought for an improper or collateral purpose.

75. An example of the latter type of abuse of process was *Nomura International plc v. Granada Group Ltd* [2007] EWHC 642 (Comm), where the claimant issued proceedings for negligent misstatement against the defendant just before expiry of the six year limitation period, without knowing whether it had a claim against the defendant since that would depend on whether the claimant was later held liable to a third party bank. The claimant was therefore unable to particularise its claim against the defendant.

76. Striking out the action as an abuse of process, Cooke J observed at [37]:

> "In my judgment, when regard is had to these authorities the key question must always be whether or not, at the time of issuing a writ, the claimant was in a position properly to identify the essence of the tort or breach of contract complained of and if given appropriate time to marshall what it knew, to formulate particulars of claim. If the claimant was not in a position to do so, then the claimant could have no present intention of prosecuting proceedings, since it had no known basis for doing so. Whilst therefore the absence of present intention to prosecute proceedings is not enough to constitute an abuse of process, without the additional absence of known valid grounds for a claim, the latter carries with it, as a matter of necessity, the former. If a claimant cannot do that which is necessary to prosecute the claim by setting out the basis of it, even in a rudimentary way, a claimant has no business to issue a claim form at all 'in the hope that something may turn up'. … The plaintiff/claimant thus, unilaterally, by its own action, seeks to achieve for itself an extension of the time allowed by statute for the commencement of an action, even though it is in no position properly to formulate a claim against the relevant defendant. That must, in my judgment, be an abuse of process and one for which there can be no remedy save that of striking out the proceedings so as to deprive the claimant of its putative advantage. The illegitimate benefit hopefully

> achieved can only be nullified by this means. Whatever powers may be available to the court for other abuses, if this is an abuse, there is only one suitable sanction."

77. I was referred to CPR rule 24.2 and the principles applicable where summary judgment on a claim or issue in a claim is sought. These are now conventionally articulated by reference to the judgment of Lewison J, as he then was, in the *Easyair* case (*Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]) and are too well known to need repeating here. Obviously, I direct myself to apply those principles to the applications for summary judgment.

78. Mention was made in submissions of the principle *res ipsa loquitur*. In appropriate cases, this principle may be relied upon to establish either negligence or causation of loss. It does not, as is sometimes supposed, reverse the legal burden of proof. It does not create a legal presumption of liability which the defendant must rebut to avoid liability. It puts an evidential burden, and no more, on the defendant: see generally the discussion in *Clerk & Lindsell on Torts*, 23rd edition at 7-207, 2-13 (especially footnote 39) and 9-107.

79. Where causation of loss and damage is at issue, there will be cases where the cause of the loss claimed is evident from the nature of the duty owed and the manner in which it was breached. In other cases, the cause will be far from self-evident. The question in each case is the ordinary one of causation in fact (the "but for" test) and in law (the *causa causans*). Invocation of the maxim *res ipsa loquitur* does not alter that state of affairs.

80. Depending on the facts, the court may or may not be prepared to draw inferences favourable to the claimant from the primary facts. If so, inferences that would otherwise be drawn may be rebutted by explanatory or contrary evidence from the defendant. This is not a reversal of the burden of proof; it is an evidential burden on the defendant which, if not met, will permit the claimant to *discharge* its burden of proof by proving the primary facts from which the inferences of breach of duty or causation of loss are drawn by the court.

81. There was much debate about the application of striking out and summary judgment principles in the context of multiple allegations of professional negligence arising from construction work. The debate centred on when extrapolation is permissible; whether Standard Life's selected 122 variations were properly representative for trial by sample; whether the suitability of the sample was a matter for trial or for pre-trial case management; whether the inferences Standard Life was asking the court to draw at trial were impermissible; and whether the breaches alleged were "systemic" or individual.

82. There is no dispute that in an appropriate case, extrapolation is permissible as a matter of law. For example, in *Imperial Chemical Industries Ltd v. Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC), one of the agreed issues was (see Fraser J's judgment at [9]) "[w]hat percentage of the welding was defective such that it failed to comply with BS 4677 and was not in accordance with the Contract and as such, the Defendant was in breach of contract?"

83. On the facts after a trial, however, the judge found at [160] that:

> "… such defects as were present in the welding, when considered against those that could be identified by the testing regime agreed, on the balance of probabilities does not exceed the percentage of welds that are to be expected agreed by the experts of 5%. The sampling/extrapolation exercise performed by ICI's experts is in my judgment wholly invalid. It requires an assumption to be made that the 412 weld reports considered by Mr Millwood was a randomly chosen sample, which it plainly was not."

84. All four counsel referred me with alacrity to HHJ Stephen Davies' decision in *Amey LG Ltd. v. Cumbria County Council* [2016] EWHC 2856 (TCC) and the useful discussion in it of extrapolation cases. The claim involved about 36,000 allegedly defective road surfacing works under a long term road repair contract. At [1.26] the judge said:

> "I accept that it is open to Cumbria as a matter of law to seek to persuade me to accept its extrapolation case on the basis that its sample is sufficiently representative to be relied upon. I accept that there is no principle of law nor of statistical theory that a claim or a proposition can only be established by statistically random sampling. I accept that it is perfectly open to a claimant to seek to establish a claim by reference to representative sampling, although further and different considerations will apply to such a claim, with which I shall have to engage in due course."

85. At [25.104] he explained:

> "Cumbria's pleaded case is that Amey was guilty of a series of systemic breaches in relation to its patching works, extending to a significant proportion of the total number of patches laid over the duration of the contract, and in respect of which Cumbria is claiming damages. As I have already said, there is a difference between such a claim and a claim where there are a number of individual claims being made in relation to a number of individual identified patches. Although it may be said that the dividing line between the two classes of claim may be difficult to draw in some cases, it is clear in my judgment that this claim falls squarely within the former category."

86. And at [25.107]:

> "I accept that in those circumstances it is not unreasonable in principle for Cumbria to seek to rely upon representative sampling in this case. The key issue, however, is whether or not Cumbria can demonstrate that it is sufficiently representative to enable the court to place reliance upon it, in circumstances where on any view it converts a small number of individual complaints, modest in value both individually and collectively, into a very substantial claim."

87. Trial by sample is a critical tool in the hands of the case managing judges of this court. We could not manage without it. The judges of this court regularly give directions accordingly. In doing so, they are making good use of their power to control the evidence and determine the issues on which evidence is required: see CPR rule 32.1(1) and (2), which provide:

> "**Power of court to control evidence**
> 32.1—(1) The court may control the evidence by giving directions as to—
> (a) the issues on which it requires evidence;
> (b) the nature of the evidence which it requires to decide those issues; and
> (c) the way in which the evidence is to be placed before the court.
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible."

88. Sub-rule (2) does not allow the court to admit inadmissible evidence but does permit the exclusion of admissible evidence. Admissible evidence can include what is often called similar fact evidence, applying the ordinary test of relevance. If the evidence is relevant to an issue and probative, it is admissible, subject to the power to exclude it; see the discussion in *Phipson on Evidence*, 19th edition, at paragraphs 22-5 to 22-08; *O'Brien v. Chief Constable of South Wales Police* [2005] 2 AC 534, per Lord Phillips at [55]-[57].

89. However, in *Laughton v. Shalaby* [2014] EWCA Civ 1450, [2015] PIQR P6, the Court of Appeal (Longmore LJ giving the leading judgment, with which McCombe and Vos LJJ agreed) noted in the context of a medical negligence claim at [21] that "[e]vidence of incompetence in other cases is highly problematic". At [22], Longmore LJ considered and rejected the submission that:

> "'evidence of systemic failure of various types of incompetence is admissible in professional negligence cases as enabling a judge to make inferences of negligence in a particular case.' … In my judgment evidence of extraneous matters should be confined to cases of similar fact for the traditional reason that, unless the evidence is similar fact evidence, it is not probative of the issue to be determined. The question whether extraneous evidence is truly similar fact evidence is, no doubt, one of some difficulty and it may be that courts are now readier to admit evidence as being similar fact evidence than they were in the past. But that should still be the test."

90. The possibility of some similar fact evidence of repeated negligence or repeated causation of loss being admitted at trial is a relevant factor here, given these defendants' invitation to the court to deal on a summary basis with the primary claim and to award summary judgment in respect of it. As Lewison LJ pointed out in the *Easyair* case, the court has to consider what evidence may be available at trial when considering whether summary judgment is appropriate.

91. Mr Moran 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. I would add that it could be a case where admissible similar fact evidence lends probative weight to the drawing of inferences of negligence and causation of loss.

92. At the other end of the spectrum, it is obvious that you cannot prove that a firm of architects negligently failed to detect dry rot at a residential property in Bermondsey by proving that the same firm (still less, if it was a different firm) negligently failed to detect dangerous combustible cladding at an office block in Birkenhead. If that was the basis of the claim, it would be *par excellence* a case for striking out.

93. In a case falling between the two extremes, the question for a court asked to deal with the matter on a summary basis is whether the inference sought is so manifestly impermissible that no reasonable trial judge could draw it. If the matter is not as clear cut as that, the question becomes one for the trial judge and, before that, for the case management judge striving to find the right directions to give so that the samples chosen are as representative as possible.

94. A "global" claim attributing a party's losses to another's breach of contract without strict attribution of individual items to specific causes, is permissible in principle, subject to proof on the balance of probabilities, carrying with it the need to overcome particular evidential difficulties on the facts: *Walter Lilly & Co Ltd v. Mackay* [2012] EWHC 1773 (TCC), [2012] BLR 503: see the judgment of Akenhead J at [486] (mis-numbered as [481]) and [487].

95. I respectfully adopt and agree with the commentary on that passage in Akenhead J's judgment by the learned editors of the Building Law Reports at page 506 in the report, beneath the headnote:

> "The judge's decision reaffirms the essential principle that it is for the judge, once liability has been established, to assess recoverable damages on the available information. Strict attribution of individual items of loss and expense to specific causes gives rise to significant difficulty in many cases and may be indeed be literally impossible in some cases unless detailed records kept. Whilst the absence of detailed evidence of quantum is a reason for the tribunal to be cautious in its assessment of loss it does not preclude it altogether. The employer argued that the contractor's claim should not be allowed because firstly, it was a global claim and secondly, the impossibility of disentanglement had been caused by the contractor. Akenhead J concluded that the claim was not a global claim, but went on, in obiter comments, to reject the submission that the claim should be rejected in those circumstances. Absent any express provisions in the contract excluding such claims, Akenhead J commented that a global or total costs claim may be permissible on the facts and subject to proof, recognising that there are generally added evidential difficulties which a claimant contractor in such a case will need to overcome."

96. Drawing those threads together, I summarise the principles applicable to this challenge to the pleaded case in the following propositions:

(1) The overarching proposition is that the court must deal with the case justly, which includes dealing with it at proportionate cost.

(2) A pleading must set out the facts relied on concisely, in a manner that tells the defendant the case it has to meet.

(3) The pleading must not be vague, incoherent, vexatious or obviously ill-founded.

(4) Where professional negligence is alleged, the claim must normally be supported by expert opinion, though not necessarily in the form of an expert's report served with the particulars of claim.

(5) The claim must not be advanced on a basis that seeks to gain improper advantage, for example to avoid a limitation defence accruing at a time when the claimant does not know what its case is.

(6) Poor drafting and untidy pleading are to be deprecated but are not, in themselves, enough to condemn a pleading if it is sound otherwise than in point of style and presentation.

(7) Summary judgment is reserved for cases where the claim or part of it is doomed to failure, applying ordinary principles. It may not be suitable if the law is developing and is not suitable if a trial of the facts is required.

(8) A claimant may plead primary facts and invite inferences of negligence or causation of loss to be drawn from proof of them. A court considering whether to draw the inferences will consider any rebuttal evidence.

(9) If, but only if, the court could not reasonably draw the inferences necessary for liability even without such rebuttal evidence, the case is likely to be suitable for summary disposal by striking out or summary judgment.

(10) Extrapolation from sampling is one method of persuading a court to draw the inferences necessary for liability and is a permissible method of establishing liability or causation of damage.

(11) However, to the extent that the samples are unrepresentative of the claim as a whole, liability or causation of loss on an extrapolated basis will not follow; and in any case, rebuttal evidence may defeat the inferences invited.

(12) A "global" claim attributing a party's losses to another's breach of duty without strict attribution of individual items to specific causes, is permissible in principle, subject to proof and particular evidential issues.

The Parties' Contentions

97. The main points made by the three defendants, as you would expect, overlapped substantially. In relation to the extrapolated parts of the claim they may be paraphrased briefly in the following summary:

(1) It is unprecedented and wrong to allow a claim for professional negligence to proceed by sampling and extrapolation.

(2) The facts and matters on which Standard Life relies are not pleaded; the essential elements of a professional negligence claim are absent.

(3) The defendants therefore do not know the case they have to meet.

(4) No narrative at all is pleaded in relation to the more than 3,000 variations that do not form part of the small sample of about 122 variations.

(5) In the loss and expense claim, there is no pleaded explanation of how "additional costs" of "financing charges", and other liabilities were incurred.

(6) The pleading is vague and incoherent, does not properly set out the facts establishing liability and therefore does not inform the defendants of the case they must meet.

(7) Standard Life's approach amounts to an attempt to reverse the burden of proof, described by Mr Moran as "a sort of quasi *res ipsa loquitur*".

(8) There is no coherent plea of any systemic breaches of a kind which would justify extrapolation from one case of alleged negligence to another.

(9) Rather, each allegation is a separate and distinct claim, without any common features to link the claims together.

(10) For this reason, Standard Life's method of sampling cannot produce and has not produced any representative sample that could validly support the extrapolation it seeks.

(11) The sample on which Standard Life relies in the variations claim is skewed by selecting the four work areas (residential fit-out, secondary steelwork, cladding and roofing). These are not representative of the work as a whole.

(12) The chosen sample is also distorted by selecting high value variations within those four work areas, rather than a cross-section by value.

(13) The sample also wrongly assumes equal participation and responsibility by each of the three defendants in the works; the apportionment by percentage to each defendant does not cure this vice.

(14) It is no answer to assert, as Mr Stone does, that the performance of the three defendants within the sample was "so poor" that it is reasonable to infer their performance outside it was "equally poor".

(15) No allowance is made for costs that would have been incurred without any negligence. Standard Life itself accepts this by limiting its claim to works done under variations that would not have had to be done anyway.

(16) Yet, no credit is given in the pleading for works that would have had to be done anyway. The extrapolation claim does not exclude any CAIs or CVIs for which these defendants are not held responsible.

(17) Thus, there is no reduction in the variations claim equivalent to the reduction made in the loss and expense claim in respect of works not laid at these defendants' door, such as the M&S works or the section 278 works.

(18) No allowance is made for the unusually large proportion of provisional sums in the building contract when made (the subject of the Part A claim). The amounts claimed in Part B therefore artificially inflate the quantum.

(19) Standard Life invokes a "smoke screen of proportionality", in Mr Moran's phrase. Mr Stone's estimates of the cost and time required to investigate the claims fully are exaggerated; it would not be disproportionate to do so.

(20) Standard Life should have focussed on the highest value variations and investigated and pleaded them properly. Proportionality could be ensured by omitting the low value variations, of which there are many.

(21) For example, a table produced by Mr Piers Stansfield QC, for Cundall, shows that there are 163 variations with a claimed value of £35,000 or more, with a total value of £19.6 million.

(22) The idea that the issues raised in the three applications are properly matters for trial is wrong, unfair on these defendants and would lead to a chaotic trial with the issues not properly defined.

(23) The applications are not tactical, as Standard Life suggests. It is Standard Life that is seeking unfair advantage and seeking to exert improper pressure to settle by artificially inflating its claim.

98. For BDP, Mr Moran made the following further points, again in my paraphrase:

(1) Standard Life's presentation of its claim by extrapolation would, if allowed to proceed, open the floodgates to a large number of similarly unparticularised claims.

(2) A professional negligence claim could, if this approach is allowed, "lazily and provocatively extend to cover the whole of the works impacted by the professional's workscope – without having to identify any criticisms .. that the defendant could understand, assess and respond to".

(3) Standard Life's sample of about 122 variations is not selected impartially according to highest value, as it claims; it only reviewed six of the ten highest value variations in the residential fit-out package.

(4) Standard Life seeks to derive an unfair benefit by issuing its claim while unable to identify the essence of the breaches being alleged, an abuse of process comparable to that found by Cooke J in the *Nomura* case.

(5) Standard Life's excuse that BDP's poor record keeping has disabled it from particularising its claim would appear to a cynic as "a desperate attempt to muddy the waters and is bad in law without evidence of what a party has lost by reason of missing documents or information".

(6) The proportionality argument is bad for the reasons given in Mr Henchie's second witness statement. Mr Henchie there makes the point that county court claims worth in the region of £10,000 are routinely investigated without the economies of scale available to Standard Life.

(7) Standard Life's pleading is unsupported by any expert report, contrary to the requirement in all but exceptional cases that allegations of professional negligence must be supported by the view of an appropriately qualified expert (see the *Pantelli* case, per Coulson J at [17]).

(8) It is too late now for that part of the claim to be saved by, for instance, a further application to amend the particulars of claim, or further sampling. Standard Life has responded to two applications for further information and has already amended its claim.

99. On behalf of SGA, Ms Joanna Smith QC also added the following points that particularly applied to her client, which I paraphrase as follows:

(1) Only 118 rather than 122 variations were particularised. (I do not attempt to resolve this minor difference in the figures.)

(2) The non-extrapolated variations claim as against SGA amounts to £1.2 million; the extrapolation exercise unjustifiably inflates it to £8.5 million.

(3) In relation to the loss and expense claim, the extrapolated part amounting to £4.6 million is illegitimately pro-rated as between these defendants in the same proportions as in Standard Life's analysis of the variations.

(4) The extrapolated part of the variations claim attributes responsibility to SGA for matters it had nothing to do with, such as section 278 works and mechanical engineering works.

(5) It also includes attribution to SGA of responsibility for over 2,300 variations made after its involvement had ceased, in February 2010.

(6) Thus, SGA never had any responsibility for Block F, nor for the entire basement design; nor any responsibility for Block B after October 2009; yet no attempt is made to exclude SGA from the extrapolation claim in so far as variations relate to those parts of the works.

(7) If, which SGA does not know, BDP failed to keep adequate records, that is not a matter that can justify relieving Standard Life of its obligation to plead its case properly against SGA. If the point has any validity it can only be made against BDP and not against SGA; it is not pleaded against SGA.

100. Mr Piers Stansfield QC, for Cundall, added the following contentions particularly relevant to the position of his client:

(1) Claims against Cundall based on extrapolation are advanced of £4.2 million in respect of variations and of £0.8 million in respect of loss and expense.

(2) These extrapolated claims are "not pleaded to have been caused by identified breaches of duty on the part of Cundall".

(3) Therefore, those claims are bound to fail and should be eliminated now by means of striking out or summary judgment.

(4) The tabulated 163 variations with a value of £135,000 or more show a mix of subject matters identified by cost codes demonstrating that this sample is not representative of the works as a whole.

(5) Thus, the 163 variations include matters in which Cundall was involved (e.g. riser and boiler flue design), and matters for which it bore no responsibility (e.g. section 278 works, the M&S works, substructure works and drainage).

(6) It is absurd to propose that if Cundall was negligent in relation to risers and boiler flue design, it must have been both involved in and negligent in relation to other works forming no part of its remit.

(7) Standard Life could attempt at trial to add unpleaded allegations amounting to "little more than mud-slinging"; Standard Life's Mr Stewart already writes in his witness statement of unspecified "problems" with Cundall's work on fire alarms, TV and satellite systems and incoming utilities.

(8) Any claim for loss of opportunity to particularise Standard Life's claim founded on BDP's poor record keeping cannot assist Standard Life in its claims against Cundall; no failure of reporting is alleged against Cundall.

(9) Striking out the primary claim would not preclude further amendment of the particulars of claim, if the court allowed any application to do so, in a way that might, if the court granted the application, resurrect the primary claim or some of it, based on proper sampling.

101. Standard Life, through Mr Selby, countered with submissions which I paraphrase in brief as follows:

(1) The applications appear tactical; they were all made on the same day, no doubt coordinated, at a time when these defendants knew Standard Life was planning to amend its particulars of claim and after the parties had agreed to a mediation (which took place two days before the hearing before me).

(2) The trial would take many months longer than the current listing of 12 weeks, agreed by all the parties, if all 3,500 variations had to be examined. Standard Life shudders to think (if a corporation can shudder) how long and costly would be the trial and preparation time in advance of trial.

(3) These defendants demand more of the court's resources than is fair to other litigants. The parties and the court must "grasp the nettle" and find a way of dealing with the claim that is proportionate to the amount of the claim and the cost of litigating it.

(4) The reasoning supporting the extrapolation method used was clearly explained in Standard Life's responses to the requests for further information. There is no scientific right or wrong way for a claim such as this to be tried. As Mr Selby put it in oral argument, there is "more than one way to skin a cat".

(5) These defendants did not take up the offers made to them to propose alternative sampling methods. They could have proposed test claims or "sub-claims" such as those arising in respect of the four work packages selected by Standard Life or, indeed, outwith those four work packages.

(6) Instead, they implicitly propose that the claim must be litigated in a disproportionate manner, requiring Standard Life to plead and prove its claim in respect of all 3,500 and more variations and all the 280 or so delay notices.

(7) Insistence on litigating in a disproportionate manner is the abuse of process here, not Standard Life's position. Had Standard Life done what these defendants now advocate and pleaded every claim in detail, they would have complained of disproportionality and balked at exposure to the costs of that exercise.

(8) The defendant's position (particularly of BDP's) is especially unattractive given the breach of BDP's obligations to keep proper records and provide information to Standard Life, specifically pleaded against BDP as the "loss of opportunity" claim; and the reporting obligations on SGA and Cundall.

(9) The failure to provide the information they should have provided has caused the very inability to particularise the claims of which these defendants now complain. It is they, and principally BDP, not Standard Life, who are responsible for the paucity of information about each variation.

(10) In the absence of any proposed better alternative to Standard Life's method, the primary case should go to trial on the basis of the existing pleading. Standard Life's primary case is not an abuse of process, nor doomed to fail. Thus, a want of particularity in the four schedules 1-4 is not asserted.

(11) While the building works took place up to 2013, the claim is still young; pleadings are not closed; the first case management conference has not yet taken place. Striking out and summary judgment are draconian remedies available only at a high threshold. They are wholly inappropriate at such an early stage when the court cannot begin to be sure the primary claim has no real prospect of success, even if ultimately it achieves only partial success.

(12) The detailed narrative in schedules 1-4 shows there is consistent evidence of failings by all three defendants in each of the four chosen work packages and failings by Cundall in all but one of them. That makes it unlikely their performance was any better outside the scope of those four areas of work.

(13) There is no plea of other reasons for excessive variations across the whole range of building works, such as Standard Life constantly changing its mind or Costain being an errant contractor. It is particularly telling that sums due to Costain were certified as such by one of the defendants, BDP. If Costain were not entitled to them, why would BDP have certified that it was?

(14) The extrapolation method does not reverse the burden of proof but seeks to discharge it as best Standard Life can with the minimal documents it has, pending disclosure. Should the trial judge refuse to draw the inference that negligence across the board caused the losses represented by all 3,500 plus variations and all 280 delay notices, then Standard Life will have failed to discharge the burden of proof but it is not reversed by inviting the inference.

(15) As for the loss and expense claim it is "not demurrable as a matter of pleading", as Mr Selby put it, relying on Akenhead J's analysis in the *Walter Lilly* case. As Mr Selby put it, "the fact that there is approximately £4.6 million of loss and expense that is claimed in the Primary Claim without directly linking that loss and expense to particular breaches of duty, does not make this claim demurrable".

(16) These defendants assert that the way the claim is advanced is novel; in which case the claim is unfolding in a developing area of the law and thus unsuitable for summary disposal, on well known authority. It is thus a particularly suitable case to go to trial and the court (again on established authority) should take account of evidence that will be available at trial, which would be more than is yet available.

(17) As to what that evidence is likely to be, BDP's reluctance to give disclosure now prevents Standard Life and the court from knowing, but BDP, SGA and Cundall would have to give disclosure which would fill some evidential gaps. By refusing

disclosure at this stage, BDP is taking advantage of its own breaches of duty to keep proper records and report properly.

(18) Standard Life's "loss of opportunity" claim will have to go to trial anyway. It is clearly pleaded that, to the extent the claim may fail for want of the documents to prove it, BDP will be held to account separately in damages for that failure. It would therefore be futile to strike out the variation and loss and expense claims, as advanced in the primary claims.

(19) These defendants are well aware from Standard Life's copious pleading of the case they have to meet. Their reliance on Coulson J's judgment in *Pantelli* is misplaced. In so far as BDP criticises the absence of any supporting expert's report, Standard Life responds that it has consulted experts throughout the process of developing and particularising its case.

(20) In any case, *Pantelli* is not authority for the proposition that a professional negligence case cannot be permitted to proceed without the direct support of an expert's report, as shown by the observations of Akenhead J, commenting on *Pantelli* at [16]-[19] in *ACD (Landscape Architects) Ltd v. Overall* [2012] EWHC 100 (TCC) at [17], propositions (a) to (e).

Reasoning and Conclusions

102. In my judgment, these defendants have demonstrated that there are instances in this pleading where the allegation of breach of duty specified is not reasonably capable of supporting the inference sought from the court. Mr Selby realistically conceded that there are examples within the amended particulars of badly done work in areas where one or more defendants had no responsibility. Some such cases may, he recognised, have been "overlooked".

103. Examples are given by Ms Smith: blaming SGA for bad basement design; for badly done section 278 works; for works to Block F; and for works to Block B after October 2009. SGA cannot bear responsibility for these things even if the work was done badly unless responsibility for them was within its remit. Mr Stansfield's examples also appear to be cases in point: in the apportionment exercise, Standard Life blames Cundall for section 278 works, the M&S works, substructure works and drainage. Cundall cannot bear responsibility for these faults if its remit did not include any responsibility for those matters.

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.

106. The problem with this pleading is, in my judgment, not that it attempts to erect a legal presumption of liability, but that some parts of it invite inferences to be drawn from primary facts which no reasonable judge could or would draw. Cases in point are the examples from Ms Smith and Mr Stansfield which I have just mentioned.

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.

112. The court is invited to infer that a particular defendant was negligent in a particular way, on a particular occasion, because that defendant was negligent in the same way on another occasion. As I have said, that seems to me impermissible in, at least, the examples mentioned. It does not mean the breaches of duty pleaded are unclear or incomprehensible.

113. I would not, however, characterise the allegations of breach of duty as "systemic" in the sense stated by HHJ Stephen Davies in the *Amey* case. It is not said here that there was something wrong embedded in the defendants' system of working which

caused the same fault to recur over and over again. Rather, the contention is to the effect that these defendants did not have any properly operating system of working at all.

114. A case where performance is chaotic or close to non-existent is much less well suited to extrapolation than one where the defendant is alleged to have mass-produced the same error, so that the effect of the error can reasonably be proved by sampling and statistical analysis leading to extrapolated losses. Mr Stansfield is correct to observe that you cannot rely on the fact that the breaches of duty occurred as the thing that makes them systemic.

115. However, I reject these defendants' suggestion that extrapolation cases are confined as a matter of law to cases where the pleaded breach or breaches are "systemic". There is no magic in that adjective. It is a convenient label to describe cases where the defendant operates a system that reproduces an error many times over, as pleaded in the *Amey* case. Extrapolation may also be legitimate in other kinds of case, applying ordinary principles of evidence including the drawing of permissible inferences from primary fact.

116. For example, where the defendant operates no "system" at all but fails to perform properly in the same way repeatedly – for example, by failing to read documents properly or report properly – in relation to different aspects of the works, the court could, if appropriate, draw an inference from one part of the works to another. Such a case in principle should fall within Mr Moran's concession, mentioned above (though he would disagree) that extrapolation may be permissible where ten houses suffer from exactly the same defects.

117. If the claimant proves that building, say, two or three of the ten houses has cost double what it should have cost, through negligent lack of reporting and lack of control over cost overruns and delay, the court may be willing to draw the same inference in the case of the other seven or eight houses, absent rebutting evidence from the defendant to differentiate the other houses. And the court may, as I have pointed out, in limited circumstances and with caution rely on any evidence qualifying as similar fact evidence as part of its overall assessment of the evidence and whether the drawing of inferences is justified.

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.

121. The court may be willing to group together certain allegations of negligence and, if they are proved, to draw the inference that the resulting losses can be measured by a more limited form of extrapolation than that appearing now on the face of the pleading. It may be, for example, that within the work package "residential fit-out", it is legitimate to infer that losses caused by negligence in respect of Block A are relevant, by extrapolation, to calculating losses caused by the same kind of negligence in respect of Blocks C and D.

122. This point is not conclusively demonstrated in Standard Life's favour, I accept. But nor is it ruled out by these defendants' submissions. They point to stark examples of impermissible extrapolation but they are only examples. This is important because I have rejected the argument that the extrapolated claim is in general tainted by abuse of process, incoherence or improper purpose; and because proportionality precludes a minute and accurate separation of the good from the bad parts of the claim now.

123. I therefore reject the contention of these defendants that the extrapolated part of the claim should be stuck out in its entirety. Nor, by the same reasoning, is it suitable for summary judgment. The court could only give summary judgment by spending weeks separating the wheat from the chaff. That is not practicable or proportionate. The parties' time estimate for the hearing was two days.

124. The best outcome consistent with the overriding objective is to give these defendants the comfort of knowing now, from this judgment, that the impermissible parts of the extrapolated claim, if pursued at all (which seems unlikely if the parties are guided by this judgment), are going to fail at trial.

125. Even if it were practicable to get rid of the bad parts of the extrapolated claim now, there would still have to be a trial of such good parts as would survive, together with the whole of the non-extrapolated claim. These defendants, therefore, should take from this judgment the knowledge that the maximum size of the claims they face is not £38.1 million, but a lesser amount.

126. Standard Life should be correspondingly chastened in the knowledge that it cannot hope to recover as much as that sum and its maximum recovery could be far less – how much less, at this stage I cannot say. Its claim is, at least, inflated, which is commonplace. Standard Life is also warned and on notice that these defendants are entitled to protection against being "ambushed" by reliance at trial on new and unpleaded allegations of negligent acts or omissions in the course of written or oral evidence.

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.

129. Mr Henchie pointed out in his second witness statement that the average value of each variation, where the total claim is just over £38 million and there are some 3,500 variations, is about £10,000 and "[c]ounty court claims of this value are properly investigated and pleaded every day without the economies of scale inherent in a dispute of this size." That approach is, with respect, unrealistic. It is obvious that to direct a trial of 3,500 claims of £10,000 each would allocate disproportionate court resources to this case.

130. Next, I recognise that, as Mr Moran forcefully pointed out, Standard Life has twice replied to requests for further information and once amended its particulars of claim. He argued that it had already had every opportunity to put its case in order and should not be given another chance. I am not persuaded by that submission. Mr Stansfield put the matter differently, acknowledging that if I were to strike out the whole of the extrapolation claim, Standard Life could still apply to resurrect it or parts of it by seeking permission to amend further.

131. The present case is, as yet, at a relatively early stage. Although the building works were carried out over six years ago, the claim was issued last year; pleadings are not yet closed and the first CMC has yet to take place. I do not think the extra time needed to improve the readiness of the case for trial would be time ill spent or cause unacceptable delay.

132. The issues are complex. I express no view on the merits of the claims save to say there is no obvious lack of merit in the criticisms of these defendants, particularly BDP against which bad record keeping and reporting failures are pleaded as additional breaches of duty supporting an alternative damages claim for loss of opportunity to save money and avoid losses.

133. I also bear in mind that none of these defendants was willing (at least openly) to take up Standard Life's twice repeated offer to propose alternative or additional sampling or sampling methods. They chose instead the more aggressive step of applying for summary relief, a strategy partially vindicated in this judgment; but they could have combined that strategy with constructive suggestions for further sampling and did not do so.

Further Case Management

134. In charting the way forward, a balance must be struck. On the one hand, these defendants should know the full case they face, including better information about causation and quantum. On the other hand, Standard Life should have a means of redress in the court at proportionate cost and within a reasonable time. The court

must do the best it can to reconcile the tension between these two propositions, which pull in opposite directions.

135. In the case of the variations claim, these defendants know what allegations of breach of duty they face; they know that extrapolated losses found to have resulted from those breaches, if they are proved, will only be recoverable to the extent that a court considers that the extrapolation is a reasonable inference; and they can be confident that in respect of a significant proportion of the variations, it is not a reasonable inference.

136. I think the sample of 122 variations examined so far is too small. It is no answer to say, as Mr Stone does in his first witness statement, that the extent of proved losses is just a matter of the quantum experts producing reports and a joint statement. There needs to be further sampling in the variations claims, to enable the defendants to acquire the fuller knowledge of Standard Life's case on causation to which, in my judgment, they are entitled.

137. I should say something here about the loss and expense claim. Standard Life says it is a "global" claim in so far as made outside the four chosen work packages. I accept Mr Selby's submission, on the authority of the *Walter Lilly* case, that the claim is not demurrable merely because the amounts claimed are not directly linked to particular breaches of duty; the issue is whether or to what extent Standard Life can discharge the burden of proof.

138. While that issue is a matter for trial, that does not necessarily exclude the need for improved clarity and particularity. There is force in the submission made (in particular by Ms Smith for SGA) that the loss and expense claim is pro-rated in an arbitrary way as between the three Design Team members in the same proportions as in Standard Life's analysis of the variations.

139. Again, I think there should be more complete articulation of the loss and expense claim. Some of the £4.6 million extrapolated part of it is likely to be unsustainable. In my judgment, Standard Life can fairly be asked to do further work to justify the extrapolated part and to lay bare any parts of it – and there are likely to be some - that are not sustainable, so they can be excluded.

140. These three applications have shown, even before the first CMC, the need for further samples to be identified and for Standard Life to plead out its case in respect of them. These defendants have with some justification criticised the basis of Standard Life's choice of sample variations and delay notices. They should have the opportunity to select some further samples themselves, to make them representative, or closer to being representative, of the claim as a whole.

141. I therefore propose to give further directions, as is often appropriate where a court declines to strike out a pleading but recognises clear shortcomings in the manner in which the case is presented. Needless to say, the directions I propose below are subject to further argument and the parties may want to adjust the number of samples I propose and will want to address the court on how the directions are to be structured and worded.

142. I think it is inevitable that where there is a pressing need for trial by sample and the samples currently before the court are not adequate, directions for further sampling must be given. To help the parties and further the overriding objective, I think it is appropriate to indicate my views about the way forward, subject to further argument.

143. I propose to give directions in relation to the variations claim along the following lines, or something like them:

(1) that Standard Life should state by number any variations in respect of which its claim is not pursued and is withdrawn; and as to those that remain

(2) that BDP is at liberty to nominate up to 80 variations, i.e. CAIs or CVIs (**the BDP variations sample**);

(3) that SGA is at liberty to nominate up to 40 variations (**the SGA variations sample**);

(4) that Cundall is at liberty to nominate up to 40 variations (**the Cundall variations sample**); (together, **the Design Team variations samples**);

(5) Standard Life must provide a table (similar in form to the tables in schedules 1-4) for each of the Design Team variations samples, setting out its case.

144. I propose to give directions in relation to the loss and expense claim along the following lines, or something like them:

(1) that Standard Life should state by number any delay notices in respect of which its claim is not pursued and is withdrawn; and as to those that remain

(2) BDP is at liberty to nominate up to 40 delay notices (**the BDP delay notices sample**)

(3) SGA is at liberty to nominate up to 20 delay notices (**the SGA delay notices sample**);

(4) Cundall is at liberty to nominate up to 20 delay notices (**the Cundall delay notices sample**); (together, **the Design Team delay notices samples**);

(5) Standard Life must provide a table for each of the Design Team delay notices samples, setting out its case.

145. I propose to include in my directions an order that Standard Life's tabulated response to the Design Team variations samples and the Design Team delay notices samples should comprise or include the following in respect of each sample individually identified, if a claim in respect of it is pursued:

(1) the amount of additional cost to Standard Life claimed;

(2) whether a claim is pursued against BDP and if so the negligence or breach of duty alleged and the case on causation and quantum;

(3) whether a claim is pursued against SGA and if so the negligence or breach of duty alleged and the case on causation and quantum;

(4) whether a claim is pursued against Cundall and if so the negligence or breach of duty alleged and the case on causation and quantum;

(5) if a claim is pursued against more than one Design Team member, what apportionment is proposed as between members and why.

146. The above directions in relation to samples chosen by the defendants would not preclude Standard Life, if it wishes, to select further samples of its own and conduct the same exercise in relation to them (**the SL further variations sample** and **the SL further delay notices sample**); but to maintain balance and keep the claim manageable I do not think these further samples should exceed, say, 50 variations samples and 30 delay notices samples.

147. Standard Life will then have to re-calculate its primary case (and, if so advised, its alternative case). Its pleaded case should then be set out in a new document, its further amended particulars of claim, which should make a fresh start and not include deletions and additions. It should be a composite fresh pleading of the Part B claim expressed more succinctly than the current pleading, not exceeding 100 pages excluding schedules. The three defendants to the Part B claim will then be free to re-plead their defences accordingly.

148. I also envisage including in my order a direction that the parties are free to agree to a greater or lesser number of samples than the figures I have stated above, which are not based on any scientific method. There will have to be time limits set for the whole exercise. I am conscious that there is currently a CMC fixed for 17 February 2021. That may be too soon; the further sampling exercise I propose to direct may not have been completed by then.

149. I should add that if and to the extent that Standard Life's pleaded case and schedules do not allege any specific negligent act or omission or breach of duty against any Design Team member, over and above those already pleaded, Standard Life will not be permitted at trial to assert that the relevant Design Team member was, other than as already pleaded in generic terms, negligent or in breach of duty in respect of the relevant variation or delay notice.

150. The effect of this judgment will be to accelerate the giving of case management directions of the kind normally given at the CMC. Further case management should take place after the sampling exercise I have described has been carried out. It is therefore acceptable, in my judgment, for the CMC to be postponed if necessary by a few weeks or months to enable further case management to take place on the basis of the updated pleadings.

151. I recognise, however, that the Part A and Part C claims are likely to be affected by this judgment, that they have an interest in the timetabling and that the directions I propose to give are likely to cause some delay that could jeopardise the dates fixed for the trial of all three parts of the action together, in late 2022. The Part A and Part C defendants should therefore have liberty to apply for further directions. A provision to that effect will be included in my order.

152. Subject to any submissions they may make, I think the delay resulting from the current exercise is a price worth paying for enabling the case to be managed properly. I will hear counsel on the wording and timing of the sampling exercise I propose, on the timing of the CMC and on other consequential issues. I conclude by expressing my thanks to the parties and their representatives for helping the court resolve the difficult issues raised by these three applications.