Case No: HT-2019-000306
Case No: HT-2020-000022

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

Neutral Citation Number: [2022] EWHC 1310 (TCC)

Royal Courts of Justice
Rolls Building
Fetter Lane, London, EC4Y 1NL

Date: 27/05/2022

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

STANDARD LIFE ASSURANCE LIMITED

Claimant

- and -

(1) GLEEDS (UK) (a firm)
(2) BURO FOUR PROJECT SERVICES LIMITED
(3) SHEARER PROPERTY ASSOCIATES LIMITED

Defendants

- -
- -

Jonathan Selby QC & Tom Owen (instructed by **Mayer Brown International**) for the **Claimant**
Claire Packman QC & Martyn Naylor (instructed by **Clyde & Co LLP**) for the **First Defendant**
Patrick Lawrence QC, Marion Smith QC and Nicholas Higgs (instructed by **DAC Beachcroft LLP**) for the **Second Defendant**
Graeme McPherson QC & Ian McDonald (instructed by **Kennedys LLP**) for the **Third Defendant**

Hearing dates: 25th and 26th May 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"**This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 27th May 2022 at 10:30am"**

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. The matter before the Court is the application by the Second Defendant, supported by the First and Third Defendants, to strike out parts of the claim, and/or for summary judgment in respect of those parts, on the basis that the Statements of Case disclose no reasonable grounds for bringing those parts of the claim and they have no real prospect of success.

Background facts

2. This claim arises out of a mixed residential and commercial development at Parkway, Newbury, West Berkshire. The Claimant ("Standard Life") is an investment fund which procured the development project. The First Defendant ("Gleeds") was the quantity surveyor and cost consultant, the Second Defendant ("Buro 4") was the project manager and the Third Defendant ("Shearer") was the development manager in respect of the project.

3. The building contract with Costain was entered into on 26 August 2008. At the time of the building contract, the estimated outturn construction cost was £85 million approximately. The written order to commence the works was issued on 16 September 2008. On 11 April 2013 practical completion of the retail units was achieved and on 15 July 2013 practical completion of the residential units was achieved.

4. The final construction cost in respect of the development was £146 million approximately, substantially in excess of the estimated cost.

Proceedings

5. On 28 August 2019 Standard Life commenced proceedings against Shearer and on 31 January 2020 proceedings were commenced against the other Defendants. The claims were consolidated by order dated 21 July 2020. The claim was originally in three parts: Part A, Part B and Part C.

6. The application relates to the Part A Claim. Part A concerns a claim for negligent advice and performance as to the estimated construction cost and the procurement and terms of the building contract entered into with Costain. Standard Life's case is that Gleeds and Shearer, without any dissent from Buro 4, negligently advised that estimated outturn construction costs were £85 million approximately, whereas they should have advised an estimate of approximately £105 million. Further, the procurement strategy advised by Gleeds and Buro 4, and supported by Shearer, resulted in a high risk building contract, with a substantial proportion of provisional sum items.

7. Standard Life's case is that, had it been advised and warned of the true risks involved in the procurement and terms of the building contract, and the true likely outturn construction cost, it would have abandoned the development, would not have entered into the building contract and not issued the written order to commence the works. The claim is for damages in the sum of £20,141,515.00 plus interest, calculated as the difference between what it alleges ought to have been advised as the outturn construction cost plus construction contingency less what was advised.

8. Liability and quantum are disputed by the Defendants. In particular, it is contended that the quantum claim should exclude losses caused by other factors and which could not reasonably have been foreseen, and should give credit for the benefits Standard Life has derived from the development.

9. The Part B claim has been compromised.

10. Part C concerns a claim against Buro 4 for negligent advice in respect of an agreement dated 25 January 2008 with Marks and Spencer plc concerning land subject to a compulsory purchase order. Standard Life's case is that Buro 4 failed to provide adequate advice as to the scope of the enabling works for which Standard Life was liable, preventing it from enforcing its compulsory purchase powers and resulting in additional costs. The claim is for damages in the sum of £11,514,911.67 plus interest.

11. Liability and quantum on the Part C claim are disputed.

12. On 21 July 2020 the trial was fixed for 3 October 2022 with an estimate of 12 weeks. Following a strike out application and appeal in respect of the Part B claim, resulting in delays to the conclusion of pleadings, at a CMC held on 17 and 19 February 2021, the trial date was vacated and re-fixed for 3 October 2023.

The application

13. On 25 February 2022, Buro 4 issued an application, seeking an order that:

    i) Paragraphs 86 and 87 and Annex 7 of the Particulars of Claim;

    ii) Paragraph 2(9)(b) of the Reply to the First Defendant's Defence;

    iii) Paragraph 2(11) of the Reply to the Second Defendant's Defence; and

    iv) Paragraph 38(3) of the Reply to the Third Defendant's Defence

    be struck out pursuant to CPR 3.4(2)(a) or (b) and/or summary judgment be given on those parts of the claim pursuant to CPR 24.2 on the grounds that (i) they disclose no reasonable grounds for bringing the claim; and/or (ii) the Claimant has no real prospect of succeeding on those parts of the claim.

14. The application is supported by the second witness statement of Olugbenga Dansu, solicitor of DAC Beachcroft LLP, dated 24 February 2022.

15. The application is opposed by Standard Life and reliance is placed on the fourth witness statement of Jonathan Stone, solicitor of Mayer Brown International LLP, dated 17 May 2022.

The material pleadings

16. Standard Life pleads the losses which it alleges it suffered as a result of the Defendants' negligent advice in its Particulars of Claim as follows:

"8. Standard Life's **Part A** losses are particularised in **Section G** and **Annex 7**. Standard Life limits its **Part A** claim to **£20,141,515** or such other sum the court shall determine. Namely: the difference between what ought to have been advised for outturn construction costs plus construction contingency (£105,872,515) less what was advised in fact (£85,731,000). This is an 'information case' for which the First to Third Defendants are jointly and severally liable for the consequences of their advice being wrong or their failure to advise as they ought.

…

86. Standard Life claims from the First to Third Defendants, jointly and severally, its losses on the Development from August 2008 to date. These losses are £128,417,518 or such other sum as the Court shall determine.

87. See **Annex 7** for further particulars of the losses.

88. Standard Life limits its **Part A** claims to **£20,141,515**. Paragraph 8 is repeated."

17. Annex 7 of the Particulars of Claim states:

"1. But for the breach of the **Part A** Defendants' obligations, Standard Life would not have proceeded with the Development. Standard Life would not have entered into the Building Contract on 26 August 2008. It would not have executed the Written Order to Commence Works on 16 September 2008.

2. Standard Life's losses are calculated by way of a basic comparison between:

(1) the position Standard Life would have been in had it not proceeded with the Development; and

(2) its actual position.

3. Standard Life's actual position is that it incurred £146,419,486 of construction costs.

4. The calculation of the position Standard Life would have been in had it decided not to proceed with the Development is set out below.

(1) Standard Life would not have incurred £146,419,486 in construction costs.

(2) Deducted from this figure are costs incurred by Standard Life for which the Part A Defendants were not responsible:

(a) the cost of Standard Life introducing John Lewis as an anchor tenant (£8,698,287);

(b) the cost of tenant variations (£2,423,681); and

(3) A further deduction is made to allow for certain irrecoverable sums incurred by Standard Life prior to August 2008. Prior to August 2008, Standard Life incurred total expenditure of approximately £15,000,000. Standard Life estimates that, of this sum, it would have been able to recover approximately £8,120,000 in proceeds from sale of land. The loss of the aborted Development would, therefore, have been approximately £6,880,000.

(4) Standard Life would not have incurred a loss elsewhere with the construction costs which would not in fact have been expended on the Development.

5. The basic comparison, therefore, is £146,419,486 less sums for which the Part A Defendants would not have been responsible in any event (£11,121,968) less irrecoverable costs of £6,880,000. That totals £128,417,518, or such other sum as the Court may find.

6. Standard Life limits its Part A claim, as pleaded in paragraph 8 of the POC. That is £20,141,515 or such other sum as the Court may find, calculated as follows:

(1) the sum which ought to have been advised for outturn construction costs – £100,591,463 (as calculated in Annex 6); plus

(2) the sum which ought to have been allowed for construction contingency at 5.25% – £5,281,052; namely £105,872,515 less

(3) £85,731,000. On 29 July 2008, Gleeds advised in Financial Report No.7 £83,640,000 for outturn construction costs, not including construction contingency, and excluding fees and VAT. This advice was repeated by Gleeds on 4 September 2008 in Financial Report No.8. In its Appraisal of 14 August

> 2008, Shearer included a construction contingency of 2.5%. £83.64m plus 2.5% construction contingency, excluding fees, was £85,731,000."

18. Gleeds raises the issue of recoverable loss in paragraph 6.8 of its Defence:

> "If, contrary to this Defence, Standard Life suffered loss as a result of breach of duty by Gleeds, Standard Life's recoverable loss is limited to the lesser of (a) and (b) below:
>
> (a) Standard Life's actual loss on the Development to the extent reasonably foreseeable by Gleeds, but reduced for Standard Life's contributory negligence. Calculation of Standard Life's actual loss requires the following to be deducted from Costain's agreed final account:
>
> (i) all costs caused by matters for which Gleeds was not responsible and which Gleeds could not reasonably foresee, such as the matters which in POC, Parts B and C, Standard Life alleges were caused by breach of duty on the part of other consultants and scope changes which Standard Life instructed;
>
> (ii) the value of the completed Development;
>
> (b) the difference between the sum(s) which Gleeds estimated as the cost of the Development before the Building Contract was made and the 'correct' estimate at that time."

19. Paragraph 2(9) of the Reply to Gleeds' Defence states:

> "No deduction in the basic comparison is required for the value of the completed Development.
>
> (a) Gleeds pleads no particularised case in law or in fact for the assertion.
>
> (b) There is no benefit to deduct. Even if there were, it was not caused in fact and in law by Gleeds' breaches of duty. Even if it were, or in any event, it is collateral to the losses sustained by reason of the information, advice and performance particularly as to outturn construction cost for which Gleeds is liable being negligently wrong. In any event, the value of the Development has decreased. On Gleeds' logic, that increases the losses. Standard Life does not seek recovery of the same, for the same reasons above."

20. Buro 4 sets out its position in paragraph 12(g) of its Defence:

> "If Standard Life establishes breach and causation against B4 (which is denied) the quantum of the claim is ill-conceived. Standard Life's claim has been calculated by applying a cap to its alleged total losses on the Development. However, Standard Life has not (as it should): (a) excluded losses with other causes, including the Part B claim; and (b) accounted for the benefits it has derived from the Development, including continued beneficial ownership."

21. Paragraph 2(11) of the Reply to Buro 4's Defence states:

> "Paragraph 12(g) asserts that Standard Life's losses should deduct: (a) "losses with other cases", including Part B; and (b) account for "the benefits it has derived".
>
> (a) As to any deductions to sums it in fact recovers pursuant to its claims in Part B and Section E2 of Part C POC, see Response 3(c) to Gleeds' RFI of 23 February 2020.
>
> (b) No deduction in the basic comparison is required for the value of the completed Development.
>
> (c) Buro 4 pleads no particularised case in law or in fact for the assertion.
>
> (d) There is no benefit to deduct. Even if there were, it was not caused in fact and in law by Buro 4's breaches of duty. Even if it were, or in any event, it is collateral to the losses sustained by reason of the information, advice and performance particularly as to outturn construction cost, for which Buro 4 is liable, being negligently wrong. In any event, the value of the Development has decreased. On Buro 4's logic, that increases the losses. Standard Life does not seek recovery of the same, for the same reasons above."

22. Shearer sets out its response to the claimed loss in Appendix 2 to its Defence.

23. Paragraph 38 of the Reply to the Third Defendant's Defence states:

> "Shearer asserts in paragraph 3(b) of its Appendix 2 that Standard Life "must give credit for the value of the completed Development". That is denied.
>
> (1) No deduction in the basic comparison is required for the value of the completed Development.
>
> (2) Shearer pleads no particularised case in law or in fact for the assertion.

> (3) There is no benefit to deduct. Even if there were, it was not caused in fact and in law by Shearer's breaches of duty. Even if it were, or in any event, it is collateral to the losses sustained by reason of the information, advice and performance particularly as to outturn construction cost for which Shearer is liable being negligently wrong. In any event, the value of the Development has decreased. On Shearer's logic, that increases the losses. Standard Life does not seek recovery of the same, for the same reasons above."

Parties' submissions

24. Mr Lawrence QC, leading counsel for Buro 4, submits that Standard Life's formulation of its claim for damages is misconceived and must be re-pleaded. Although Standard Life states that its losses are to be calculated by way of a basic comparison between the position in which it would have been had it not proceeded with the development and its actual position, it has failed to bring into account any evaluation of the value of the benefit acquired as a result of the relevant expenditure on completion of the development.

25. Mr Lawrence identifies the following legal principles that apply in this case. First, a claim against a negligent valuer or provider of a costs estimate must not be confused with a claim founded on a breach of warranty, which requires a different approach to assessment of loss. Second, in a negligent misinformation case the first causation issue is: "What different action would the claimant have taken if provided with reasonably accurate information?" Third, once the primary causation issue has been determined, it is necessary to carry out the basic comparison, identified by Lord Nicholls in *Nykredit plc v Edward Erdman Limited* [1997] 1 WLR 1627 at 1631:

> "Typically in the case of a negligent valuation of an intended loan security, the basic comparison called for is between (a) the amount of money lent by the plaintiff, which he would still have had in the absence of the loan transaction, plus interest at a proper rate, and (b) the value of the rights acquired, namely the borrowers covenant and the true value of the overvalued property."

Fourth, having carried out the basic comparison in order to ascertain the loss sustained as a matter of fact, it is then necessary to carry out a *SAAMCo / MBS* analysis in order to identify what if any part of the loss falls within the scope of the duty that has been breached by the defendant.

26. Mr Lawrence submits that Standard Life's contention, that the benefit obtained by its expenditure on the development is collateral and does not fall to be taken into account, is erroneous and unsustainable. The value of what was obtained was not collateral but an integral part of the transaction that is said to found the claim for loss. In any event, such question only arises following the basic comparison of loss, namely, evaluation of what the claimant paid in the course of entering into the relevant transaction and the value of what the claimant obtained as a result of entering into that transaction.

27. Mr Selby QC, leading counsel for Standard Life, submits that it would be inappropriate for the Court to strike out the claim or grant summary judgment. The Particulars of Claim were served on 31 January 2020 and the Replies were served on 9 October 2020. At the CMC before Jefford J on 17 and 19 February 2021 the Defendants raised the prospect of pleading a 'no loss' defence but no application was made to strike out this part of the claim until 25 February 2022. The application is disputed on the merits but is academic because Standard Life has made proposals for serving a further pleading on quantum to which the Defendants can respond.

28. Mr Selby submits that the valuation, methodology and circumstances raise disputed issues of fact, opinion and law. There is a conceptual, factual and expert issue as to whether there is a benefit at all. As to the account that has to be taken for benefits accruing as a result of a breach of contract, it is necessary for the Defendants to establish that the benefit or credit sought was caused in fact and in law by the breach of duty: *AssetCo v Grant Thornton* [2020] EWCA Civ 1151 per David Richards LJ at [214]; *Tiuta International v De Villiers Surveyors* [2017] UKSC 77 per Lord Sumption at [12]; *Fulton Shipping v Globalia Business TravelSAU (The "New Flamenco")* [2014] 2 Ll.Rep.230 per Popplewell J (as he then was) at [64]. This is a fact-sensitive exercise: *Earls Terrace Properties v Nilsson Design and Charter Construction* [2004] EWHC 136 per HHJ Thornton QC at [100] to [108].

29. Standard Life's case is that the Defendants' breaches did not cause any benefit. The court has no agreed or assumed facts against which to assess this issue and should not determine the matter in a vacuum. Further, the issue has not been sufficiently articulated on the pleadings. Standard Life has pleaded that there is no benefit. None of the Defendants has identified the nature or extent of the alleged credit that should be given, or the date on which any benefit should be assessed. This could affect whether any credit would arise, regardless of the issue of principle.

The applicable test

30. CPR 3.4(2) provides that:

> "The court may strike out a statement of case if it appears to the court:
>
> …
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim …"

31. The principles to be applied are as follows:

i) If the pleaded facts do not disclose any legally recognisable claim against a defendant, it is liable to be struck out. However, the application must assume that the facts alleged in the pleaded case are true.

ii) It is not appropriate to strike out a claim in an area of developing jurisprudence, since in such areas, decisions as to novel points of law should be based on actual findings of fact: *Barratt v Enfield BC* [2001] 2 AC 550 per Lord Browne-Wilkinson at p.557.

iii) The court must be certain that the claim is bound to fail; unless it is certain, the case is inappropriate for striking out: *Hughes v Colin Richards & Co* [2004] EWCA Civ 266 per Peter Gibson LJ [22]-[23]; *Rushbond v JS Design Partnership* [2021] EWCA Civ 1889 per Coulson LJ at [41]-[42].

32. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

33. The principles to be applied on such applications are well-established and can be summarised as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91.

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*.

iv) The court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550.

v) The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63.

vi) If the court is satisfied that it has before it all the evidence necessary for the proper determination of a short point of law or construction and the parties have had an adequate opportunity to address the question in argument, it should grasp the nettle and decide it. It is not enough to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

vii) The burden of proof remains on the defendants to establish that the claimants have no real prospect of success and that there is no other reason for a trial.

Discussion and disposal

34. Mr Lawrence's analysis as to the steps to be taken in assessing the recoverable loss in this case, including the basic comparison of what the claimant paid in the course of entering into the relevant transaction and the value of what the claimant obtained as a result of entering into that transaction, is sound in principle and persuasive. However, the court is mindful that in *Nykredit* Lord Nicholls was concerned with a negligent valuation case, rather than a negligent cost estimate case. The general principles that apply to questions of scope of duty, breach, causation, nexus and legal responsibility have been set out in *Manchester Building Society v Grant Thornton* [2021] UKSC 20, a negligent valuation case, but they do not extend to consideration of the basic comparison exercise to be applied in a negligent cost estimate case. In the context of this case, it is arguable that different factors might apply.

35. It is clear from the authorities before the court that any assessment of loss in a negligent advice case such as this case is highly fact sensitive. The court should be cautious before determining this principle of law in the absence of clear pleaded issues, expert evidence on the competing evaluations of costs and benefits associated with the development, and relevant findings of fact.

36. Standard Life has pleaded that there is no benefit that would give rise to any credit. On a strike out application, the court must proceed on the basis that the facts pleaded, including this assertion, are true. If, on the facts, no benefit has been derived from the development that falls to be brought into account, it cannot be said that the claim is bound to fail.

37. None of the parties has set out in detail its case as to the competing valuations and costs relied on. Mr Lawrence has recognised that the court may well consider that this would be an appropriate case in which Standard Life should have an opportunity to amend its pleaded case. Indeed, the parties have agreed the timetable for such pleadings. Mr Selby has confirmed that Standard Life intends to produce particulars of loss that assert that no credit is required to be given in respect of the value of the development but that, if the court determines that such credit should be given in principle, it will set out its calculation showing the value of such credit, from which it asserts the losses will exceed or equal the SAAMCo cap as pleaded. The court considers that it is incumbent on Standard Life to plead its primary and alternative cases on recoverable loss so that the Defendants can respond and there is a clear agenda for the experts and for trial.

38. In all the circumstances, the Defendants have not established that Standard Life's pleaded case on recoverable loss has no real prospect of success.

Conclusion

39. For the reasons set out above, the application to strike out parts of the pleading or for summary judgment on those parts is dismissed.

40. The court will make the following orders:

i) By 4.00pm on 24 June 2022:

a) The Claimant shall file and serve its draft amended particulars of quantum on Part A.

b) The Claimant shall file and serve Amended Particulars of Claim on Part C.

ii) By 4.00pm on 1 July 2022 the Defendants shall notify whether they consent or object to the amendments, and the basis of any objections. If objection is taken, the Claimant shall apply for permission to amend by 4.00pm on 8 July 2022. If no objection is taken, the draft served on 24 June 2022 shall stand as the Amended Particulars of Claim on Part A and Part C without need for re-service.

iii) By 4.00pm on 5 August 2022:

a) The Part A Defendants shall file and serve amended defences in response to the amended particulars of quantum.

b) The Second Defendant shall file and serve an Amended Defence in Part C, if so advised.

iv) By 4.00pm on 30 September 2022 the Claimant shall file and serve its amended Reply on the Part A and Part C claims, if so advised.

41. The court will hear the parties on all consequential matters arising out of this judgment.

42. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any applications for permission to appeal, and any time limits are extended until such hearing or further order.