

Legal Briefing

Ted Lowery looks at an application to strike out a developer's claims for negligent advice as to estimated construction costs

Standard Life Assurance Limited v Gleeds (UK) and others [2022] EWHC 1310 (TCC)

Before Mrs Justice O'Farrell DBE

In the Technology and Construction Court

Judgment delivered 27 May 2022

The facts

During August 2008 Standard Life entered into a contract with Costain for the construction of a mixed residential and commercial development in Newbury. Standard Life appointed Gleeds as the quantity surveyor and cost consultant, Buro 4 Project Services Limited as the project manager and Shearer Property Associates Limited as development manager. The development was completed in July 2013 at a cost of £146m.

During 2019 and 2020 Standard Life commenced proceedings against Gleeds, Buro and Shearer alleging negligent advice as to the overall construction cost on grounds that Gleeds and Shearer had advised an estimated total cost of circa £85m and Buro had not demurred from this figure. Standard Life claimed that had it been properly advised of the construction risks and likely cost it would have abandoned the development. In its particulars of claim served in January 2020, Standard Life calculated its losses by reference to the position it would have been in had it not proceeded with the development: from its overall spend of £146m Standard Life deducted losses for which the defendants were not responsible, irrecoverable sums incurred prior to August 2008 and the expected proceeds from the sale of the land had it not been developed. Standard Life then capped its claim at just over £20m being the difference between the sum it said ought to have been advised as the overall construction cost - £105,872,515 - and the estimate of £85,731,000 actually advised in July 2008.

In their defences, Gleeds, Buro and Shearer challenged Standard Life's calculations including on grounds that Standard Life had failed to account for the benefit it had derived from the development and its continued beneficial ownership. In its replies, Standard Life contended that any benefit was collateral to the losses sustained in consequence of the negligent advice, that there was no legal basis for the defendants' arguments and that no such benefit had been obtained.

During February 2022, Buro applied for an order that the paragraphs within Standard Life's particulars of claim and replies setting out the calculations of loss should be struck out as disclosing no reasonable grounds for bringing a claim and/or as having no real prospect of success.

In response, Standard Life contended that the application was made too late, that there were disputed issues of fact that could only be considered at trial and that the application was academic in any event where it intended to amend its claims on quantum.

The issue

Should Standard Life's claims be struck out?

The decision

The judge summarised the principles applicable to a claim for striking out of a statement of case pursuant to CPR 3.4(2) on a summary basis in line with CPR 24.2. These principles included assessing whether the claimant had a realistic – that is, carrying some degree of conviction – as opposed to a fanciful prospect of success, that the court must not conduct a mini trial, must take into account evidence that can reasonably be expected to be available at trial and, in the context of a strike-out application, is entitled to assume that the pleaded facts supporting the claim are true.

The authorities relied upon by Buro in support of its position that any benefit had to be taken into account concerned negligent valuations and the judge noted that with a claim for negligent cost estimates, different factors might apply that would need to be considered at trial. The judge further observed that any assessment of damages in the context of a negligent advice case would be highly fact sensitive and therefore that the court should be cautious about reaching a conclusion on a claim for losses in the absence of expert evidence on competing valuations of costs and benefits and other relevant findings of fact.

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The judge noted that Standard Life's pleaded case was that it had not derived any benefit from the development sufficient to give rise to any credit against its claims. Thus where in a strike-out application the court must proceed on the basis that the pleaded facts are correct, then if here the court could assume that no benefit had been obtained by Standard Life, it could not be said that the claims were bound to fail.

The judge therefore concluded that Buro had not established that Standard Life's claims had no real prospect of success.

Commentary

Following on from *Avantage Cheshire v GB Building*, this is another case in which a defendant's attempted knockout blow has not succeeded: here, Standard Life's case and calculations were not so doubtful as to justify the dismissal of the claims without consideration of the issues and evidence at trial.

Ted Lowery
July 2022