Russell McVeagh

Breaking Ground

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Case Law Update

England and Wales

Building Design Partnership Ltd v Standard Life Assurance Ltd [2021] EWCA Civ 1793 (CA)

Construction disputes which make it to formal determination often arise from the combined effect of a number of smaller issues. For example, claims arising from numerous improperly permitted variations, or hundreds of small defects, and so on.

It is this type of dispute with which the Court of Appeal of England and Wales was confronted in *Building Design Partnership Ltd v Standard Life Assurance Ltd*.[1] More specifically, this case addressed whether a principal claiming damages for a significant number of erroneously permitted variations could investigate only a small number of those variations, and then plead its entire case on the basis of that sample.

Facts

- Standard Life Assurance (SLA), the developer, engaged Costain Ltd to carry out construction works on a mixed retail and residential development in Berkshire (Project). Building Design Partnership Ltd (BDP) led the design team, and were also the contract administrators (fulfilling a similar function to an engineer to the contract under NZS 3910).
- The original contract price was around £77m, but the final account was around twice that at £146m. The significant increase in project price resulted from thousands of variations, and the costs associated with the delay and disruption caused by those variations. SLA claimed that BDP had been negligent in authorising variations which were unjustified and avoidable.
- SLA investigated a sample of 167 variations to the Project. Of this sample, they found that 122 (around 83%) related to breaches of the design team who had provided late, inaccurate and uncoordinated information. SLA claimed BDL was specifically responsible for 81.7% of these avoidable design variations. SLA said that this "breach percentage" could also be applied to the remaining 3,437 "uninvestigated" variations. This brought the total pleaded claim against BDL to £27.3m, around £24m more than the quantum actually investigated through sampling.
- In relying on this method, SLA argued that it would be disproportionate (and unrealistic) to analyse the remainder of the variations in the same detail when they arose from the same fundamental failures of the contract administrators.

Outcome

The judge, and then Court of Appeal, considered that it was appropriate and open to SLA to plead the claim on an extrapolated basis because the variations actually assessed were "part of the system operated by BDP across the whole project".[2]

Some of the underlying themes in the investigated claim, including BDP's failure to coordinate the design information and failure to keep proper records, "plainly cut across all aspects of the project".[3] BDP had the same team working across this project, dealing with all aspects of the design.

There was therefore an arguable basis for extrapolation. In addition, it would be impractical and disproportionate for SLA to plead the entirety of the pool of variations in the same detail, as this would cost "as much, if not more, than the sums at stake in the action itself".[4]

Footnotes

1. *Building Design Partnership Ltd v Standard Life Assurance Ltd* [2021] EWCA Civ 1793 (CA).
2. At [66].
3. At [66].
4. At [60].

The New Zealand context

While this was an English case, there are two key points of relevance to New Zealand.

First is simply the reinforcement of the possibility of proving (or even pleading) a case based on sampling.

- A sampling approach can be a cost-efficient and effective way to plead a claim where there has been a multitude of defaults arising from the same failures across a single project.
- However, extrapolated claims can be difficult to establish, and will fail if the court has insufficient confidence in the sampling methods used, or if the court cannot be satisfied that the samples are truly representative of the defects alleged. Two cases cited in the judgment which had pleaded extrapolated claims, failed.[5]

Second, in this case, the contract administrator was pursued due to allegedly having allowed the contractor to claim variations when it shouldn't have. It therefore serves as a reminder that the engineer, given their role under NZS 3910, may also become a target for legal action if a project goes awry.

Liability of engineers

While engineers are not usually parties to the construction contract itself, the engineer will generally have a separate contractual arrangement with the principal. Where a principal wishes to bring a claim against the engineer, it will accordingly most often be via that contract (as was the case in *Building Design Partnership*).

For the contractor, the position is different. A contractor will not usually have a direct contractual relationship with the engineer. In addition, courts have historically been unwilling to recognise a duty of care between engineer and contractor, meaning that a contractor may struggle to bring a claim against the engineer in negligence.[6]

In *Pacific Associates v Baxter*, which remains the leading authority in this area, the court noted that the contractor could instead pursue the employer (principal) to recover any sums relating to the erroneous actions of the engineer.[7] This will usually provide an adequate remedy to the contractor. Under NZS 39 forms of contract, the arbitrator is given express power to "open up, review, and revise" any decision or valuation of the engineer.

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Footnotes

5. *Amey LG Ltd v Cumbria County Council* [2016] EWHC 2856 (TCC); *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (No. 2)* [2017] EWHC 1763 (TCC).
6. *Pacific Associates v Baxter* [1990] 1 QB 993 (CA). However, the door (at least arguably) does remain open to a court finding that an engineer owes a duty of care to a contractor if the contractor is able to show particular circumstances evidencing that the engineer had assumed direct responsibility for them.
7. *Pacific Associates v Baxter* [1990] 1 QB 993 (CA) at 1029.

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