DUTY OF CARE IN CONTRACTUAL CHAINS: HAVE WE REACHED A CONSENSUS?

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Introduction

1. Imagine a scenario where an employer client has come asking for advice on who to sue following a catastrophic fire that led to a total loss of a newly constructed care home it operates. The fire investigation suggests the fire should not have spread so far or so fast as it did. There are signs that the fire separation was not adequate. At first it may seem that you are spoilt for choice: there was an employer's agent, an architect, a contractor, a sub-contractor and even a fire engineering consultant. You could issue a straightforward, multi-party breach of contract claim for failure to exercise reasonable skill and care in design (architect, fire engineering consultant or sub-contractor) or in supervision (employer's agent or contractor), and for faulty workmanship or defective materials (contractor or sub-contractor).

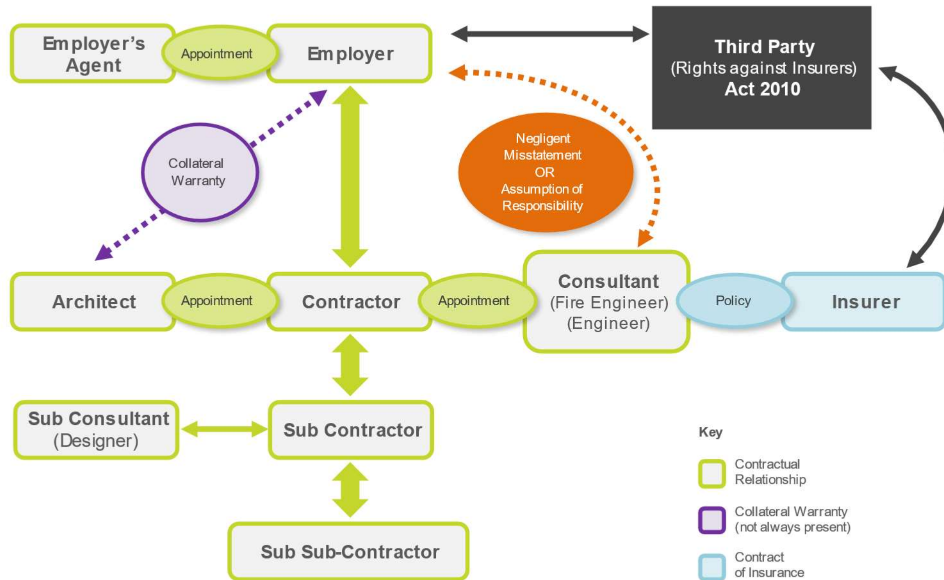
2. This rosy picture changes rapidly once we receive the documents from the client. It is discovered that:

   - The contractor is in administration.
   - The architect was engaged by the contractor and not by the employer client directly and there is no contractual relationship via a collateral warranty.
   - The fire engineer had also been engaged by the contractor, and their advice included a disclaimer against third party liability.
   - No collateral warranties appear to have been given.
   - The terms had not been agreed with the employer's agent, so it looked like there was no contract.

3. How can it be right that a valuable newly built commercial property has gone up in smoke, and there is no one to sue?

4. Imagine you are acting for the insurer of the architect in the scenario above. Is it right that the architect's insurer should be liable when there was no contractual relationship between the architect and the employer, and the reason why the employer is going after the architect was because the middleman – the contractor – is in administration (and perhaps not insured)?

General Scheme of Relationships



Two recent cases

5. In *Avantage (Cheshire) Ltd v GB Building Solutions Ltd (in Administration)*,[1] Mrs Justice Joanna Smith considered and dismissed an application for summary judgment brought by the fire engineer (WSP) against the claimant operators of a care home that had burned down, who asserted that the fire engineer engaged by the main contractor also owed them a duty of care based on an assumption of responsibility.

6. In *Multiplex v Bathgate*[2] where the contractual matrix resembled the scenario in the second paragraph above, Mr Justice Fraser presided over a trial of preliminary issues encompassing what he referred to as 'classic duty of care issues arising on a complex construction project'.[3] It might appear surprising that in construction, the industry that has made an art form of codifying obligations into set pieces of written contract, there can still arise duty of care issues with such frequency and regularity on complex construction projects that they can rightly be described as 'classic'. Such cases have been referred to as encompassing factual situations which are 'akin to contract'. A blunter but perhaps more accurate description is cases which are 'contractually challenged' – or at its most basic – cases where the claimants have no route (or the route has been blocked) via a contract, and a tortious claim is their only choice.

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[1] *Avantage (Cheshire) Ltd v GB Building Solutions Ltd (In Administration)* [2022] EWHC 171 (TCC).

[2] *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd (formerly known as Dunne Building and Civil Engineering Ltd* [2021] EWHC 590 (TCC), 195 Con LR 1, [2021] BLR 391, [2021] PNLR 19.

[3] *Multiplex v Bathgate*, note 2, para [12].

7. Why is this a perennial issue? Where contractual chains abound, why should anyone end up with no choice but to seek to run a claim in tort? As seen above, limitation, liquidation[4] and no insurance are the principal reasons.[5] A later accrual of the cause of action on the 'date of damage',[6] or a postponed start date based on a later 'date of knowledge'[7] are both commonly the catalyst for the claim in tort. Insolvency or no insurance may turn a worthwhile target defendant to one made of straw.

8. What we plan to do in this paper is provide a short refresher on the law which underpins these decisions – namely what are the restrictions and requirements for a successful claim in tort in the construction context? – bearing in mind that usually in these sorts of claims the route of choice in contract is barred for one reason or another. We will then consider lessons learned and touch upon what the future might hold for such claims.

Duty of care and contractual chains

9. The essential problem is that tortious claims are inimical to commercial certainty. Parties to a contract agree to assume responsibilities towards each other. They take care, generally, to specify the kinds of responsibilities they owe to each other. By contrast, a tortious duty is imposed by the law as a result of the relationship the parties have with one another.

10. In a perfect legal world, the intrusion and imposition of a tortious duty of care would be contraindicated where parties go to the trouble of setting out their duties and responsibilities in the form of codified, express obligations set out in a web of detailed contractual arrangements, which are then also combined with clear disclaimers to acceptance of any responsibility or liability to third parties. That is how those parties have expressed their choices, and how they have elected to accept or share out risk. However, as stated above, the numerous factual scenarios that arise, unpredictably, mean there remains scope for a tortious claim to arise in this land of contract.

What principles are in play?

11. **The incremental approach.** The well-known 'three stage test' from *Caparo Industries v Dickman*,[8] which had been adopted as applying to all claims in the modern law of negligence, was a mistaken understanding of

[4] Or any form of insolvency.

[5] There are other reasons: the test for remoteness for claims in tort is generally thought to be less restrictive than in contract, leading to a wider recovery. NB: In *Wellesley Partners LLP v Withers LLP* [2016] Ch 529, the Court of Appeal held in a case where there was a claim in both tort and contract, the foreseeability test was held to be the stricter, contractual one (though ultimately the head of loss claimed was also found to be recoverable applying the contractual remoteness test; a contractual bar to assignment of a contract could be overcome by an assignment of a cause of action in tort; via section 3 of the Latent Damage Act 1986 a claim in negligence will found a new cause of action in each successive owner.

[6] Section 2 of the Limitation Act 1980.

[7] Section 14A of the Limitation Act 1980.

[8] *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568.

the whole point of that case. The statement of Lord Bridge had been intended to repudiate the idea that a single test could be applied to all cases – and ironically led to precisely the opposite. This was pointed out by Lord Toulson in *Michael v Chief Constable of South Wales Police*.[9] Since that time (though earlier cases had also provided support) the approach to be adopted is one of developing the law incrementally, by analogy with established authorities, as their lordships in *Caparo* noted[10] and recognised when they praised the words of Brennan J in *Sutherland Shire Council v Heyman*:[11]

> 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed."'

12. The application of this approach, in practical terms, means asking two questions:

    (1) Has the existence or non-existence of a duty of care on the facts of the instant case been established by reference to existing case law? If so that case law is to be followed.

    (2) If not, (i.e. a novel application) should a duty of care be recognised? Only if there is a novel application will the three stage test be applied.[12]

13. **Exclusionary rule for recovery of pure economic loss.** The starting point is that, generally, defendants are not liable in tort for 'pure economic loss'. 'Pure economic loss' denotes financial loss suffered by a claimant which does not arise from physical damage or loss to his property.

14. Whilst this proposition sounds simple at first, in practice it can become difficult quite quickly. If negligently installed cladding leads to a fire which causes damage to the surrounding buildings, then the financial consequences of the damage to those buildings are recoverable. However,

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9 *Michael v Chief Constable of South Wales Police* [2015] AC 1732, [2015] 2 All ER 635, [2015] 2 WLR 343 para [106].

10 *Caparo v Dickman*, note 8, page 746 (Lord Bridge):
> 'I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43–44.'

11 *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 pages 43–44.

12 In *Meadows v Khan* [2021] UKSC 21, [2021] 3 WLR 147 at para [66] (Lord Hodge & Lord Sales, with whom Lord Reed, Lord Kitchin and Lady Black agreed):
> 'Finally, Yip J asked herself whether it is fair, just and reasonable to impose liability in negligence for the totality of Adejuwon's disabilities. But, as Nicola Davies LJ stated, this case does not concern a novel application of the law of negligence in which it is necessary for the court to address that question because established principles provide an answer: *Robinson* [2018] AC 736, para 27, per Lord Reed.'

if the defective installation is discovered and fixed by the owner, so that no physical damage results, he cannot recover that cost from the guilty party in negligence. Nor can he recover his losses occasioned by not being able to let the property to tenants while the cladding is being rectified.

15. This conundrum arises because the duty of care that a defendant owed to a claimant must be consistent with the responsibility that defendant assumed towards that claimant. There is no presumed general duty to avoid causing economic loss to one another and it must be shown that such a duty was assumed.

16. What is the reason for this different treatment? Public policy is the short answer. Perhaps more helpful an answer is to explain that it is a policy that is intended to prevent a flood of indeterminate claims. In real life, if there is an incident and as a result physical damage or loss is caused, then the prospective claimant and the prospective defendant(s)' relationships are likely to be proximate, have recognisable limits and also be fairly limited in terms of numbers of parties.

17. The opposite applies to claims for financial loss. Usually in construction cases, rights and liabilities are protected by a contractual chain. For that reason, courts generally consider that a duty of care to avoid causing pure economic loss is inconsistent with the contractual matrix as other remedies are available. For example, a sub-contractor is not presumed to have assumed a duty of care to the employer because the sub-contractor would be liable to the main contractor (via the subcontract) if the main contractor has to compensate the employer (via the main contract) for faults in the sub-contractor's works.

18. However, as can be seen from the factual scenarios above, by the time the financial loss occurs (or is recognised) there is not always a contractual remedy left to pursue; or the contractual remedy may be inadequate due to limitation, insolvency or no insurance. In those cases, the general exclusionary rule against financial loss has to be circumvented in order to bring a claim for pure economic loss in tort.

19. The two main routes for doing this are:[13]

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[13] Another route that has been considered, but has now been rejected and doubted as having any role to play is the so-called 'complex structures theory', derived from Lord Bridge's speech in *D&F Estates v Church Commissioners* [1989] AC 177 (HL) where he was considering a defect in a garden wall that was detected and cured before it causes damage, meant the loss sustained is purely economic, and not physical damage, and accordingly not recoverable in tort:

> 'However, I can see that it may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to 'other property,' and whether the argument should prevail may depend on the circumstances of the case. It would be unwise and it is unnecessary for the purpose of deciding the present appeal to attempt to offer authoritative solutions to these difficult problems in the abstract.'

19.1. **Assumption of responsibility:** showing that there was a special relationship between the two parties such that either the defendant assumed a responsibility towards the claimant not to cause them economic loss ('assumption of responsibility'), or that there is a relationship between the two that is 'almost as close as a commercial relationship as is possible to envisage short of privity'[14] ('akin to contract') or that the adviser has '"taken on responsibility" for a particular task having a particular purpose'[15];

19.2. **Negligent mis-statement:** Showing that there was negligent mis-statement by the defendant where the defendant owed a duty of care to the claimant.[16] That is to say, the adviser carelessly gave false advice in circumstances where the adviser knew the advice would be relied on by a specific person and that an inaccuracy in the statement would cause that person loss, and the advisee relied on the statement and suffered loss as a result.

20. **Physical damage to property.** However, the *Hedley Byrne*[17] analysis does not displace the common law 'neighbour' principle that a duty of care will be owed to those who may (or whose property may) foreseeably be injured by a lack of care:

> 'In my judgment, there is nothing in *Hedley Byrne* to affect the common law principle that a duty of care which arises from a risk of direct injury to person or property is owed only to those whose person or property may foreseeably be injured by a failure to take care. If the plaintiff can show that the duty was owed to him, he can recover both direct and consequential loss which is reasonably foreseeable, and for myself I see no reason for saying that proof of direct loss is an essential part of his claim. He must, however, show that he was within the scope of the defendant's duty to take care.'[18]

21. Damage to property owned[19] other than the same property as the professional or contractor was engaged to design or build usually gives

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14 *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 (HL), [1982] 3 WLR 477.

15 *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2021] 3 WLR 81 para [16].

16 *Henderson v Merrett Syndicates Ltd (No.1)* [1995] 2 AC 145, [1994] 3 All ER 506; *White v Jones* [1995] 2 AC 207, [1995] 2 WLR 187.

17 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

18 Roskill J at pages 251–252 in *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 QB 219.

19 For a claim in tort the claimant must have either legal ownership or possessory title to the property damaged, at the time of the damage – equitable ownership, or contractual rights in relation to the property are not sufficient, even if they are adversely affected: *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 (HL). However, a beneficial owner of property (not in possession) can recover, subject to the rules of remoteness and damage, for all the loss which it had suffered by joining the legal owner (who was a bare trustee of the title) to the proceedings in respect of damage to property: *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86 (CA) para [142].

rise to a duty of care – without requiring an 'assumption of responsibility'.[20]

22. Generally cases involving physical damage are treated differently, to the point where loss which is consequential to, or flows from, damage to property (even if it is financial loss such as expenditure or loss of profits) may be recovered.[21] Whilst economic loss consequential upon physical damage is generally recoverable in a tortious claim, it may be excluded by the circumstances in which the duties were undertaken, such as where a contractual scheme expressly excludes or limits such consequential loss.[22]

23. **Collateral duty of care.** Professionals' owing a duty of care collateral to contract is well settled law – the mere existence of the contract is sufficient (though the scope of the two duties is not necessarily coextensive):

> 'An architect normally owes a contractual duty to his client and a parallel duty in tort – see *Henderson v Merrett Syndicates* [1995] 2 AC 145 at 194. The parallel duty in tort may be coextensive with the contractual duty. The significance of the distinction between the duty in tort and the duty in contract usually relates to questions of limitation. The scope of the duty depends on the express and implied terms of the architect's contract of engagement. Those terms may be affected by the extent to which others – e.g. engineers, contractors, specialist sub-contractors – are also engaged to do things in relation to the building, the scope of their responsibilities and their interrelationship with the architect.
>
> In the absence of a statutory duty or of assignment, collateral warranty or other contractual relationship, the duty owed by an architect to a subsequent owner or occupier has to be a duty in tort. Its existence and its scope depend on the extent to which the architect is taken to have assumed responsibility to the subsequent owner or occupier. The scope of any such duty cannot normally be larger than the architect's contractual and tortuous duty to his client.

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20 See Ramsey J at para [171] in *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWHC 6 (TCC), 118 Con LR 104, [2008] BLR 155.

21 *Shell UK v Total UK*, note 19, where a duty of care was held to be owed (to a beneficial owner of property just as much as to a legal owner of property) by a defendant who could reasonably foresee that its negligent actions would damage that property. If, therefore, such property was, in breach of duty, damaged by the defendant, that defendant would be liable not merely for the physical loss of that property but also for the foreseeable consequences of that loss, such as the extra expenditure to which the beneficial owner was put or the loss of profit which he incurred.

22 In *Biffa Waste Services v Maschinenfabrik Ernst Hese*, note 20, Ramsey J decided that the contractual terms between the second claimant and the defendant sub-contractor expressly limited the duty of care owed by the sub-contractor engaged to design and build a recycling plant, to prevent consequential loss in respect of physical damage by fire to the plant. At para [208]:

> 'Those parties have so structured their relationship that it would, in my judgment, be inconsistent to impose unlimited liability. In particular, I do not consider that a duty of care should be permitted to circumvent or escape the contractual limitation of liability for the acts and omissions that also constitute the tort.'

Forbes J was correct so to hold in the present case – see his paragraph 58. So much does not appear to have been in dispute. It is, however, important to emphasise that, although the scope of the duty cannot normally be larger than the scope of the architect's duty to his client, the two duties are not necessarily coextensive.'[23]

24. **No collateral duty of care.** Quite the opposite is the case for building contractors – no tortious liability arises simply by reason of the construction contract.[24]

> 'When one moves beyond the realm of professional retainers, it by no means follows that every contracting party assumes responsibilities (in the *Hedley Byrne* sense) to the other parties co-extensive with the contractual obligations. Such an analysis would be nonsensical. Contractual and tortious duties have different origins and different functions. Contractual obligations spring from the consent of the parties and the common law principle that contracts should be enforced. Tortious duties are imposed by law, as a matter of policy, in specific situations. Sometimes a particular set of facts may give rise to identical contractual and tortious duties, but self-evidently that is not always the case.'[25]

25. For a building contractor to owe a duty of care there must be something more, namely an assumption of responsibility.[26]

26. Predictably, with two such completely opposed positions, where there is an overlap of responsibility and, to some extent, overlapping areas of expertise (fire compartmentation design being a key example), problems arise where professionals interact with those (like contractors) who are acting solely under commercial contracts, or where a party (such as an employer or operator) does not have a direct contractual appointment (or collateral warranty) with the professional.

27. In such situations, where multiple parties are involved in one construction project, how do you define the scope of each party's responsibility? Which approach should prevail? Why should some have an advantageous position? Particularly where the contract (design & build) imposes express contractual duties on the contractor which are *literally* expressly stated to be the same as if the designer was a professional. These are highly fact dependent matters:

> 'The extent of an architect's responsibility for the detailed working out of construction details for which he has provided an underlying design again depends on the express and implied terms of his engagement and its interrelation with the responsibility of others. The scope of any such responsibility depends on the facts of each

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23 May LJ at paras [73] to [74] in *Bellefield Computer Services v E Turner & Sons Ltd* [2002] EWCA Civ 1823.

24 *D&F Estates v Church Commissioners for England*: note 13.

25 Jackson LJ at para [76] of *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2012] QB 44.

26 *Robinson v PE Jones (Contractors)*: note 25.

case. There is a blurred borderline between architectural design and the construction details needed to put it into effect. Borderlines of responsibility cannot be defined in the abstract. A carpenter's choice of a particular nail or screw is in a sense a design choice, yet very often the choice is left to the carpenter and the responsibility for making it merges with the carpenter's workmanship obligations. In many circumstance, the scope of an architect's responsibility extends to providing drawings or specifications which give full construction details. But responsibility for some such details may rest with other consultants, eg structural engineers, or with specialist contractors or subcontractors, depending on the terms of their respective contracts and their interrelationship. As with the carpenter choosing an appropriate nail, specialist details may be left to specialist subcontractors who sometimes make detailed 'design' decisions without expecting or needing drawings or specifications telling them what to do. In appropriate circumstances, this would not amount to delegation by the architect of part of his own responsibility. Rather that element of composite design responsibility did not rest with him in the first place.'[27]

A practical approach to a claim for economic loss

28. **Existence of the contractual chain.** The contractual chain is the starting point (and not the end point) of the court's duty of care analysis. Whilst the existence of a complex multi-party contractual arrangement involving non-professionals is not exactly promising territory, it cannot and does not, on its own, provide the answer as to whether a duty of care in tort is owed. That is a matter to be considered separately, and determined on the facts:

> 'There cannot be a general proposition that, just because a chain exists, no responsibility for advice is ever assumed to a non-contractual party. It all depends on the facts.'[28]
>
> 'Although the existence of a contract is not entirely determinative, it is a highly relevant feature. In my judgment, the closer the situation under scrutiny is to a more conventional or habitual business-like relationship governed by contractual terms agreed by the parties, the less likely the law will be to answer the questions concerning assumption of responsibility and fairness, justice and reasonableness, in favour of a claimant such as Multiplex who has no contractual relationship with RNP'.[29]

29. **Looking for physical damage.** As the principles above indicate, if there is any way to make good a claim to ownership of property that has been

[27] *Bellefield Computer Services v E Turner & Sons*, note 23, para [76] (May LJ).

[28] *Riyad Bank v Ahli United Bank (UK) Plc* [2006] EWCA Civ 780, [2007] PNLR 1 para [32] (Longmore LJ).

[29] *Multiplex v Bathgate*, note 2, para [164] (Fraser J).

damaged (besides the building itself), then financial loss can be considered to be 'consequential' upon that damage, and recoverable.

30. **Mis-statements and communications that cross the line.** The next stage is to consider the case law relating to duty of care in cases of economic loss: see Akenhead J's analysis of authorities and summary of the principles in *Galliford Try Infrastructure Ltd v Mott Macdonald*:[30]

> '(a) There are in effect two types or manifestations of duties of care which may arise in relation to economic loss, firstly, out of a negligent mis-statement or misrepresentation and, secondly, where there is a relationship akin to contract or the non- contractual provision of services. There is no simple formula or common denominator to determine whether a duty of care, in relation at least to economic loss cases, arises or not.
>
> (b) The courts have traditionally observed some caution and conservatism in economic loss cases. Attempts to open the floodgates, such as in *Anns v Merton LBC*, have ultimately been rejected. An incremental approach is favoured.
>
> (c) It is always necessary to consider the circumstances and context, commercial, contractual and factual, including the contractual structure, in which the interrelationship between the parties to and by whom tortious duties are said to be owed arises. Thus, it is not every careless mis-statement which is actionable or gives rise to a duty of care. Foreseeability of loss is not enough.
>
> (d) It is necessary for the party seeking to establish a duty of care to establish that the duty relates to the kind of loss which it has suffered. One must determine the scope of any duty of care.
>
> (e) In considering the first type of duty of care, it is relevant to determine if the statement giver is being asked to give and is giving advice to the recipient. It is then necessary to establish that the statement giver is fully aware of the nature of the particular transaction which the recipient has in contemplation and that its statement would be relied upon by the recipient and, finally, that the recipient has to rely upon the statement in entering into the transaction in question.
>
> (f) In considering the second type of duty of care, it is material to consider whether the relationship between the parties is akin to contract or whether the party alleged to owe the duty was asked by the person to whom the duty is said to be owed to provide services to or for the benefit of that person. Reliance is important also in this type of negligence to link the damage suffered to the breach of duty.
>
> (g) Although the voluntary assumption of responsibility test is not mandatory, it is a useful guide in determining if a duty of care of

[30] *Galliford Try Infrastructure Ltd v Mott Macdonald* [2008] EWHC 1570 (TCC) para [190] (Akenhead J); also *RSK Environment Ltd v Hexagon Housing Ltd* [2020] EWHC 2049 paras [31]–[47] (O'Farrell J) and *Multiplex v Bathgate*, note 2, paras [116]–[166] (Fraser J).

either sort arises. It is an objective test. The threefold test (of reasonable foreseeability of the economic loss, proximity and fairness, justice and reasonableness) provides no simple answer where, in a new situation, a duty of care is said to arise. These tests are all helpful but are not always determinative.

(h) So far as disclaimers are concerned, they are simply one factor, albeit possibly an important one, in determining whether a duty of care arises. One cannot, usually, voluntarily undertake a responsibility when one tells all concerned that one is not accepting such responsibility.

(i) The context of and the circumstances in which statements are made by one party to another need to be considered to determine not only if there is a duty but also the scope of any duty. The facts that a statement is made by A to B, that A knows that B will rely upon it and that B does rely upon it are not or at least not always enough to found a duty of care.'[31]

Multiplex v Bathgate – overview

31. This case arose out of the large and prestigious construction project at 100 Bishopsgate. This City of London project involved a two-acre site, with a 40-storey tower (Building 1) and two connected six-storey buildings. Multiplex was the main contractor for the project under a design & build contract. Bathgate, previously known as Dunne, was the specialist sub-contractor for the design & construction of the concrete package of works for Building 1, which comprised both substructure and superstructure works, including a concrete core, constructed level by level using a temporary works piece of equipment called 'a slipform rig'.[32] BRM was the specialist designer/engineering consultancy appointed by Dunne to design the slipform rig. RNP was an independent design checker, engaged by Dunne to carry out a 'Category 3 check', which resulted in RNP providing to Dunne two Category 3 Design Check Certificates.[33]

32. The decision concerns the trial of preliminary issues relating to the legal obligations owed by RNP to Multiplex. Multiplex was claiming over £12 million in losses.[34] Two issues arose for determination:

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31 *Galliford Try Infrastructure v Mott MacDonald*, note 30, para [190] (Akenhead J); cited by Fraser J at para [155] in *Multiplex v Bathgate*: note 2.

32 The slipform rig is essentially a piece of equipment that is continuously moving formwork, used where concrete works (such as the concrete central core of Building 1 which contained all the services, lifts and staircases) are cast and constructed incrementally allowing the concrete at a particular level to be poured and to start setting or curing. As the concrete is cast, and sets the slipform rig moves gradually up the height of the building at a rate which allows the concrete to harden sufficiently, whilst the slipform rig moves on to permit the casting of the concrete core to be continuous.

33 In fact, the first of the two certificates was not provided to Multiplex in the form it was produced by RNP – Dunne had changed the certificate, deleting certain parts of it, without either Multiplex or RNP being aware.

34 Losses included remedial works.

(1) Did RNP owe any duties or obligations to Multiplex in respect of the Category 3 Design Check Certificates?

(2) Did RNP provide warranties to Multiplex?

33. What is a Category 3 check? Complex designs are referred to as Category 3 designs. Category 3 designs require an independent third party to check and approve its use.[35] The third party must be from a different organisation to the designer. The underlying rationale to ensure the integrity of the design of such works; it demonstrates that such design has been performed correctly; it ensures safety. A Category 3 check is the highest level of check and the only one which requires an independent organisation to carry it out. Category 3 checks were required under the relevant British Standard.

34. Both certificates contained the following wording:

> 'We certify that reasonable skill and care has been used in the preparation of this design/check to ensure that the calculations accord with the design brief, current industry practice and design codes.'[36]

35. It was not disputed that part of the purpose of such a design check is to ensure safety, in the course of works which are potentially dangerous.

36. The case pursued by *Multiplex* was shaped by the following events:[37]

36.1. Dunne went into liquidation.

36.2. This was an Event of Default under the Subcontract which Multiplex then terminated.

36.3. A replacement sub-contractor concluded both Dunne's works and slipform rig were defective.

36.4. To complete the works Multiplex replaced the slipform rig.

36.5. Losses of over £12 million (remedial works, delay, disruption, consequential losses).

36.6. BRM (the designer of the slipform rig) was not insured.

36.7. Judgment in default was entered against both Dunne and BRM.

36.8. Multiplex had no contractual connection with RNP, who checked BRM's design. But RNP was insured (by Argo), with Limit of Indemnity £5 million.

36.9. As RNP entered liquidation the claim was pursued against Argo under the Third Parties (Rights against Insurers) Act 2010.

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35 By contrast, Category 2 designs can be checked by someone other than the designer, within the same organisation.

36 *Multiplex v Bathgate*, note 2, para [34].

37 *Multiplex v Bathgate*, note 2, para [57].

37. Against that background, *Multiplex* sought to formulate its case as follows:

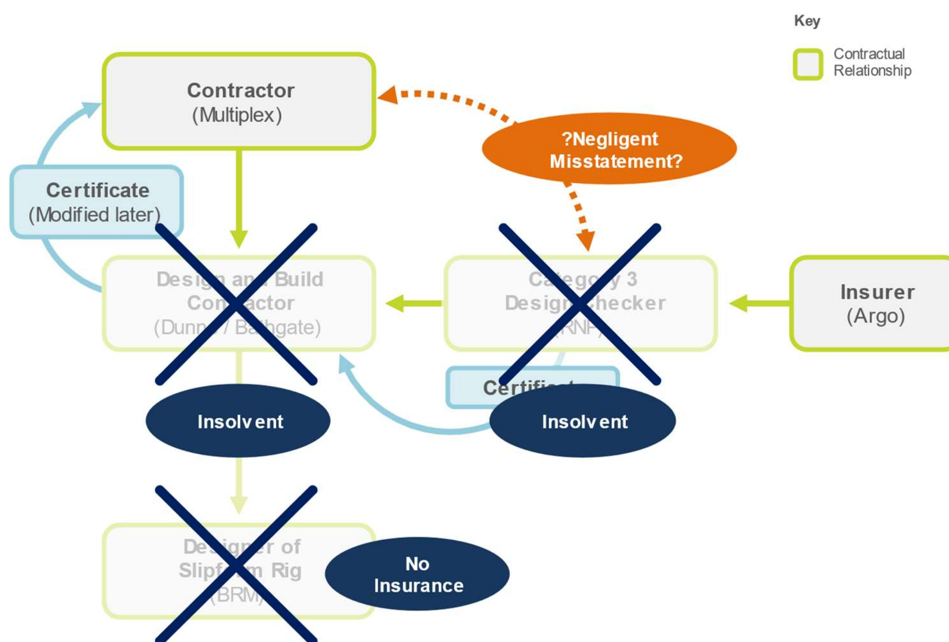
37.1. Dunne owed obligations to Multiplex in contract. One such obligation required an independent third-party check, which was also required by the relevant British Standard.

37.2. Multiplex argued that RNP had assumed a duty to Multiplex to exercise reasonable care and skill in considering the design, and that the certificates constituted a negligent mis-statement and/or contained warranties that reasonable skill had been used.

37.3. Multiplex asserted it was entitled to proceed directly against Argo as it claimed that the rights RNP had to be indemnified by Argo were transferred to Multiplex because RNP owed it duties of care and warranties (which it asserted had been breached).

37.4. The real issue was: did RNP owe a duty to hold Multiplex harmless from economic loss?

Multiplex v Bathgate



38. From paragraphs [116] to [166] of his judgment Mr Justice Fraser undertook a review of the authorities in this thorny area of law, which is distilled below:

38.1. The existence of a duty of care cannot be dealt with in the abstract. The finding of a duty of care is to be made with reference to whether RNP had a duty of care related to the kind of loss suffered,

i.e. economic loss as a result of under-performance/failure of the rig.[38]

38.2. There are three different tests for the finding of a duty of care, and three different routes of analysis though these may not lead to substantially different results, or may only do so in the rarest of cases: the assumption of responsibility test, the three-part test and the incremental test.

38.3. *Hedley Byrne*[39] is distinguished as a basis for the duty contended for. Unlike the company's bankers when asked for a reference, who had three choices (silent, decline, answer), RNP had no 'choice'.

38.4. Generally there is no assumption of responsibility where the parties have consciously so structured their relationships (in contract), that to find such an assumption would be inconsistent with those arrangements. Would it be inconsistent to find RNP liable, given that it would be 'short circuiting the contractual structure so put in place by the parties'? Is the contractual structure, 'so strong, so complex'?[40]

38.5. Exchanges were viewed objectively: do any statements cross the line (RNP/Multiplex)? Are the certificates such statements? Or simply provided to Dunne to show design had been checked.[41]

38.6. Is the safety aspect of the Category 3 check a determinative factor? A classification society did not owe a duty of care to cargo owners for the statements made by its surveyor regarding the seaworthiness of a vessel.[42]

38.7. What if RNP knew the identity of Multiplex? This is not relevant as the assumption of responsibility is an objective test.

38.8. The assumption of responsibility is a sufficient condition of liability – if that test is passed, then no further enquiry is needed. If it is not passed, then further enquiry must be made. Look at the detailed circumstances and the particular relationship as a whole:

> '[T]he tests used in considering whether a defendant sued as causing pure economic loss owed a duty of care disclosed no single common denominator by which liability could be determined.'[43]

38.9. There is no place for tort in a purely commercial context, where parties have consciously and voluntarily arranged their affairs;

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38 Akenhead J in *Galliford Try Infrastructure v Mott MacDonald*: note 30; Lord Hoffmann in *SAAMCO* [1997] AC 191 and *Caparo Industries v Dickman*: note 8.

39 *Hedley Byrne*: note 17.

40 *Henderson v Merrett Syndicates Ltd*: note 16; *White v Jones*: note 16.

41 *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830.

42 *Marc Rich & Co AG v Bishop Rock Marine Co Ltd ('The Nicholas H')* [1996] 1 AC 211.

43 *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28.

tortious duty should not be invoked where there is no 'liability gap'. A 'gap' is not essential, but relevant to consider.[44]

38.10. The context of and circumstances in which statements are made need to be considered to determine if there is a duty and, if so, its scope.[45]

38.11. Knowledge of and consent to advice being passed on to a known third party, who will rely on it for a specific purpose, may be sufficient to demonstrate sufficient foreseeability and proximity, and that the context may also show that it is fair, just and reasonable in such circumstances to impose a duty of care owed by the defendant to that third party. This is more likely for a third-party consumer.[46]

38.12. Reliance: Multiplex did not allow the certificate issue to 'operate on its mind' in such a way that the economic loss was suffered by it on account of that reliance. RNP did not assume responsibility to Multiplex for the statements in the Category 3 check certificates. Christopher Clarke LJ in *Hunt v Optima (Cambridge) Ltd* stated that:

> 'In order to recover in the tort of negligent misstatement the claimant must show that he relied on the statement in question: *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113,126. It must operate upon his mind in such a way that he suffers loss on account of his reliance e.g. by buying at too high, or selling at too low, a price, or making an agreement or doing something which he would not otherwise have made or done.'[47]

39. The salient points found by Mr Justice Fraser were as follows:

39.1. The certificate RNP provided (including the statements therein that the Category 3 check had been performed using reasonable skill and care) was provided to Dunne and not Multiplex. It was provided so that Dunne could meet the CDM Regulations and its own contractual obligations to Multiplex. It was important, even if it wasn't decisive, that there was no direct exchange between RNP and Multiplex, no communication 'crossing the line'.[48] RNP was not asked to give, and did not give, advice to Multiplex at all.[49] For the claim to succeed, RNP would need to have assumed responsibility to Multiplex, or for the certificate's use by Multiplex for particular purposes.

39.2. In a non-consumer context, where the claimant was a main contractor with detailed contracts governing its relationship with others, it was unlikely that the defendant's knowledge of and

44 *Riyad Bank v Ahli United Bank UK plc* [2006] EWCA Civ 780.

45 *Galliford Try Infrastructure v Mott MacDonald*: note 30

46 *Arrowhead Capital Finance Ltd (In Liquidation) v KPMG LLP* [2012] PNLR 30.

47 *Hunt v Optima (Cambridge Ltd)* [2014] EWCA Civ 714 para [54].

48 *Multiplex v Bathgate*, note 2, para [138].

49 *Multiplex v Bathgate*, note 2, para [155].

consent to the passing of their advice to a third party who would rely on it would be sufficient to find a duty of care.[50]

39.3. In fact, given the project's detailed and careful contractual structure, the direct placement of a duty of care on RNP to Multiplex would be inconsistent. RNP was only discharging its duty to Dunne who had full design responsibility. No liability gap results, as Multiplex would have had remedy against Dunne (but for its insolvency).[51]

> 'It can therefore be seen that, were Dunne and BRM still solvent and/or insured, the main thrust of Multiplex's case would be against them. Certainly, as a matter of law, Multiplex has a cause of action against Dunne for the same matters advanced against RNP (or its pleading proceeds as though it does). The case against RNP would be an add-on to that main case. **As it is, RNP (or more accurately, Argo, RNP's insurer) may be the only party from whom Multiplex might realistically expect any recovery**.' (emphasis added)
>
> 'It is correct that a party is free to proceed against any one of a number of other parties against whom it has a good claim. The reason this point is potentially important here is in respect of the matters that must be considered when considering assumption of responsibility and a potential duty of care. The phrase used in some of the authorities is '**gap filling**', by which is meant whether there is a gap in terms of a claimant's contractual relations, which the law of tort might fill. Here, the 'artificial claim' point is a more refined, and subsidiary, point which arises under consideration of any gaps. **It is not a strict requirement that there be a gap, but here, in my judgment, there is no gap.**' (emphasis added)

39.4. Public policy had a role to play. Imposing a duty of care on RNP would not be fair, just and reasonable, because it could lead to unlimited liability on a major construction project, of which RNP had only been provided with a limited set of design information to allow it to check the calculations for a modest fee. It would open the floodgates for Category 3 checkers.[52]

Avantage – overview

40. *Avantage* concerned a care home that had burned down while a roofing contractor was carrying out hot works. At first blush, the contractual matrix appears fairly standard: the first claimant, Avantage, was the employer who had engaged Gleeson as a design and built contractor. Gleeson in turn had appointed WSP as a fire engineering consultant, to

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50 *Multiplex v Bathgate*, note 2, paras [159], [164].

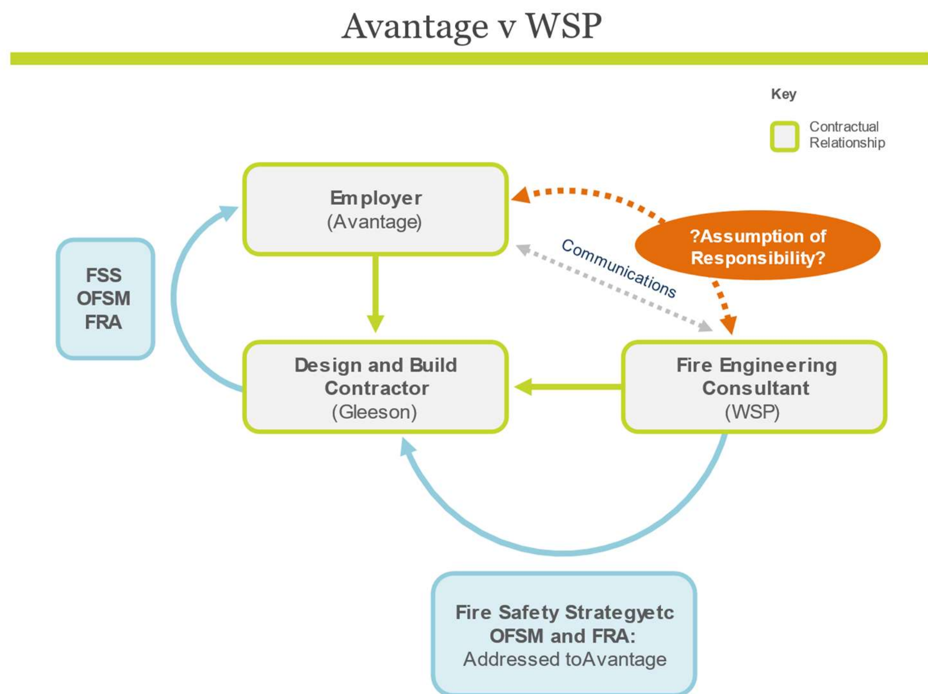
51 *Multiplex v Bathgate*, note 2, para [172].

52 *Multiplex v Bathgate*, note 2, paras [173]–[174], [179]–[181].

prepare a fire safety strategy ('FSS') for the project. Avantage did not have a direct contractual relationship with WSP.

41. The FSS stated that its purposes were to support a submission for building regulations approval in relation to the works, to detail the performance requirements for fire safety measures (to be used in the design of the facility) and to assist parties, including Avantage, with understanding of fire safety. It also contained a disclaimer that it was intended for the sole use of Gleeson and was not to be relied upon by any third party. At a later date, WSP had rendered further services, in the form of providing an Operational Fire Safety Management Report ('OFSM') and a Fire Risk Assessment ('FRA').

42. What was novel about this claim is that there was a private finance initiative ('PFI') agreement, and WSP knew that the employer had been engaged under a PFI arrangement. Furthermore, it was procedurally unusual: WSP had brought a summary judgment application against Avantage and the court was being asked to assess these issues without the benefit of disclosure.[53]



43. Mrs Justice Joanna Smith concluded that this was not an appropriate case for summary judgment:

   43.1. The number of potentially complex issues (which included some concerning disputes of fact) – meant this had 'all the hallmarks'[54]

[53] Contrast with *Multiplex* which was a trial of preliminary issues.

[54] *Avantage v WSP*, note 1, para [31].

of an attempt to persuade the court to conduct a mini-trial of the issues.

43.2. The existence of a PFI agreement was relevant background, since it meant there would be 'operators' who would rely upon WPS's recommendation and advice. It was at least arguable that the effect of this was that the claimants could rely on WSP's fire strategy scheme.

43.3. The circumstances were a 'conventional business-like relationship governed by contractual terms', but the context of WSP's knowledge and intention that operators (like the claimant) under a PFI arrangement, would rely upon their proper performance of their duties, with the other factual background features.[55]

43.4. The contractual structure, which was created at a particular time, may not reflect the ongoing evolution of the parties' relationship, and the trial judge is best placed to determine whether reliance has been placed on events which occurred after the original contractual structure was put in place.[56]

43.5. The issues of scope of duty and assumption of responsibility have long presented difficulties of definition and limits, including a different legal test depending on whether the case is 'novel' or not:

> 'Furthermore, I accept Ms Padfield's submission that the issues of scope of duty and assumption of responsibility by professional people have, over the years, been bedevilled with difficulties of definition and boundaries. If this is not a novel case, then the test of whether there has been a voluntary assumption of responsibility (or whether, as the test was straightforwardly put in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20; 3 WLR 81 at [16], WSP has 'taken on responsibility' for advising the Claimants on fire strategy) will ultimately determine the issue of duty, whereas, if this is a novel case, then the question of whether it is fair, just and reasonable to impose liability in negligence will be relevant (see *Meadows v Khan* [2021] 3 WLR 147 at [66]).'[57]

43.6. The disclaimer in WSP's Fee Proposal did cover the fire safety strategy (FSS) but it did not cover the full scope of WSP's work (for example, the later OFSM and FRA), and it was arguable that WSP's work included an ongoing provision of services by WSP in relation to fire safety – beyond the FSS.[58] The significance of a disclaimer is as a factor to be taken into account in the relevant factual matrix. [59]

43.7. Discussions were taking place between WSP and Avantage, i.e. communications crossing the line, and it was not fanciful that they

[55] *Avantage v WSP*, note 1, para [54].
[56] *Avantage v WSP*, note 1, para [56].
[57] *Avantage v WSP*, note 1, para [48].
[58] *Avantage v WSP*, note 1, para [83].
[59] *Avantage v WSP*, note 1, para [84].

gave rise to an awareness and intention that the operators of Beechmere would rely upon the non-negligent services of WSP in relation to the FSS, such that WSP (when viewed objectively) assumed a responsibility to the claimants:

> 'It does appear to me that the existence of the known PFI arrangement in conjunction with (i) the terms of the Fee Proposal, (ii) the terms of the FSS, (iii) the terms of the OFSM, (iv) the apparent inter-relationship between the services that were being provided by WSP and (v) the involvement of the Claimants/their predecessors or Mascot in relevant meetings and discussions (as is clearly evidenced in Mr Allan's statement) gives rise to an arguable case that must go to trial.'

Lessons learned?

44. **Disclosure.** The focus for the purposes of establishing an assumption of responsibility is on the documents 'crossing the line'. Given this starting point, pursuing a summary judgment relying on there being no evidence of such an assumption of responsibility would appear to be best done after disclosure or not at all. Added to this is the fact that the assumption (if present) must be considered in the wider factual context in a multi-party dispute where relevant evidence that 'crosses this line' might come from the disclosure of other parties. It all adds up to a need to have disclosure first. Contrast with:

> '*Sainsbury's Supermarkets Ltd v Condek Holdings Ltd* [2014] EWHC 2016 (TCC), a case in which it was argued by Sainsburys, defending a strike out/summary judgment application, that full disclosure had not yet been given, but the court held (at [27]) that "Sainsbury's would have copies of all documents crossing the line between the parties". I agree with Ms Padfield, that the present case is not a situation in which it would be fair to shift the evidential burden to the Claimants in the manner envisaged in *Sainsburys* at [13].'[60]

45. **Disclaimers.** Must be treated as factors to be taken into account, but this contractual limitation will not be a complete answer to a claim in tort, particularly if the factual matrix does not support the parties' clearly communicating that no duty or obligation was being accepted.

46. **Contractual limits on duty of care.** Express terms to exclude third party rights are commonplace. Why should enforceable limits on the scope of duty owed be less commonplace?

47. **Duty of care issues.** Apart from the dangers of launching a summary judgment application where there are complex issues concerning disputes

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60 *Avantage v WSP*, note 1, para [124 ix].

of fact, the resounding lesson is that 'duty of care issues are not for summary determination'. Not perhaps 'new' news.

Impacts looking forward

48. A few thoughts to end:

    48.1. In the world of construction, where contract is 'king', and a claim in tort is only relied upon because the route in contract has been blocked; where the claim will be required to overcome the hurdles and restrictions mentioned, it may be a very rare instance now that a truly novel application will arise. The PFI context of the claims in *Avantage* will be testing those waters.

    48.2. These matters are incredibly fact sensitive and this means there will always be some uncertainty where novel facts are involved – are those facts novel enough to be able to fend off the application of analogy?

    48.3. How much longer before a right to make a claim in tort is expressly and enforceably excluded (and not merely limited) by the terms of the contract? Watch this space.

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construction law amongst all those involved
in the construction industry’

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