

Alexander Nissen QC

- **On a construction project, how likely is it that the Court will find additional tortious duties are owed by parties outside the contractual chain?**

- Multiplex Construction Europe Ltd v Bathgate Realisations and others [2021] EWHC 590
- Beattie Passive Norse Ltd and NPS Property Consultants Ltd v Canham Consulting Ltd

Henderson v Merrett Syndicates [1995] 2 AC 145, HL



Lord Goff:

“in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties.... Let me take the analogy of the common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract.... [If] the sub-contracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the Hedley Byrne claiming damages from him on the basis that he has been negligent in relation to the performance of his functions. For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility.”



100 Bishopsgate Ltd (employer)



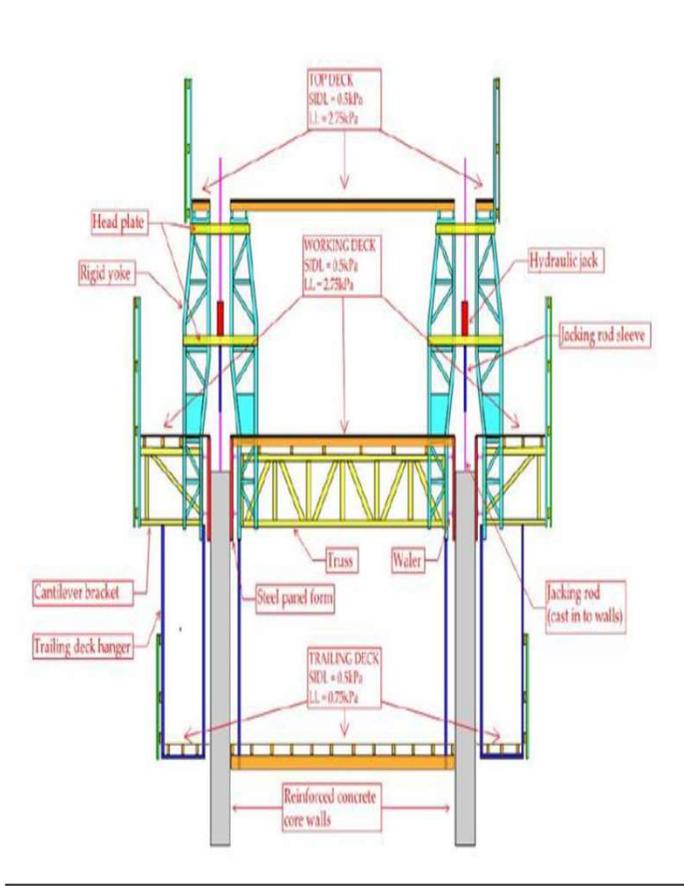
Multiplex (main contractor)



Dunne (concrete subcontractor)



BRM (designer) and RNP (design checker)



BS 5975 provides:

“9.2.1

*Prior to the commencement of the construction work, the proposed temporary works design should be checked for concept, adequacy, correctness and compliance with the requirements of the design brief. **This check should be carried out by a competent person or persons independent from those responsible for the design.** The ability of the checker and his remoteness or independence from the temporary works designer should be greater where new ideas are incorporated or the temporary works are complex.”*

“9.2.5

*On completion of the design and design check, a certificate should be issued for all categories, confirming that the design complies with the requirements of the design brief, the standards/technical literature used and the constraints or loading conditions imposed. The certificate ... should be signed by the designer and design checker. **The package of information issued to the TWC should include this certificate.**”
(emphasis added)*

- (a) Not a simple chain of subcontracts case.
- (b) No provision rendering Dunne liable for truth of certified statements.
- (c) Dunne did not write the statements or assume responsibility for them.
- (d) Certificates were for the benefit of a limited class i.e., Multiplex's TWC.
- (e) Certificates were not to be relied on by Dunne.

- (f) RNP consented to the provision of certificates to Multiplex as envisaged by BS5975.
- (g) Design checking was something which, of necessity, could not be undertaken by Dunne.
- (h) RNP did not do the original design. Certificate relied on for its independence.
- (i) Importance and gravity attributed to a Cat 3 check pursuant to BS5975.

Fraser J:

- Dunne had full design responsibility for the sub-contract works to Multiplex under the sub-contract it entered into with Multiplex. ... This included responsibility for the design of the temporary works, of which the slipform rig was a part.
- This is not a "liability gap" case. There was direct contractual responsibility for design of the temporary works (as well as many other wider matters) from Dunne to Multiplex. Multiplex advances pleaded claims against Dunne for precisely the same matters relied upon in its negligent misstatement case against RNP, and alleges responsibility on Dunne's part for failures by RNP.
- There was no direct contractual link between RNP and Multiplex in respect of the obligation upon RNP to perform the Category 3 design check.
- The consciously created contractual relations between the parties did not include any direct contractual responsibility between RNP and Multiplex.

- The purpose of the Category 3 check was to comply with the requirements of the British Standard so that Dunne could comply with its own contractual obligations.
- Multiplex did not know, and was not involved in, what documents had been provided to RNP by Dunne in order for RNP to perform its Category 3 check. Multiplex was not involved in the selection of RNP as the independent design checker, nor the terms upon which RNP was engaged by Dunne.
- There was no direct contact between RNP and Multiplex at all prior to the issue of the certificate of 25 January 2016.
- No services were provided directly to Multiplex by RNP.

- This construction project, in common with very many (if not most), had a large number of participants and a detailed and careful contractual structure between the employer and Multiplex (on the terms of the main contract) and Multiplex and Dunne (on the terms of the sub-contract). The relationship between Dunne and RNP sat entirely separate from that contractual matrix. To find that there was an assumption of responsibility on the part of RNP direct to Multiplex would indeed "short circuit the contractual relations" in the way identified by Lord Goff in *Henderson v Merrett*.

- Multiplex as the main contractor would have a large number of other contractual obligations, not only to the employer, but potentially to other sub-contractors on all the other elements of the project. RNP did not know the full extent of any of these obligations, and had no way of finding out on the basis of the very limited material that was provided to RNP to perform the check. Indeed, RNP did not know anything at all about these other obligations on the part of Multiplex.

- RNP did not assume responsibility for the accuracy of the information in the certificates to Multiplex, but rather had contractual responsibility to Dunne for that. Nor did RNP assume responsibility for the accuracy of the information in the certificates for use by Multiplex for the purpose of allowing the temporary works to commence by issuing the permit to load, rather than for the purpose of allowing Dunne to comply with its own design responsibility under the sub-contract between Dunne and Multiplex by producing a design that complied with the British Standard, the CDM Regulations and the Statutory Requirements. The mere fact that RNP knew that the TWC would (or should) be provided with the certificate is not sufficient.

Beattie Passive Norse Ltd and NPS Property Consultants Ltd v Canham Consulting Ltd [2021] EWHC 116



Fraser J:

“Canham did not owe any duty of care directly to NPS. The fact that NPS paid some invoices, and also that some personnel sometimes used their NPS e-mail accounts (which all ended .nps) for some correspondence (rather than e-mail accounts for other companies) does not assist NPS in establishing a direct duty of care to it as a shareholder. Canham had a contract with BPN. Given the nature of the construction project, the services to be provided, and given that Canham was a professional firm of engineers providing design services for a construction project, there was a co-existent duty of care owed by Canham to BPN, in addition to its contractual obligations. However, there is no justification in my judgment to find that Canham, in addition to this responsibility to BPN, the party who engaged it contractually, also owed any of the constituent shareholders of BPN – namely NPS – a separate and direct duty of care.”

Fraser J:

"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, justness and reasonableness, in favour of a claimant such as Multiplex who has no contractual relationship with RNP".

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