

# Duties of care in respect of design professionals (Multiplex v Bathgate)

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**Construction analysis:** This judgment provides a detailed consideration of the authorities relating to an assumption of responsibility, applying the same to those providing design checks or other design services in the construction industry. In this instance, the independent checker was held not to have owed the main contractor any duty of care in respect of the same. It confirms that courts will be slow to impose such tortious duties in a large construction project, where the parties have deliberately entered into a series of complex contractual relationships. It was held to be inconceivable that the design checker would have voluntarily assumed an unlimited responsibility to the main contractor on such a highly complicated project, or to any other party involved in that project other than the one with whom they were in a direct contractual relationship. Written by Georgia Whiting, barrister at 4 King's Bench Walk.

*Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd & others* [\[2021\] EWHC 590 \(TCC\)](#) (16 March 2021)

## What are the practical implications of this case?

This case provides a helpful analysis of the authorities relevant to the imposition of a duty of care in general, but applying the same to a large scale construction project. While this case turned very much on its own facts, it is clear that in a large construction project of this type, there are likely to be a series of complex contractual relationships and, as such, the courts will be slow to impose additional tortious duties separately to that complex contractual chain.

The judge considered that, in this instance, it was inconceivable that a reasonable business person would have considered that the contractor in question would have voluntarily assumed an unlimited liability towards the main contractor on what was a highly complex construction project. If the question had been raised in some notional conversation between Multiplex and RNP, it was obvious that RNP would not have been prepared to accept such an unlimited responsibility.

Further, parties choose with whom they contract, and they also choose whether they require those parties to have any insurance for their design obligations. Multiplex had a cause of action against Dunne, a company still in legal existence (albeit in administration). Denial of a duty of care did not mean Multiplex was left with no remedy, even though enforceability of that remedy may be a different matter. The law does not determine matters such as justness, and fairness, based on the financial durability of a contractor such as Dunne.

Accordingly, as well as providing a detailed analysis of the principles to be considered in respect of an assumption of a duty of care, it also confirms that those providing design checking or similar services within a construction project will not, without more, assume duties to parties whom they have not contracted to prevent economic loss.

## What was the background?

These proceedings concerned the construction of 100 Bishopsgate, a sizeable construction project in the City of London. Multiplex Construction Europe Ltd (Multiplex) was the main contractor for the project and had contracted with the employer on the basis that it had design and build responsibilities. The first defendant, Bathgate Realisations Civil Engineering Ltd, formerly known as Dunne Building (Dunne), was appointed as the design and build subcontractor for the concrete package of works. Dunne sub-contracted the design of the slipform rig to a company called BRM. Pursuant to the relevant British standard, the design of that slipform rig required a Category 3 check undertaken by an

independent third party before it could be utilised. A firm of consulting engineers, RNP, were engaged by Dunne to undertake the Category 3 check.

Dunne entered into administration on 19 July 2016 and, at the heart of the case as a whole was the result of what occurred after Dunne went into administration. Multiplex terminated Dunne's sub-contract, as it was entitled to do, and engaged an alternative specialist sub-contractor, Byrne Brother Ltd (Byrne) to replace Dunne and complete the sub-contract works. When Byrne was first engaged, the first thing it did was investigate the works to date and the slipform rig as constructed on site by Dunne. Byrne concluded that the works were defective. The cost of Multiplex replacing the slipform rig and taking other remedial steps formed part of the substantial losses overall that Multiplex claimed it had suffered as a result of various breaches, by each of Dunne, BRM and RNP. Default judgments had already been obtained as against both Dunne and BRM, and Multiplex also claimed losses directly from RNP's insurer, as RNP had since gone into liquidation.

Multiplex claimed that it was entitled to sue RNP's insurer directly under its policy because RNP owed it, Multiplex, duties of care and/or had provided warranties direct to Multiplex. In particular, while RNP had only contracted with Dunne for the provision of the Category 3 check, Multiplex argued that RNP owed it a duty of care in the provision of that check and consequential certificate, arising out of an assumption of responsibility to Multiplex. Alternatively, the Category 3 check certificates contained warranties to Multiplex which had been breached.

It was the question of any duty of care and/or warranties made by RNP, such that its insurer would be liable for losses, which fell to be determined by the court as preliminary issues.

### **What did the court decide?**

Dealing firstly with the imposition of a duty of care, this was approached from a consideration of first principles; Multiplex did not rely on any established precedent that governed the imposition of a duty of care, of the type contended for, owed to a main contractor by a Category 3 independent checker contracted by a sub-contractor.

It was well established law that it was insufficient for Multiplex simply to demonstrate that RNP did owe a duty of care, rather, they had to demonstrate that any duty owed to it by RNP was sufficient to encompass the kind of losses claimed. In this instance, the type of damage suffered by Multiplex was economic loss, and the duty of care alleged was considered with that in mind; it could not be considered in the abstract.

On the facts, the judge held that RNP did not assume responsibility to Multiplex for any statements contained within the certificates for a number of reasons, including:

- Dunne had full design responsibility for the sub-contract works to Multiplex under the sub-contract it entered into with Multiplex. That included responsibility for the design of the temporary works, of which the slipform rig was a part
- this was not a 'liability gap' case, as there was a direct contractual responsibility for the design of the temporary works from Dunne to Multiplex. Multiplex advanced claims against Dunne for precisely the same matters replied upon in its negligent misstatement case against RNP, and alleged responsibility on Dunne's part for failures by RNP
- there was no direct contractual link between RNP and Multiplex in respect of the obligations upon RNP to perform the Category 3 design check. Further, the role of RNP was limited to performing the Category 3 check upon the design produced by the entity with design responsibility. 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 to perform the Category 3 check. Multiplex was also not involved in the selection of RNP as an independent design checker, nor the terms of its engagement
- there was no direct contract between RNP and Multiplex at all prior to the issuing of a certificate and, even that document did not 'cross the line', as it was not passed on

to Multiplex intact, but in an adulterated form. Even if it had been passed as originally drafted, it would not lead to an assumption of responsibility to Multiplex by RNP

- the project in question, in common with many, had a large number of participants and a detailed and careful contractual structure between the employer and Multiplex. The relationship between Dunne and RNP sat entirely separately from that contractual matrix. To find that there was an assumption of responsibility on the part of RNP to Multiplex would, in effect, 'short circuit the contractual relations'

Expanding further upon why it would not be just, reasonable, or fair to impose a duty of care upon RNP of the type contended for by Multiplex, the judge noted that Multiplex chose to contract with Dunne on highly detailed terms. Parties choose with whom they contract, and they also choose whether they require those parties to have any insurance for their design obligations. Multiplex had a cause of action against Dunne, a company still in legal existence (albeit in administration). Denial of a duty of care did not mean Multiplex was left with no remedy, even though enforceability of that remedy may be a different matter. The law does not determine matters such as justness, and fairness, based on the financial durability of a contractor such as Dunne.

The judge also held that, as there was no contractual relationship between Multiplex and RNP, nothing contained within the certificates provided could constitute a warranty in the circumstances.

#### Case details:

- Court: High Court of Justice, Business and Property Courts, Technology and Construction Court (QB)
- Judge: The Honourable Mr Justice Fraser
- Date of judgment: 16 March 2021

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