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Case No: HT-2019-000372

Neutral Citation Number: [2021] EWHC 590 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date of judgment: 16 March 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

Multiplex Construction Europe Limited
Claimant

- and –

(1) Bathgate Realisations Civil Engineering Limited
(formerly known as Dunne Building and Civil Engineering Limited) (In administration)
(2) BRM Construction LLC
(3) Argo Global Syndicate 1200
Defendants

- -

Judgment

- -

Alexander Nissen QC (instructed by **Stephenson Harwood LLP**)

for the Claimant
Lucy Colter and Will Cook (instructed by **Weightmans LLP**)
for the Third Defendant
The First and Second Defendants did not
appear and were not represented

Hearing dates: 16, 17 and 18 February 2021
- -

Mr Justice Fraser:

1. This judgment is in the following parts:

A. Introduction

B. The Issues

C. Independent Category 3 checks

D. The British Standard

E. The Witnesses

F. The Experts' Joint Statement

G. Preliminary Issue 1 – Duty of Care

H. Preliminary Issue 2 – Warranties

I. Conclusions

Appendix: RNP's Terms of Business

A. Introduction

2. These proceedings concern the construction of 100 Bishopsgate, London EC2 (referred to as 100BG in the pleadings), a sizeable construction project in the City of London. The Claimant, Multiplex Construction Europe Ltd ("Multiplex"), was the main contractor for this project, which comprised what is called a campus of three main buildings around an enlarged public space. The site is two acres in size. Multiplex had contracted with the employer on the basis that it, Multiplex, had design and build responsibilities. Building 1 of the three is a 40 storey tower, situated on the corner of Bishopsgate and Camomile Street. The other two buildings are both 6 storeys high, each connected to Building 1 at what is called the Podium Level. This was therefore a very substantial construction project. The First Defendant, Bathgate Realisations Civil Engineering Ltd, was formerly known as Dunne Building and Civil Engineering Ltd (and is referred to in the pleadings, and all the documents, simply as "Dunne", notwithstanding its change of name to Bathgate). I shall therefore also refer to it in this judgment as Dunne. Dunne entered into administration on 19 July 2016[1].

3. This is a trial of preliminary issues, set out as ordered at [11] below. They concern the legal relationship between RNP, an independent design checker engaged by Dunne, and Multiplex. There was no contract between Multiplex and RNP, and Multiplex allege that RNP owed it certain duties of care, and also that RNP had provided warranties to Multiplex. Accordingly, Multiplex seeks to advance a claim directly against RNP, notwithstanding the lack of any direct contractual link between them.

4. Dunne was engaged as a sub-contractor to Multiplex for the design and construction of the concrete package of works to Building 1 at 100BG, which included both the sub-structure and superstructure works. This included the concrete core, which was constructed, level by level, using what is called a slipform rig, which is part of the temporary works. The slipform rig is a constantly moving piece of equipment that permits the concrete core to be constructed incrementally. Originally Dunne was engaged by Multiplex in 2011, but the project was put on hold by the employer until 2015. In 2015 Multiplex was given instructions by the employer to proceed with the

project, and therefore Dunne was instructed by Multiplex to proceed in 2015 too. The identity of the employer is not relevant to this case, nor is the period 2011 to 2015 when the project was on hold.

5. The Sub-Contract terms between Multiplex and Dunne are not in dispute. It incorporated the JCT Design and Build Sub-Contract 2005 Edition, Revision 2, 2009, subject to certain modifications. The Sub-Contract contained the following material terms:

1. By Clause 2.13.1, Dunne warranted and understood that it had "exercised and shall continue to exercise all the reasonable skill, care, and diligence to be expected of a properly qualified and competent architect or other appropriate designer experienced in designing work of a similar size, scope, nature and complexity to the Sub-Contract Works";

2. By clause 2.13.2, Dunne warranted and undertook that "using the standard of skill, care and diligence set out in clause 2.13.1":

> (a) "The various elements of the design of the Sub-Contract Works shall be properly co-ordinated and integrated"; and
>
> (b) "The completed Sub-Contract Works shall comply with the Contractor's Requirements, Statutory Requirements and any performance specification or other requirements under this Sub-Contract".

3. By paragraph 21.16.18; Part 1 of Contractor's Requirements, and in relation to "Site Safety Environmental Health and Safety Plan", Dunne stated that it would ensure that all "temporary works and structural work method statements and temporary works design submissions should as a minimum receive a complete and independent third party check".

4. By paragraph 34.2.11; Part 1 of Contractor's Requirements, the parties agreed that "The Sub-Contractor shall be responsible for submission of all details of any temporary works… needed to facilitate construction. All temporary works must be 3rd party checked by a qualified person. Details shall be submitted to the Contractor at least seven days before proposed erection. No temporary works shall be commenced without written approval of the Contractor".

6. The concrete core is part of the permanent works, and the slipform rig used to construct it is part of the temporary works. Dunne had, due to the terms of its sub-contract with Multiplex, full design responsibility both for the concrete core, and for the temporary works, and this is agreed by the parties. The Second Defendant, BRM Construction LLC ("BRM") was a specialist design and engineering consultancy, who was appointed by Dunne in respect of the design of the slipform rig, under a Consultancy Agreement executed between Dunne and BRM on or about 18 November 2015. BRM was based in Dubai and does not appear to have been insured. Another entity, RNP Associates Ltd ("RNP"), was engaged by Dunne to provide independent third party design services. RNP was a professional design checking consultancy based in London. It entered liquidation on 1 October 2018. RNP was insured.

7. The Third Defendant, Argo Global Syndicate 1200 ("Argo"), are RNP's insurers. By reason of the Third Parties (Rights against Insurers) Act 2010 ("TPRAI Act"), Multiplex claims that the rights RNP had to be indemnified by Argo were transferred to Multiplex. RNP's liability to Multiplex has not yet been determined, but is said to arise as a result of the independent design check performed by RNP on the design for the temporary works. Such an independent third party check is required under the relevant British Standard, namely BS 5975 (3rd edition, effective from 31 December 2008). It was also, as has been seen, required by Dunne under the terms of Dunne's sub-contract with Multiplex, namely in paragraph 34.2.11; Part 1 of the Contractor's Requirements (which is set out at [5](4) above). RNP was the independent third party design checker for the design of the slipform rig, and provided what is called a Category 3 design check on that design. RNP was engaged by Dunne to perform this design check for a modest fee of £3,978, in circumstances which I explain further below.

8. The heart of the case as a whole arises as a result of what occurred after Dunne went into administration. Multiplex terminated Dunne's sub-contract, as it was permitted to do, and engaged an alternative specialist sub-contractor, Byrne Brothers Ltd ("Byrne") to replace Dunne, and to complete the sub-contract works. At that point in mid-2016, Dunne had performed the concrete core slipform works to Building 1 up to level 7, out of the 37 levels required. It is said by Multiplex that those works had progressed only very slowly, but nothing turns on that in terms of resolution of the preliminary issues and any claim against Argo. When Byrne was first engaged, the first thing that it did was to investigate both the works to date, and the slipform rig as constructed on site. Byrne concluded that both were defective. Indeed, not only was Byrne not prepared to take responsibility for the performance of the slipform rig, but Byrne concluded that in some respects it was unsafe and should not be used. Multiplex therefore had the rig replaced, as part of wider works considered necessary at that time in order to proceed with Byrne, and to continue the project. The works thereafter proceeded with Byrne completing those the subject of the sub-contract between Multiplex and Dunne.

9. The costs of Multiplex replacing the slipform rig, and taking other remedial steps, form part of the substantial losses overall that Multiplex claims it has suffered as a consequence of the various breaches by each of Dunne, BRM and RNP in respect of the works at 100BG. The total claim is pleaded in the sum of over £12 million, including remedial works, delay, disruption and consequential losses. Default judgments have already been obtained by Multiplex against both Dunne and BRM. The limit on the policy provided by Argo is £5 million, and given RNP's liquidation, any recovery against that defendant is said by Multiplex to be limited to that figure.

10. Multiplex claims that it is entitled to proceed directly against Argo to recover under the policy because RNP owed it, Multiplex, duties of care and/or had provided warranties direct to Multiplex. It also relies upon the terms of the TPRAI Act, but nothing arises in that respect under the preliminary issues, which are concerned with the existence of a duty of care and/or any warranties provided by RNP. Unless RNP did owe such duties, or provide warranties, directly to Multiplex, then Multiplex's claim directly against Argo cannot succeed, hence the preliminary issues.

B: The Issues

11. On 10 September 2020 Pepperall J approved the trial of preliminary issues agreed by the parties. These issues concern Argo's potential liability to Multiplex. They were

submitted as Schedule 1 to a consent order and (with a minor and agreed amendment in terms of substituting the names of RNP for Argo) are as follows:

(1) Did RNP owe any duties and/or obligations to the Claimant in respect of the Category 3 Design Check Certificates provided by RNP to the First Defendant on 25 January 2016 and 4 February 2016?

(2) Did RNP provide warranties to the Claimant?

12. The issues as originally ordered referred to the Third Defendant, Argo, and not RNP who provided the services to Multiplex, the Claimant. However, nothing turns on this, and it is Argo who is advancing the arguments against the imposition of a duty of care and warranties. The preliminary issues encompass what could reasonably be called classic duty of care issues arising on a complex construction project. Pepperall J endorsed the approach of the parties in seeking to have these issues determined first, and made clear that issues of breach were not encompassed within the issues that he ordered. Although he gave permission for each party to call expert evidence from a structural engineer, he indicated that he anticipated there would be a large measure of agreement between them and it would be unlikely that either would have to provide oral evidence at the trial of the preliminary issues. That anticipation proved correct.

13. Ordinarily, on the trial of preliminary issues, having set them out, the judgment would immediately address the evidence and the arguments in respect of them. However, in this case, that option is not immediately available, at least not without some explanation. This is due to the following matters that arose after the order of Pepperall J was made:

    1. On 19 November 2020 the parties served their witness statements for the preliminary issues, Mr Bailey for Multiplex, and Mr Markham for RNP.

    2. On 9 December 2020 Multiplex amended its case against RNP. In particular paragraph 35A, which was new and, by that amendment, added particulars in which the Category 3 design check was said to be defective. Existing paragraph 43 was amended to set out the duty of care alleged against RNP. The existing paragraph 44 was not amended; this already set out a case against RNP in negligent misstatement in paragraph 44(2). An amended Defence was produced following this, but no order was made in this respect.

    3. On 10 February 2021 the parties served their skeleton arguments for the preliminary issues. Argo raised express reliance on certain of RNP's Terms of Business ("the RNP Terms") which were said to be incorporated into the contract between RNP and Dunne. These are set out in the Appendix to this judgment. Multiplex's skeleton concentrated (arguably, almost exclusively) on its case in negligent misstatement.

    4. On 16 February 2021, Argo re-amended its Defence. This was provided to me on the first morning of the hearing, together with a consent order. This pleaded in detail the incorporation of the RNP Terms into the contract between RNP and Dunne, and reliance upon the RNP Terms.

14. Although the re-amendment to the Defence set out in detail the RNP Terms relied upon by Argo, in particular those numbered 13.1 and 13.3, Argo had already pleaded

that there was a contract between RNP and Dunne in paragraph 19 of its original Defence. That paragraph had stated that the contract arose in the following way:

"Roger Tice [of RNP] responded [to an enquiry by Dunne] by email of 2 December 2015 at 10.53 enclosing a fee proposal. The "Quotation for Design services" was addressed to "Dunne Group" and was for a sum of £3,978. The quotation was accepted and formed the basis for the contract between Dunne and RNP for the provision of these services."

The Amended Defence had added to this and pleaded that:

"It [ie the quotation] was stated to be based on the "RNP Terms" terms of business (and further stated: "This quotation is subject to RNP's Standard Terms of Business unless otherwise agreed and noted within") The RNP Terms (issue 02 Issue Date 08/2015) provided inter alia: "*13.3 Nothing in this Agreement confers, or purports to confer on any third party any benefit or any right to enforce any term of this Agreement. In particular any advice provided by the Consultant is for the sole benefit of the Client and may not be used or relied upon by third parties*' "

15. By the re-amendment of the Defence, the acceptance by Dunne leading to a contract was also expanded upon in that the pleading now stated:

"The quotation was accepted by Dunne, in that it was content for RNP to carry out the Category 3 design check on the basis set out therein and it therefore formed the basis for the contract between Dunne and RNP for the provision of these services. RNP's Standard terms of Business, including clause 13.3, where thereby incorporated by notice into the contract between Dunne and RNP."

The re-amendment also stated "Whilst Dunne sent a letter to RNP on 3 December 2015 referring to attached "Consultancy Agreement" [for RNP] to sign and return, there is no indication that the attachment was signed and returned on behalf of RNP".

16. Mr Markham, RNP's sole witness to be called for the preliminary issues, had given written evidence in his witness statement that he was involved on the technical side and that it was his co-founder of RNP, Mr Tice, who had dealt with the contract being agreed with Dunne. Mr Markham said he did not know if the terms of business had been sent to Dunne. He also said that "I was under the impression that the check was being carried out under RNP's Standard Terms of Business. It was only subsequently that I became aware of this correspondence alluding to a possible Consultancy Agreement. As Managing Director, Roger Tice would have dealt with this task and I have seen no record of whether or not the Consultancy Agreement was signed and returned to Dunne. I do not recall ever seeing the Consultancy Agreement and I do not know if it was ever signed or returned to Dunne". He gave no evidence of RNP's usual practice in terms of contract formation either.

17. Both parties wished me to deal, in this preliminary issue trial, with what the terms of the contract were between RNP and Dunne, and whether that contract incorporated those terms which I have called the RNP Terms. Ms Colter for Argo did not seek either to call any additional witnesses, or deal with the point any further with Mr Markham (which was understandable, since he had said he was not involved) and although Mr Nissen accepted there was *a* contract between RNP and Dunne, he

submitted there was insufficient evidence to find that it incorporated the RNP Terms. This was for two main reasons. Firstly, he submitted that there was no evidence the terms had ever been sent to Dunne. Secondly, due to the chronology, after the email pleaded by Argo of 2 December 2015, Dunne had on 3 December 2015 sent a letter (signed by Mr Ranjit Singh) back to RNP which stated that it was sending two copies of a "*recently prepared Consultancy Agreement*" to be signed and returned by RNP. Neither Argo nor Dunne's administrators were able to locate a copy of such a Consultancy Agreement, and nobody could say what its terms were. However, unless (which Mr Nissen submitted was extremely unlikely) that Consultancy Agreement had included or accepted the RNP Terms, it demonstrated lack of acceptance (if not rejection) by Dunne of the RNP Terms, and a counter-offer. He submitted that Argo's plea of acceptance by conduct could not succeed in the light of such a counter-offer.

18. It is somewhat novel for a court to find itself invited to make findings of contract terms in such an evidential vacuum:

1. Argo have one witness from RNP who said he was not involved in contract formation. He did not know if the RNP terms were sent to Dunne; he did not know that a Consultancy Agreement had been sent by Dunne to RNP until these proceedings; he did not know if the Consultancy Agreement was signed by RNP and returned to Dunne or not; all he could say was that he was "under the impression that the check was being carried out under RNP's Standard Terms of Business."

2. Argo also rely on the reference to the RNP Terms within the quotation sent to Dunne by email on 2 December 2015 to show they were incorporated into the contract between RNP and Dunne.

3. Multiplex rely upon the subsequent letter from Dunne that stated it was enclosing two copies of a Consultancy Agreement sent to RNP on 3 December 2015. This letter is stamped "received" by RNP on 4 December 2016. No one has been able to find any copy of the Consultancy Agreement document that is referred to in that letter, either signed or unsigned, and either retained at RNP and/or at Dunne. It is not therefore possible to consider the terms of that proposed Consultancy Agreement.

19. There is no evidence that RNP and Dunne contracted on the basis of the "Consultancy Agreement" document, and there is no evidence of what its terms even were. All that the letter of 3 December 2015 does is to show the date when it was sent, the date it was received by RNP, and that Dunne wanted the Consultancy Agreement signed and returned. On the balance of probabilities, that shows that the Consultancy Agreement did not within it include the RNP Terms (which would in any event be inherently unlikely). I accept that on the documents, the sending of the Consultancy Agreement constitutes a counter-offer by Dunne.

20. Ms Colter, very fairly, accepted that if the letter of 3 December 2015 constituted (or is to be treated as) a rejection of the RNP Quotation of 2 December 2015 then the only way in which the RNP Terms could have been incorporated would be if Dunne were later to have abandoned that position, and accepted RNP's quotation of 2 December 2015 by conduct. I accept that is the sequence which would have led to acceptance by Dunne of RNP's quotation; it is a logical analysis. However, there is nothing to show that such an abandonment occurred. This is a battle of the forms type scenario. There is nothing to show what happened after the letter of 3 December 2015 sent by Dunne

was received by RNP on 4 December 2015. There is no need to speculate on what might have occurred; there are a number of scenarios, but there is no evidence to support any of them. There is certainly no evidence to support any finding that Dunne abandoned its position set out in the letter of 3 December 2015 when it sought acceptance by RNP of the Consultancy Agreement. There is no evidence to suggest that Dunne accepted RNP's offer of 2 December 2015.

21. Mr Markham's "impression" that the design check was being carried out under the RNP Terms is not sufficient, when put with the other evidence on this subject, to justify a finding that the RNP Terms were incorporated into the contract between RNP and Dunne. I do not consider that the letter from Dunne of 4 December 2015 can be read as an acceptance by Dunne of RNP's quotation of 2 December 2015.

22. Multiplex suggested, at one point, that there could be added a further preliminary issue to those already before the court, to deal with determination of the contract terms governing the contract between Dunne and RNP (as it had been admitted by Multiplex in its Reply that there was *a* contract, but none of the terms were known). There was no evidence from Multiplex on contract formation, although none could realistically be expected as Multiplex was wholly uninvolved in the formation of contractual relations between RNP and Dunne. The only evidence available was what I have set out above in terms of the documents passing between Dunne and RNP.

23. Both parties were agreed, in any event, that the question of what terms governed the contract between RNP and Dunne ought to be resolved in this preliminary issue trial. Both parties also submitted that this subject formed part of, or was inherent within, consideration of preliminary issue 1 in any event. I accept that it would be somewhat unsatisfactory for the parties to be left wondering, for resolution on another day, what contract terms governed the relationship between Dunne and RNP. In particular, the issue of the disclaimer or limitation of liability in clause 13.3 of the RNP Terms impacts upon the analysis of the existence and scope of any duty of care.

24. I therefore will deal with the subject of RNP's contract with Dunne in this judgment, and with the agreement of the parties. There is no unfairness to Dunne in doing so, as Dunne has chosen not to participate in the proceedings following the judgment in default obtained against it. I would observe in passing that this situation was not in any way ventilated before Pepperall J when he ordered the preliminary issues. It would have been far better had this movement on the pleadings, with amendments and re-amendments, been dealt with somewhat in advance of the trial of the preliminary issues, rather than in the days immediately leading up to the trial (and on the first day of the trial itself). That last minute development of the pleadings was rather reminiscent of the somewhat old-fashioned approach that would have been adopted some decades ago. However, in the interests of furthering the over-riding objective, the best approach is simply to grasp the nettle and deal with contract formation now.

25. All the court can do on the thin material available is to reach the following conclusions:

    1. There is no evidence that Dunne specifically accepted RNP's quotation of 2 December 2015. Offers can, of course, be accepted by conduct but that depends on the particular circumstances in any given case.

2. In this case, the letter of 3 December 2015 from Dunne enclosing the Consultancy Agreement demonstrates on the balance of probabilities that Dunne did not specifically accept RNP's quotation. That letter also serves as a counter-offer to contract on the terms of the Consultancy Agreement. It is unlikely that the Dunne Consultancy Agreement simply replicated the RNP Terms. This removes the possibility of acceptance by Dunne of the quotation of 2 December 2015 by conduct. There is no evidence that, after 4 December 2015, RNP made a further offer to Dunne contract on the RNP Terms.

3. There is no Consultancy Agreement available and there is no evidence that RNP accepted its terms. There is no evidence that it was ever signed and returned. No conclusions, one way or the other, can be drawn regarding what happened after the letter of 3 December 2015 from Dunne was received at RNP, nor from the fact that no copy of the Consultancy Agreement has been produced by any party in this litigation. This is because there is no evidence available from any source that would lead to any conclusions.

4. There is no evidence that Dunne later abandoned its position, set out in the letter of 3 December 2015, of seeking to have RNP contract with it by accepting the terms contained in the Consultancy Agreement.

5. There was a contract between Dunne and RNP. This is accepted by Multiplex. This contract was, in the absence of either party's terms being accepted by the other, in simple terms that do not incorporate either the terms of the RNP quotation (which was not accepted by Dunne) or the Consultancy Agreement (there being no evidence that this was accepted by RNP). The simple terms upon which the parties were agreed were that RNP would, at Dunne's request, perform the Category 3 check upon the design brief for the slipform rig for the agreed fee of £3978, and would provide Dunne with the relevant certificate. It was an implied term of that contract that RNP would use reasonable care and skill in performing that design check.

26. The result of these findings on contract formation is that the RNP Terms were not incorporated into the contract between RNP and Dunne. I will therefore address the legal arguments on the preliminary issues on that basis. I will, however, return briefly to this point at the end, and provide an alternative answer (if it is alternative) to deal with an alternative scenario, namely if Argo were entitled to rely on RNP's standard terms in its dealings with Dunne. This will provide my answer to the preliminary issues in the event that I am wrong at [25](4) above.

27. In light of that, I therefore turn to consider the two preliminary issues, as set out above at [11]. The first issue concerns the scope of any duty of care owed by RNP to Multiplex for the performance of its duties in performing the Category 3 design check and the issue of the certificates. The second also concerns the certificates, but is in respect of warranties said to have been provided by RNP contained in the certificates and whether any warranties were provided by RNP directly to Multiplex.

28. Multiplex submits that the issues can be answered with a simple yes/no to each; indeed, that is all Multiplex seeks. The issues could potentially be answered in that way, and if the answer to either issue were to be "no", then perhaps nothing further is required. However, if the answer to either issue (but particularly the first one) were to be in the affirmative, it seems sensible to go somewhat further than a mere "yes".

Simply being told, for example, that there *was* a duty of care owed, but not to explain further in terms of the scope of any duty were one to be owed, would not be of assistance to the parties. Nor, in my judgment, would a simple answer stating "yes" fit with the authorities, which state that the existence of a duty of care cannot be dealt with in the abstract.

29. Questions of breach are not, in my judgment, part of either of the preliminary issues. This has been made clear to the parties at earlier interlocutory hearings, including the one before Pepperall J on 10 September 2020 when he said:

"if one or other party starts filing evidence at this stage where the expert is opining one way or the other as to whether there is a breach, for example, then the other side should not be responding to that, but should simply regard that as something that the judge at the preliminary issue trial will put a line through."

30. I fully endorse those views. The preliminary issues were discussed and agreed by the parties, and approved by the court, on the basis that they would deal with the existence and potential scope of any duty of care and/or warranties as a matter of law, and not that they would delve into the potentially complex and factual domain of any breach of duty arising on the facts. This is clear from the wording of the preliminary issues themselves, and was made clear by Pepperall J at the hearing that approved them as a matter of case management. Notwithstanding that, some evidence on potential breach was adduced by the parties (for example by Mr Taylor the expert for Multiplex in his report). I do not address such matters in this judgment.

31. Reliance is however something that must be considered, in terms of reasonable reliance (in the sense of the use to which such certificates would be put). Actual reliance *in fact* in this case is not part of the preliminary issues. Multiplex also sought to cut off, as it were, any consideration of what happened after Dunne received the certificates. The reason for that is explained at [35] below and following, but basically this is because Multiplex were not, in any event, provided with the important first certificate in the form it was produced by RNP. Dunne changed the certificate, deleting certain parts, without RNP or Multiplex knowing this.

C: Independent Category 3 Checks

32. Complex or innovative designs – which the temporary works being performed by Dunne for 100BG were – are referred to as Category 3 designs, as they appear in that relevant table within the British Standard itself, considered in more detail at [63] below. Such designs require an *independent* third party both to check and to approve them, in addition to the designer themselves. The third party must be from a different organisation than the designer. Lower category checks, such as Category 2, can be done by someone who is not the designer but is within the same organisation. The purpose of checks such as these are to ensure the integrity of the design of such works, and also to demonstrate that such design has been performed correctly. The requirement for a Category 3 check means the check must be done by an independent party. Argo accepts that part of the purpose of such a check is to ensure safety.

33. Multiplex was the main contractor on this construction project, and Dunne was its specialist design and build sub-contractor. Multiplex is not an entity removed from the contractual framework, or a later arrival to a project, such as a later occupier or subsequent purchaser of 100BG. Dunne was performing the works the subject of the design for Multiplex under its own specific and very detailed sub-contract, and was constructing them under that sub-contract too. This included designing and

performing the temporary works. Indeed, the Temporary Works Design Brief Certificate provided by BRM to Multiplex dated 16 January 2016 was a template document provided by Multiplex and was on Multiplex headed paper. RNP was appointed by Dunne (and paid by Dunne), and the signed Category 3 Design Check Certificate provided by RNP dated 25 January 2016 was provided by RNP direct to Dunne. Dunne provided it (or to be entirely accurate in this case, only a partial version of it) to Multiplex. It was provided to Multiplex by Dunne as part of a package of information that dealt with the temporary works, which Multiplex required from Dunne in order to permit the temporary works to commence.

34. The first certificate stated the following on its face:

"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".

The second certificate dated 4 February 2016 contained the same words.

35. There are however three factual complications in this sense. Although RNP provided two certificates – 25 January 2016, and 4 February 2016, which are identified in the preliminary issues – the first one included notes inserted by RNP on the face of the certificate in a section headed "Notes/Observations", and this was sent to Dunne by RNP. The version of this certificate that was then sent on by Dunne to Multiplex not only had these notes removed, but had the entire box headed "Notes/Observations" removed too. These notes must have been removed by someone at Dunne, although it is not known exactly by whom. Multiplex did not receive the certificate as it was sent to Dunne. No explanation is available for why Dunne removed RNP's "Notes/Observations" in this way. It is something that certainly calls for an explanation at some stage, and the certificate should not have been altered in this way.

36. Mr Tziogas-Papandreou of Multiplex reviewed the version of the Category 3 check certificate received by Multiplex (namely, the one with the notes removed) on 29 January 2016, and he identified errors and questions in the design. He gave this design status B. Status B is one of qualified acceptance; it is not a rejection, which would be status C. Although the certificate he reviewed was the one with the notes/observations from RNP removed, that was not at that time known to him or anyone else at Multiplex. Nor was it known to anyone at RNP. Indeed, it did not become clear until 2020 when disclosure took place in these proceedings. On 1 February 2016 Mr Bailey of Multiplex sent comments both to Dunne, and within Multiplex, asking that revised documents be submitted by Dunne as soon as possible. Mr Smith of RNP then provided an updated Category 3 check certificate to Dunne (the one dated 4 February 2016) on that same date in February.

37. A second factual complication is that there is no evidence that this second certificate was sent by Dunne to Multiplex until 22 June 2016, by which time, it is accepted by Multiplex, the slipform rig had already been in use by Dunne for some months. The revised design check was given status A by Mr Tziogas-Papandreou on 4 July 2016, a date which supports the conclusion that Multiplex did not have it until late June. Status A means acceptance. By then, no fewer than 10 different permits to load the temporary works had been issued by the TWC.

38. The temporary works were therefore commenced, and progressed for some months, using the slipform rig when the only certificate provided by RNP to Dunne had not

been provided to Multiplex at all, because Dunne had removed the "Notes/Observations", and sent on to Multiplex only an adulterated certificate.

39. This point may explain why Multiplex, in carefully worded submissions, invited the court to answer the Preliminary Issues by reference to the certificate(s) sent to Dunne, rather than the certificate(s) which Multiplex in fact received. Although in one sense that approach by Multiplex could be argued as consistent with the issues as ordered, the alteration of the certificate was not known about at the time Pepperall J made the order in September 2020. For its part, Ms Colter for Argo invited the court to take account of the alteration of the certificate. She submitted that it would be a rare case in negligent misstatement if the receiver of the statement never actually received the statement itself, but merely a doctored version of it. This was met by Multiplex arguing that they relied only on the statement made in the certificate, set out at [34], and not the whole of the terms of the certificate.

40. I do not consider that it would be correct in law to split the certificate into separate elements, consider only one passage within it, and ignore the existence of the notes and comments that are part of the certificate and go with it. The statement made by RNP were the words in, or comprising, the certificate *as a whole*. Further, the statement that Multiplex relies on in these proceedings includes the words "the preparation of this design/check" and "this design/check" and that must be construed as including the notes and observations. The whole document is headed "Design Check Certificate". The notes and comments are part of the design check performed by RNP. It would be wholly artificial, in my judgment, to focus on one statement or sentence within the certificate, extract it and consider it separately from the other text. Other boxes within the certificate explain and qualify the certificate as a whole. The boxes headed "Description of Check/Calculations" and "Design Criteria & References" put the statement of certification in its proper context. The box "Notes and Observations" does the same. However, my decision that the statement is the whole certificate, and not the small part upon which Multiplex invite me to concentrate, may not affect the answer to the preliminary issues.

41. This point is also likely to be relevant at some later stage in these proceedings (if they continue beyond resolution of the preliminary issues) when actual or factual reliance by Multiplex is considered. Given that the approval necessary from the Temporary Works Co-ordinator, which permitted the temporary works to commence because it led to the issue of the permit to load, was given after the certificate of 25 January 2016 was sent to Multiplex, the only certificate upon which Multiplex can be said to have relied is the altered one provided to it by Dunne, and not the one in the form it was issued by RNP. Although there was a second certificate issued by RNP, namely that dated 4 February 2016, that was not provided to Multiplex until 22 June 2016. This was a point added to the Defence by way of amendment following the Amendment to the Particulars of Claim permitted by Kerr J on 9 December 2020. Paragraph 26(d) of the Amended Defence (the part added by amendment) states:

> "26(d) Further and in any event, it is denied that Multiplex can have placed any reliance upon the revised Design Check Certificate dated 4 February 2016 in planning, preparing or programming the temporary works, whether as alleged or at all. It did not receive this certificate from Dunne until at least 22 June 2016, by which point ten permits to load had already been issued and the slipform had been in operation for nearly five months."

42. I will return to reliance later. The third factual complication is that the slipform rig on site that Byrne concluded was not safe, and therefore had to be substantially modified or replaced, was not the slipform rig whose design had been subject of the Category 3 check by RNP. There were some differences, and in the claim against Dunne, Multiplex has pleaded in paragraph 31(1) that in August 2016 it, Multiplex:

"(1) Discovered, following a survey by a company called SES, that the original slipform design had been modified on site by Dunne, including the introduction of 49 additional jacks".

Multiplex allege defects and inadequacies both in the original design (set out at paragraph 33 of the Amended Particulars of Claim) and in the modified design (set out at paragraph 34 of the Amended Particulars of Claim). Part of its case against Dunne is therefore that the actual slipform was not constructed as designed.

43. I recite these factual complications for completeness. Reasonable foreseeability and actual reliance are not the same thing. Multiplex appeared at one stage to invite some provisional findings on *actual* reliance, notwithstanding the dates provided in the preliminary issues themselves, to which Mr Nissen submitted I should pay very close and specific regard when deciding the preliminary issues. Actual reliance is not included as part of the preliminary issues, and was certainly not intended to be included by the court when the order was made. Further, such findings are not necessary to decide the issues.

44. Notwithstanding my finding that the statement made by RNP was the entirety of the certificate and not simply the single sentence of certification, I shall deal with the case in negligent misstatement as a matter of principle generally. I shall then return to the disagreement between the parties set out at [39] after I have reached conclusions upon the two preliminary issues, and consider the effect of that, if any, upon those answers.

45. Multiplex was the employer of the Temporary Works Co-ordinator for the whole of the site, who issued permits allowing the loading of the slipform for the concrete core works to be performed. Although the word "issue" is used, in fact this comprised signing forms already prepared by Dunne, although I do not consider that slight difference to be relevant. Slipform is a method whereby the concrete works are constructed incrementally, allowing the concrete at a particular level to be poured (and therefore to start to cure or set) with the works moving gradually up the height of the building. Slipform is continuously moving formwork. These types of works are, as with so many construction operations, potentially dangerous. Temporary works of any type also have a particular level of dangerousness in my judgment, in particular if they are works of this nature. The temporary works procedure was at Appendix 7 to the construction phase plan produced by Multiplex as part of the fulfilment of its duties under the Construction (Design and Management) Regulations 2015. Paragraph 1 of the temporary works procedure stated in terms:

"temporary works can represent huge risks to the safety of people working on site if not designed, constructed and managed correctly".

The same passage continues on:

"While clearly avoiding this safety risk is the primary consideration, if temporary works go wrong, they can cause major material damage and can result [in] major set-backs".

46. The concrete core was particularly large at 100BG, as it contained all the services, lifts and staircases for the building. This was to provide what are called clear span floor plates, which means that the whole of the floor area of each floor would be available for office space. The core also provided the entirety of the tower's stability, given there was no lateral stiffness provided by any other structural element. For a high level building of this nature, the design of the permanent and temporary works would obviously be important and complex.

47. Paragraph 9.2.5 of the British Standard itself (addressed in more detail below in Part D of this judgment) states that "the package of information issued to the TWC" should include the Category 3 certificate. The initials TWC stands for Temporary Works Co-ordinator, which is an actual person, and in this case was Mr Bailey, the witness called by Multiplex who appeared before me in the trial of the preliminary issues. Dunne appointed a Temporary Works Supervisor, or TWS, a role which was occupied by a number of its employees, including Mr Keyur Soni, Mr Keith Wilmoth and Mr Declan McLaughlin. The role and responsibilities of the TWC and the TWS are set out at paragraph 7 of BS 5975.

48. In its claim against RNP, Multiplex pleads that the statements made in the Category 3 check were "made negligently in that RNP knew, or ought to have known, that the said statements were false." Multiplex alleges that RNP was in breach of the duty to take reasonable skill and care in checking the design. Multiplex also alleges both that Dunne is liable for its contractual obligations in terms of design, and also that Dunne is itself liable under the terms of the Sub-Contract for the alleged failures of RNP and the alleged inadequacies of the Category 3 check.

49. Multiplex claims against Dunne that it (i.e. Dunne) was bound to comply with Statutory Requirements, pursuant to Clause 2.13.1 and .3 of the sub-contract. Statutory Requirements are defined in Clause 1 of the sub-contract and mean "any statute, statutory instrument, regulation, rule or order made under any statute or directive having the force of law which affects the Sub-Contract Works or performance of any obligation under this Sub-Contract". The check carried out pursuant to BS 5975 is not, in itself, a Statutory Requirement but is a requirement of the CDM Regulations. Mr Nissen sensibly accepted that the CDM Regulations were part of the Statutory Requirements, a point made clear in clause 1.1. of the Sub-Contract which defines these. Statutory Requirements are defined as "any statute, statutory instrument, regulation, rule or order made under any statute or directive having the force of law which affects the Sub-Contract Works or performance of any obligation under the Sub-Contract". They therefore include the CDM Regulations, which are a statutory instrument. Dunne was therefore contractually bound to Multiplex to comply with the CDM Regulations, which means to comply with the British Standard, which means obtain a Category 3 certificate.

50. Although it is not entirely determinative of the nature and scope of any duty of care, the way that the case is pleaded by Multiplex is illuminative and puts into perspective some of the submissions made, focused as they were on the ingredients of the cause or causes of action against RNP that Multiplex allege to exist. The case that Multiplex brings against RNP is set out at paragraphs 43 and 44 of the Amended Particulars of Claim. Paragraph 43 states that:

"43. RNP owed a duty of care to Multiplex which arises out of its assumption of responsibility to Multiplex in its capacity both as Main Contractor and as Temporary

Works Coordinator, as set out in the Reply. RNP knew or ought to have known that its design check certificate(s) would be seen and relied upon by Multiplex. Therefore, RNP were also, in the said premises, in breach of such duty of care and/or of the warranties set out in the Design Check Certificates, in that they had not used reasonable skill and care in the preparation of the design check to ensure that the calculations contained within the Dunne/BRM design accorded with the design brief, current industry practice and design codes".

51. The case in negligent misstatement is set out in paragraph 44, in particular paragraph 44(2) which states:

"44. Further or alternatively, the statements contained in the said certificates were:

…..(2) made negligently in that RNP knew, or ought to have known, that the said statements were false."

(emphasis added)

52. Mr Nissen submitted that paragraphs 43 and 44 were both concerned with, and only with, negligent misstatement. I cannot accept that submission. Paragraph 43 is concerned with failure to use reasonable skill and care in the preparation of the design check, not the making of the statement (negligently or otherwise) or the issuing of the certificates. Paragraph 44 expressly states in its introductory wording "further or alternatively". It cannot be read as re-stating the same subject matter as paragraph 43; it is additional to that. In my judgment paragraph 43 of the Amended Particulars of Claim goes wider than simply negligent misstatement, and alleges a duty of care generally in performance of the design check. This is important in terms of how Multiplex put its case in terms of the law of tort filling a gap in liability under the contractual structure or chain. Multiplex maintain that there is such a gap, and that it, Multiplex, would have no right of recovery against Dunne for a failure to take reasonable skill and care in making the statement in the certificate.

53. However, although that was the argument advanced at the trial of the preliminary issues, it is not the way that the case is put by Multiplex in its Amended Particulars of Claim. In paragraph 39, under the heading "Breach of Obligations", the defective design of the slipform rig is alleged to constitute "a breach of the obligations undertaken by [Dunne] and [BRM], and RNP, in that the design had not been carried out with reasonable skill, care and diligence." Particulars of that are then provided in the following paragraph:

"40. Thus, Dunne

(1) Failed to carry out and complete the Sub-Contract Works in a proper and workmanlike manner (breach of Clause 2.1.1);

(2) Failed to exercise all the reasonable skill, care and diligence to be expected of a properly qualified and competent designer experienced in designing works of a similar size, scope, nature and complexity (breach of Clause 2.13.1);

(3) Were, in the premises, in breach of the warranties and undertakings which they gave at Clauses 2.1.6.1 and 2.13.1 of the Sub-Contract;

(4) Were in breach of Clause 2.13.2, and paragraph 21.16.8, Part 1 of the Contractor's Requirements, in that the Category 3 check failed to comply with the Statutory Requirements, in the respects set out at paragraph 43(2) below.

Particulars of sub-paragraphs (1) to (3)

The design, whether as originally conceived, or as modified, was defective and fell below the standards to be expected of a properly qualified and competent designer experienced in designing work of a similar size, scope, nature and complexity to the Sub-Contract Works, in the respects set out at paragraphs 33 to 35 above.

(5) Were in breach of Clause 2.13.2 and paragraph 21.16.8, Part 1 of the Contractor's Requirements in that the Category 3 check failed to comply with the Statutory Requirements, in the respects set out at paragraph 44(2) below."

(emphasis added)

54. I have already explained how paragraph 44(2) is the part of the pleading that alleges negligent misstatement. Therefore, Multiplex's clear pleaded case against Dunne is that Dunne failed to comply with the Statutory Requirements in the same terms as that case is advanced against RNP in paragraph 44(2), namely that the statements made in the certificates were made negligently.

55. Whatever the different ways that Multiplex advances its claim against Dunne, and whether it is a claim for breach of contract, breach of CDM obligation, and/or breach of Statutory Requirement, it is clear that they encompass the same complaints in respect of the alleged defects in the certificates (and the statements in the certificates) as are advanced against RNP. In my judgment, the important point can be summarised as follows from the contractual provisions. Dunne had direct contractual obligations to Multiplex to perform the design (including the design of any temporary works) using reasonable care and skill, and to comply with Statutory Requirements, which included obtaining a Category 3 check in respect of the temporary works design. Multiplex brings a claim against Dunne, both for breach of that direct duty, and also for failures in identifying what are said to be breaches by RNP in the latter's exercise of reasonable skill and care.

56. Accordingly, Multiplex alleges failures against both RNP and Dunne for alleged failures by RNP in performing the Category 3 check. I have omitted detailed reference to the case Multiplex brings against BRM, based upon failures of BRM's design responsibility, because that is not relevant to the claim Multiplex brings against RNP.

57. 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. This point is relied upon by Argo; paragraph 2 of the Amended Defence makes extensive reference to this, and states that "Multiplex has constructed an artificial claim against Argo in respect of the work carried out by RNP". It also criticises the claim as seeking "to impose full design responsibility upon RNP in respect of the design of the slipform rig".

58. Multiplex meets the "artificial claim" point in paragraph 40 of its submissions, which states that "It is commonplace within the construction industry, and business more broadly, for entities who are legally liable for loss to be in liquidation, uninsured or difficult to trace….it may choose to sue any other party against whom it has a legitimate cause of action." 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.

59. Regardless of that, there is no doubt that Multiplex seeks recovery of all its losses from Argo (or those up to the limit of the insurance available, namely £5 million). Multiplex puts its case against RNP in the following way. It alleges a failure to exercise reasonable skill and care in considering the design, and particular aspects of this are pleaded at paragraph 35A of the Amended Particulars of Claim. The complaint is that the design check did not identify the defects in design. Various details are given of this, such as RNP is said to have failed to identify that the slipform had inadequate capacity; that there was excessive reliance on redistribution of loads from jacks to neighbouring jacks (which left an insufficient or no redundancy in the system to lift); and an inadequate margin of safety in the system. All of these allegations are disputed by RNP and by Argo. Multiplex also contends that the Category 3 check certificates contained warranties that reasonable skill had been used, and alleges that such warranties were breached by RNP.

60. Argo maintains that the nature of the parties' roles and relationships was such that RNP did not assume responsibility to Multiplex, did not owe duties of care in tort to Multiplex, and did not provide warranties to Multiplex. It maintains that Multiplex's rights in respect of the Category 3 checks were against Dunne, with whom it had contracted for (amongst other things) the entirety of the temporary works package including the design of the slipform rig and for the provision of the necessary design checks under the CDM Regulations and British Standard BS 5975.

61. Argo maintains, in the alternative, that if RNP did owe any duties to Multiplex, they were limited in scope to a duty to undertake the Category 3 check competently for the purposes of BS 5975. This duty, Argo says, was limited to one which required RNP to evaluate the design "to determine whether it conforms with the design brief and can be expected to provide a safe engineered solution" (the description in paragraph 3.10.2 of BS 5975) and to check the design for the proposed temporary works. This is because the design should be checked for "concept, adequacy, correctness and compliance with the requirements of the design brief" (paragraph 9.2.1 of BS 5975).

62. Argo denies that RNP's duty, if it had one, extends to any wider or more general check or the quality of the design, any assumption of design responsibility for the rig, or a duty to hold Multiplex harmless from economic loss, particularly in the event that the slipform rig underperformed in general terms or in respect of the specific contractual requirements either of the Main Contract or the Sub-Contract, including in respect of timing and programme.

D: The British Standard

63. The relevant British Standard is British Standard 5975: Code of practice for temporary works procedures and the permissible stress design of falsework ("BS5975"). Table 1 requires a Category 3 check for complex or innovative designs, and it is agreed in this case that the design of the slipform rig falls within Table 1 such that it required a Category 3 check. Under "independence of checker" – which is different for different levels of check – the Table states "the check should be carried out by another organisation". Category 3 is the highest level of check, and the only one in which the check is to be performed by another organisation, independent of the designer.

64. Under paragraph 1of BS 5975, the following is set out:

> "1. Scope.
>
> This British Standard gives recommendations and guidance on the procedural controls to be applied to all aspects of temporary works in the construction industry. It also includes guidance on design, specification, construction, use and dismantling of falsework. This standard gives guidance on permissible stress design of falsework."
>
> Section 2 gives recommendations for the procedures required to ensure that temporary works are conceived, designed, specified, constructed, used and dismantled all in a safe and controlled manner.

65. Under 3.10.2 of BS5975, part of Section 3 "Terms and Definitions" the following is stated:

> **"design check**
>
> evaluation of the design to determine whether it conforms with the design brief and can be expected to provide a safe engineered solution."

66. Other definitions were as follows:

> In paragraph 3.28 "Permit to load" is defined as a "certificate issued to indicate that the temporary works may safely be put to its design use";
>
> In paragraph 3.41 the "temporary works co-ordinator" (which I have described as the TWC) is defined as the "competent person with responsibility for the co-ordination of all activities related to the temporary works";
>
> In paragraph 3.42 the "temporary works supervisor" (which I term as the TWS) is defined as the "competent person who is responsible to and assists the temporary works co-ordinator".

67. In paragraph 9.2 of BS5975, which goes with Table 1, the following is stated:

> "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.

9.2.2 Design checks should be undertaken in accordance with one of the categories given in Table 1.

9.2.3 For categories 2 and 3, the checker should carry out the check without reference to the designer's calculations using only the design brief, design statement, drawings and specification and associated information not produced by the designer."

68. It is common ground that RNP should not be given the designer's calculations. The British Standard makes it clear that the independent checker is not to be provided with these.

69. The British Standard also stated the following:

"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 identify the drawings/sketches, specification and any methodology that are part of the design and it should be signed by the designer and design checker. The package of information issued to the TWC should include this certificate."

(emphasis added)

70. I have explained above that Multiplex, and the TWC, was not provided with "this certificate" (at least so far as the first certificate of 25 January 2016 is concerned) at all; it was provided with what appears to be an unauthorised alteration of the certificate, with the notes and comments removed. It was not provided with "this certificate" (meaning the second one of 4 February 2016) until the temporary works had been underway for some months.

71. There is no doubt that RNP was engaged by Dunne to perform an independent third party design check of the design of the slipform rig. The real question is whether, either by reason of performing that duty, or because performing that duty includes it as a component part, RNP owed Multiplex the wider duty alleged by Multiplex, which for Multiplex to succeed, must include a duty to hold Multiplex harmless from economic loss.

72. The way that duty is said to arise is as follows. Multiplex made clear in its Reply that its claim that RNP owed it a duty of care in carrying out the Category 3 check arises because there was a voluntary assumption of responsibility by RNP to Multiplex. This is further made clear in its written Opening Submissions by Mr Nissen. Given the nature of the claim for loss and damage, the duty which is alleged to have been owed must be one to prevent Multiplex from suffering economic loss as a result of the underperformance or failure of the slipform rig.

73. Multiplex also brings the alternative claim against RNP for negligent misstatement which I have already explained, set out in paragraph 44 of its Amended Particulars of Claim. This is on the grounds that the Category 3 check certificates issued by RNP to Dunne contained certain statements which were intended to be relied upon by

Multiplex, in that RNP knew or ought to have known that they would be so relied upon. This claim is also based on an alleged assumption of responsibility by RNP to Multiplex in the making of such statements and/or warranties.

74. It is therefore an integral part of Multiplex's claims, either in terms of the duty of care to prevent economic loss, or the claim in negligent misstatement, that there was an assumption of responsibility by RNP. This was also made clear in Multiplex's written submissions, including paragraph 38 which set out the basis of the duty of care in respect of the first preliminary issue. That stated:

> "….the claims made by Multiplex in this case are:
> (1) That RNP owed a duty of care to Multiplex not to negligently misstate the truth of what it certified in the Design Check Certificates. The statements were that reasonable skill and care had been used in the preparation of the design check to ensure the calculations accorded with the design brief; current industry practice and design codes. The duty of care not to misstate the position arises out of its assumption of responsibility to Multiplex to take reasonable care in the making of its statements within the Certificates."
> (emphasis added)
>
> (2) That RNP warranted (i.e., it made a contractual promise) to Multiplex that the content of the statements contained in the Design Check Certificates was true. The statements were that reasonable skill and care had been used in the preparation of the design check to ensure the calculations accorded with the design brief; current industry practice and design codes."

75. Given there was no contract between RNP and Multiplex, the assertion that RNP made a contractual promise to Multiplex needs to be considered from first principles. I will however return to this point later in this judgment, after considering the evidence, when I consider Preliminary Issue 2.

E: The Witnesses

76. Each side called one witness of fact. Both of the witnesses gave evidence helpfully and were genuine in their answers. There are no substantial disputes of fact in this case, at least not at this stage of the proceedings.

77. The first was Jonathan Bailey, who is now the Engineering Lead at Multiplex. He moved to Multiplex in 2015, although he was involved in the 100BG project before that, when he was a structural engineering consultant at Robert Bird Group ("RBG") between 2007 and 2013. RBG was the structural engineer on the design for 100BG. He has an engineering background and was the Project Engineer when he joined Multiplex in 2015, working on the 100BG project. He was therefore closely involved in the period of works relevant to the proceedings. He was also the TWC appointed by Multiplex for 100BG.

78. His evidence dealt with the generality of the construction design and process; the history of the works (in so far as that was relevant); and the process whereby designs were approved. He described the core as "an abnormally large and complex structure". He explained both the methodology of the design process and construction of the temporary works, and gave evidence concerning the factual chronology of the works.

79. Mr Bailey's evidence was also that Multiplex initially intended to source and pay for a Category 3 check of BRM's design of the slipform rig, and enter into a contract with an independent firm directly. He even obtained a fee proposal from RBG for this purpose, RBG being the structural engineer engaged on the Project at 100 BP. However, when he became aware that sourcing and paying for such a check was Dunne's responsibility under the Sub-Contract, this matter was not taken any further and Multiplex did not proceed with this fee proposal. Had that proposal been pursued, it would have led to Multiplex contracting directly with whichever independent design checker Multiplex chose, but that is not what occurred.

80. Argo called Mr Paul Markham who had been the Technical Director of RNP until 2018. He is a Chartered Civil Engineer and Fellow of the Institution of Civil Engineers ("the ICE"). He set up RNP in 2007 with his colleague, Mr Tice; both of them had worked together before that at Interserve, and they decided to start their own practice.

81. In paragraph 8 of his witness statement Mr Markham stated that "it is not the job of the Category 3 checker to design the scheme or to make suggestions as to how the scheme could be improved. The checker only has to verify that the original designer's drawings accord with the design brief and confirm that the scheme will be safe to use."

82. In paragraph 11 of his witness statement Mr Markham stated the following:

"RNP's only contractual relationship was with Dunne. It never entered into any contract with Multiplex, or even had direct contact with any individual at Multiplex. Indeed, at the time of undertaking the design check, I was not even aware of who the principal contractor was at 100 Bishopsgate".

83. Mr Markham's statements about the contractual relationship being between RNP and Dunne, and not RNP and Multiplex, are correct. His statement concerning his subjective knowledge of Multiplex's identity – namely, Multiplex specifically being the principal contractor, rather than simply that there was *a* principal contractor – is not relevant, in my judgment. He knew that there *was* a principal contractor; he states in paragraph 43 of his witness statement that he knew Dunne was a sub-contractor. He also knew that the Category 3 certificates were needed by the TWC; indeed, the British Standard makes it clear in paragraph 9.2.5 (set out at [69] above) what is to be done with the certificate. Indeed, Mr Markham would also have known that, absent the approval provided by the certificate, the temporary works could not take place. This is because the design would not have been approved by the relevant independent third party checker, which is required for Category 3 works. He found out in February 2016, at the time of the revised design check, that Multiplex was the identity of the main contractor.

84. The certificate issued by RNP was on RNP's headed document that stated it was a "Design Check Certificate". This had the RNP address and various references such as date and issue number. It identified the project as "100 Bishopsgate" and under "Title of Design Checked" it stated this was "CAT III Check of Slipform Rig". Under "Description of Check/Calculations (eg Concept, Structural, Dimensional)" it stated:

"Structural and dimensional check of slipform rig:
• Top, working and hanging decks
• Formwork shutters
• Steel support frames

• Jacks
• Edge protection
• Steel frame to support concrete boom on top of rig"

85. It also included a list of different British Standards under the heading "Design Criteria & References (Specification, British Standards, Standard Data, and Computer Programmes etc.)".

86. Mr Markham, by the time of the trial of the preliminary issues, had discovered himself, or had brought to his attention, that the certificate provided to Dunne on 25 January 2016, to which he was a signatory (as well as Mr Smith of RNP), was *not* the one provided by Dunne to Multiplex. RNP had included notes and comments; these had been removed at Dunne prior to that certificate being sent on to Multiplex. He had no knowledge as to who had done this; he was, however, very clear that he had not authorised removal of the notes and comments. I accept this evidence. At least at this point in the proceedings, it is not possible to decide who removed the notes and comments, or why, or upon whose instructions this was done. However, whoever it was, was it somebody at Dunne. This is because the certificate sent from RNP to Dunne had the notes and comments upon it. The certificate received by Multiplex from Dunne did not. The note that was removed was:

"Jack loads under the placing boom grillages could be greater than 60kN. This can be managed with the current yoke/jack configuration by avoiding the combination of maximum live load, load from placing boom and adhesion all acting simultaneously."

87. On the face of it, and without making any findings, this comment highlights potential jack loadings of greater than 60 kN (which is a measurement of force) with possible ways of managing this. The full relevance of this would be considered at a later trial, dependent upon the answers to the preliminary issues. The same day as Multiplex was sent the certificate that appears to have been altered, Dunne also provided to Multiplex the Temporary Works Design Brief dated 20 July 2015, and two documents from BRM, namely a Temporary Works Design Brief Certificate and Temporary Works Designer's Certificate. These documents were part of the package necessary for the TWC to consider.

88. Mr Markham also stated at paragraph 50 of his statement that no collateral warranties were required or requested by Multiplex, and therefore none were provided. That is again a correct statement. There were no collateral warranties provided, and RNP and Multiplex had no contractual relationship such that there were any contractual warranties either. I deal with that point further at [187] onwards.

89. In his evidence Mr Markham explained that he was not involved in the execution of the Consultancy Agreement with Dunne; his co-director Mr Tice would have dealt with such matters. He explained the detailed chronology and the approval of the design, the work for which was essentially done by a subordinate called Mr Smith, under his supervision. RNP had worked once with BRM before, but Dunne was a new client. Mr Markham also made the point that, in his view, Multiplex did not rely on the Category 3 check, as individuals within Multiplex had themselves independently checked the calculations (as demonstrated by comments sent from Multiplex commenting on these). Actual reliance in fact is not a discrete part of the preliminary issues. Reliance does have to be considered as part of the framework under the first preliminary issue, but in the context of the use to which certificates such as this are to be put, and not whether *in fact* Multiplex in this case relied on the certificates.

F: The Experts' Joint Statement

90. Each party also had evidence from an expert engineer. They were Mr Taylor for Multiplex and Mr Ebbatson for Argo, both of whom are expert engineers. They each produced reports and supplemental reports. They had signed a Joint Statement on 27 November 2020 about issues in the case, many of which were relevant to the two Preliminary Issues. It was decided by the parties that they need not attend and be cross-examined, a sensible decision with which I was in agreement.

91. Notwithstanding their agreement, they were not fully agreed as to the requirements of BS 5975. Each side contended for the interpretation of their own expert to be preferred; for example, Argo submitted in its Opening Submissions that "where there are differences between the experts, Mr Ebbatson's understanding of the scope and requirements of BS 5975 is clear, straightforward and is to be preferred." I reject that approach to the requirements of the British Standard. The interpretation of that wording is a matter of law and is for the court. It is not for an engineering expert to give their evidence to the court that "the meaning of this provision is this" with the court to choose between two competing constructions, each put forward by an expert. An expert engineer can give their expert evidence as to how a reasonably competent engineer would go about the task of performing a Category 3 check, and what is understood as required by the profession. But the legal meaning of the words in a written instrument, even if it is a British Standard, is not something upon which an expert can give admissible evidence.

92. I do accept Ms Colter's criticisms that Mr Taylor's expert opinion showed a tendency to elaborate upon BS 5975, in terms not supported by the wording of BS 5975 itself. However, I do not consider that this has any impact upon the resolution of the preliminary issues. This is because the only respect in which the expert evidence is relevant to the resolution of these, are those items included in the Joint Statement. I do not reproduce the whole of the expert statement in this judgment, but the most important parts are as follows.

93. Although each expert provided textually different entries against each issue in the Joint Statement, by stating that the points were "generally agreed", it is clear that each expert did not consider differences in the statements to be of particular relevance to the point being agreed. I agree with them.

94. The first point upon which the experts were agreed was Item 1 in the Joint Statement "When is Category 3 design check under BS 5975 required?". Upon this they were "Generally Agreed". The experts agreed this was when there was a complex and innovative design and a safety risk to site workers and the public. BS 5975 does not refer to the risk of economic loss.

95. Item 2 was "Was a Category 3 design check required for the Slipform rig at the site at 100 BG? If so, why? If not, why not?" Again, they were "Generally Agreed" that one was required.

96. Item 3, namely "what is the Aim, purpose, and scope of a Category 3 design check?" again attracted the entry "Generally Agreed". Multiplex's expert stated that the fundamental aim was to significantly reduce the risk of failure of the temporary works, and to confirm the temporary works will perform as required in accordance with the design brief. It was also to ensure a safe workplace/ensure the public is not at risk, and to increase confidence in the design. He said that the industry practice was

for the design checker to be responsible for the check and to pick up any errors in the design.

97. Argo's expert in respect of this item in the Joint Statement stated that before erection commences, the temporary works design should be checked for design concept; strength and structural adequacy (including foundations and lateral stability); and compliance with the design brief. The design check should be carried out by an independent competent person(s). The ability and independence of the checker should be greater where the temporary works are more complex.

98. Item 4 was "What are the possible consequences if a Category 3 design check is not carried out adequately? Would a Category 3 design checker be aware of these possible consequences when carrying out the design check?" The experts were "Generally Agreed" on this too.

99. Multiplex's expert identified that these would be that the designer would not be informed of errors or omissions in the original design or be required to correct them, with a risk of catastrophic collapse, injury or death, serious economic loss and failure to construct the permanent works to programme and/or properly or at all.

100. Argo's expert explained that the immediate consequence would be non-compliance with the requirements of BS 5975 and the lost opportunity to mitigate errors and omissions in the design. If errors and omissions are carried forward into the site works there is a risk of delay to the permanent works and potentially HSE improvement notices.

101. Both experts agreed that a Category 3 checker would be aware of these consequences.

102. The experts were also agreed on what documentation and information was required to perform a Category 3 design check in this case, and were also agreed that all the required documentation was provided to RNP. I would point out that these topics go more to later stages in the proceedings, given that the design check is to be carried out using the design brief as issued to the designer. This is set out in BS 5975 clauses 8.5 and 9.2.3, and the design brief was provided. In this case the design brief contained a generic loading requirement per square metre and RNP was asked to carry out its check on that basis.

103. Both the experts were also agreed that the Category 3 design checker should not be provided with the designer's calculations when carrying out the Category 3 design check. This would undermine the independence of the check, and by clause 9.2.3 of BS 5975 the calculations are not supposed to go to the party performing the check. In this case the calculations were provided to RNP, but again, the consequences of that would also be dealt with at a later stage of the proceedings.

104. Although the experts stated that they were "generally agreed" on issues 8 and 9 in the Joint Statement, their detailed notes that accompany these points appeared to demonstrate important areas of disagreement. Issue 8 was "Who is responsible for preparing the design brief?" Multiplex's expert added the following under this issue:

"• TWC is responsible if the particular temporary works falls under them

• TWS is responsible for their subcontractor's temporary works

• A TWS can prepare a design brief for review by the TWC."

105. Argo's expert added that the TWC was responsible for preparing the design brief or seeing that a brief is prepared, and for complex projects, the works contractor's TWS might prepare a brief specific to a section of work which the TWC will then coordinate into the overall works.

106. One would perhaps expect a simple answer to this question, given that there only about two or three candidates at most available to be identified as being responsible for preparing the design brief.

107. For Issue 9, "What is the role of the Temporary Works Coordinator ('TWC') in respect of design checking under BS 5975?", again this was said to be "generally agreed". Multiplex's expert stated that this would be "High level review only" and this was "particularly true of Cat 3 checks as the complexity is outside of the TWC's competence" and the TWC "essentially want to simply receive the cat 3 check certificate from the independent engineer that has reviewed the works". He also stated that the TWC "need to ensure a Cat 3 check has been carried out" and "a TWC has a large site based role, with many site duties. They don't have the time to perform a 4-6 week category 3 check on a complex slipform like this."

108. For his part, Argo's expert stated that "the TWC is responsible for ensuring that the contractor's procedures for the control of temporary works are implemented on site. The TWC is not normally the designer but is responsible for ensuring that a suitable temporary works design is prepared, checked, and implemented on site in accordance with the relevant drawings and specification." He agreed that the TWC would perform "a high-level review to see that the design information from the designer generally aligns with the design information used in the check", and also that the TWC would "ensure any changes made by the site team are recorded and communicated back to the designer, further check carried out if necessary."

109. The experts were agreed regarding the purpose of the Category 3 design check certificate. Multiplex's expert stated that upon receiving one, the TWC would release hold points in construction method statements to enable the works to continue/or be loaded. He said that its "fundamental purpose [was] to confirm the temporary works has been checked for concept, adequacy, and correctness, and will perform in accordance with the design brief." He also stated that the "certificate also gives confidence to the recipient that the design has been checked – confidence the design is safe and suitable to be put forward in practice as required by the design brief."

110. Argo's expert said that the TWC would "then use the design together with the supporting Check certificate to see that before erection commences, the temporary works design has been checked for: Design concept; Strength and structural adequacy; Compliance with the design brief."

111. They were also agreed that a Category 3 design checker would be expected to know that the Category 3 design check certificate would be provided to the TWC.

112. Although the experts strayed into reliance, which obviously has legal dimensions to it, they were agreed that a Category 3 checker would be aware of the importance of the certificate. Multiplex's expert stated that it would give confidence in the design, and would allow hold points to be released and risk assessments to be given to the CDM coordinators. He also said that the certificate would be used "for a range of wider coordination around the site, not just that piece of design" and also that the TWC "would not consider issuing permits to load without having that certificate in hand." Argo's expert accepted that the checker would be aware that the TWC would use the certificate in verifying a BS 5975 compliant check has been completed.

113. The further items in the Joint Statement go more to what happened in practice in this specific case, the extent to which Multiplex did, or should have, performed its own check, the consequences thereof, and the nature and meaning of caveats in the certificate. They are not therefore of relevance to the preliminary issues themselves.

114. I find that the purpose of the certificate is to confirm the temporary works have been checked for concept, adequacy, and correctness, and will perform in accordance with the design brief. The certificate will also provide confidence that the calculations used by the designer have (a) been checked, and (b) been checked by an organisation independent from the designer. A contractor with design responsibilities who has obtained such a certificate for their temporary works design – here, that contractor is Dunne – will be able to use that certificate to demonstrate that it, the designer, has complied with the British Standard.

G: Preliminary Issue 1 – Duty of Care

115. This case has to be approached from consideration of first principles, and both parties have invited me to do so. Multiplex does not rely upon any established precedent that governs the imposition of a duty of care of the type contended for owed to a main contractor (or to a TWC) by a Category 3 independent checker contracted by a sub-contractor.

116. In ***Galliford Try Infrastructure Ltd (Formerly Morrison Construction Ltd and Morrison Construction Services Ltd) v Mott MacDonald Ltd*** [2008] EWHC 1570 (TCC) Akenhead J at [190(d)] summarised the applicable principles in determining whether a duty of care was owed in the construction context. He stated that "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". I respectfully agree. The issue should not be approached considering whether RNP owed *any* duty; it should be determined by reference to whether RNP had a duty of care related to the kind of loss which Multiplex has suffered, and which it seeks to recover in these proceedings.

117. As Lord Hoffmann said at [14] in ***South Australia Asset Management Corp v York Montague Ltd*** [1996] UKHL 10, a duty of care "does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered." That is the approach that I therefore consider should be adopted in resolving this preliminary issue.

118. Lord Hoffmann also cited with approval a similar statement from Lord Bridge's speech in another seminal case, ***Caparo Industries plc v Dickman*** [1990] UKHL 2, [1990] 2 AC 605, at 627 where he said:

"It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless."

119. This is therefore well-established law. It is not sufficient for Multiplex simply to demonstrate that RNP did owe *a* duty of care, or some ill-defined duty of care. Multiplex must demonstrate that any duty that was owed to it by RNP is sufficient to encompass the kind of losses which it claims in these proceedings. The type of damage suffered by Multiplex in this case is economic loss. It is with that in mind that one must approach consideration of whether RNP owed Multiplex the duty of care alleged. It cannot be considered in the abstract.

120. I start the analysis of the authorities by referring to the three different tests for the finding of a duty of care. These are different routes of analysis, although upon examination, they may not lead to substantially different results. They are the assumption of responsibility test; the three-part test; and the incremental test. Multiplex puts its case on the first preliminary issue squarely as satisfying the assumption of responsibility test. As expressed by Lord Bingham at [4], in ***Customs and Excise Commissioners v Barclays Bank plc*** [2006] UKHL (which I consider further at [142] below), the first step is to ask if there is an assumption of responsibility. It is only if the answer to that is "No" that further consideration is called for. On any analysis, one ought only in the rarest of cases to find that a different answer is thrown up by each of the tests; and this is not likely to be such a rare case. Lord Mance at [86] in the same case stated that all approaches would often lead to the same result, although this was not necessarily so. Application of any of the tests is likely, in my judgment, in the majority of cases, to lead to the same answer.

121. Ms Colter for Argo dealt with the authorities by noting that there was a difference between how Multiplex pleaded its case, and expanded upon that case in its skeleton argument. She demonstrated that the pleading included both what she called "a free standing" duty of care as well as a different alternative case in negligent misstatement. That is a correct analysis of Multiplex's pleaded case, clearly shown by the terms of paragraphs 43 and 44 of the Amended Particulars of Claim (which are set out at [50] and [51] above). Multiplex submitted that in reality both paragraphs were concerned with negligent misstatement. I shall deal with both.

122. Because this area of the law has been considered several times at the highest level, and because the decisions of the House of Lords historically would often involve more than one speech, it is often necessary to refer to passages from different members of the court. This is one of those rare cases where comprehensive citation of previous authority may, perhaps, be excused.

123. The place to start is the well-known case of ***Hedley Byrne & Co v Heller & Partners Ltd*** [1964] AC 465. This concerned advertising agents who would incur personal liability for the cost of advertising that they placed for their customers. The agents therefore, in respect of one particular company, asked their bankers to inquire into that company's financial standing, before the agents placed expensive advertising on its behalf in an advertising campaign. Their bankers did so by contacting the company's bankers, who provided favourable references but "without responsibility".

In setting out the approach to liability for negligent misstatement, Lord Reid stated at 486:

"… I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him. I say "ought to have known" because in questions of negligence we now apply the objective standard of what the reasonable man would have done.

A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require."

(emphasis added)

124. Multiplex relies heavily upon the passage emphasised. Lord Reid said a choice to answer a question, without a clear qualification that no responsibility for it may arise, is a factor which is relevant to his acceptance of responsibility.

125. Mr Nissen argues that RNP chose to answer and knew that Multiplex would rely on the statement contained in the certificate. Because of the role occupied by Multiplex as main contractor and the employer of the TWC, and the use to which the certificate was to be put, RNP thereby assumed responsibility to Multiplex to exercise reasonable skill and care in ensuring the answer – the statement in the certificate – was correct. However, here, RNP was not "choosing to answer" in the same way as the bankers in ***Hedley Byrne***. RNP was specifically contracted by Dunne to answer. The answer that was the certificate (or contained *in* the certificate) was obviously a statement, but due to the different circumstances, it is not enough for Multiplex to rely upon a parallel with the dicta in ***Hedley Byrne*** to demonstrate the existence of the duty.

126. Ms Colter draws attention, in particular, to certain passages of the speech of Lord Devlin. He said at 528:

"I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Nocton v. Lord Ashburton* [1914] AC 932, 972 are "equivalent to contract," that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not

irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good."

(emphasis added)

127. Ms Colter drew attention to the emphasis, when considering an assumption of responsibility, upon the absence of a contractual relationship. The principle in ***Hedley Byrne*** was in any case clarified in ***Henderson v Merrett Syndicates Ltd*** [1994] UKHL 5; [1995] 2 AC 145, where the House of Lords addressed claims made by certain underwriting members (or "Names") at Lloyd's against managing agents. The Names and the managing agents were at opposite ends of a contractual chain. The House of Lords held, notwithstanding this contractual chain, that the managing agents could still owe the Names a duty of care to prevent economic loss. There were two types of Names involved. So-called direct Names had contracts directly with the managing agents; indirect Names did not. Lord Goff held (at 194 in the AC reports) that the managing agents owed a duty of care to both.

128. Lord Goff (at 180) said that the principle underlying the case of ***Hedley Byrne*** "rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which may or may not be contractual in nature". However, he emphasised how unusual the particular situation in that case was.

129. Indeed, he used the example of a building project specifically to identify how a contrary finding would be more likely in such an instance (at 195), in other words, in a more usual case:

"I wish however to add that I strongly suspect that the situation which arises in the present case is most unusual; and that 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. It cannot therefore be inferred from the present case that other sub-agents will be held directly liable to the agent's principal in tort. 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. I put on one side cases in which the sub-contractor causes physical damage to property of the building owner, where the claim does not depend on an assumption of responsibility by the sub-contractor to the building owner; though the sub-contractor may be protected from liability by a contractual exemption clause authorised by the building owner. But 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* principle, 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. This was the conclusion of the Court of Appeal in *Simaan General Contracting Co. v Pilkington Glass Ltd. (No. 2)* [1988] QB 758. As Bingham L.J. put it, at p. 781:

> "I do not, however, see any basis on which the defendants [the nominated suppliers] could be said to have assumed a direct responsibility for the quality of the goods to the plaintiffs [the building owners); such a responsibility is, I think, inconsistent with the structure of the contract the parties have chosen to make.""

(emphasis added)

130. The ***Simaan v Pilkington Glass (No. 2)*** [1988] QB 758 case referred to concerned a supplier of glass units by a nominated supplier, which were found to be defective, and did not concern (as here) the provision of professional services, or a statement in a certificate by a professional. There are therefore some differences. That case was cited to me, and submissions made upon it. However, the differences in the supply of specific goods (through a contractual chain) on such a project, and statements in a certificate by a professional in the position of RNP, are sufficient that it is of indirect interest only, and not necessary to consider in separate detail. The claim by the building owners directly against that supplier in that case failed.

131. Lord Goff also went on in ***Henderson*** to state (at 196) that there was:

> "no inconsistency between the assumption of responsibility by the managing agents to the indirect Names, and that which arises under the sub-agency agreement between the managing agents and the members' agents, whether viewed in isolation or as part of the contractual chain stretching back to and so including the indirect Names."

132. One question in this case therefore could be seen as simply being, to use Lord Goff's words, whether it would be inconsistent to find an assumption of responsibility by RNP, given this would have the "effect of, so to speak, short circuiting the contractual structure so put in place by the parties". The contractual structure put in place comprises the contract formed directly by Dunne with RNP, in the context of the existence of the sub-contract between Dunne and Multiplex on the detailed JCT terms.

133. Ms Colter also relies on dicta in ***White v Jones*** [1995] UKHL 5 [1995] 2 AC 207, a solicitors' negligence case. In that case, the House of Lords considered a claim arising out of instructions to change a father's will, following a family reconciliation, to include legacies in favour of his two daughters, who had previously been disinherited after a quarrel. The reconciliation meant that the father decided the daughters would inherit after all. Those instructions were not, however, implemented by the defendants and the testator died. The appeal by the defendants to the House of Lords, after the Court of Appeal had held they owed the plaintiff daughters a duty of care, was

dismissed. Lord Mustill dissented but in doing so, he explained that there were certain situations where the contractual arrangements were "so strong, so complex" that this would exclude the recognition of tortious duties between parties that were not contractually linked. He stated (at 279):

"If one asks how the solicitor came to be involved in the case the answer is that by accepting the retainer he promised to draw the will with care and diligence. It is therefore proper to enquire whether this source of involvement, and this alone, should create whatever remedies may be given to the plaintiffs for his failure to do what he said. I do not here refer to the argument, forcefully addressed by Professor Jolowicz Q.C., to the effect that so far from the existence of a contract between the testator and the solicitor supporting a tortious cause of action in the plaintiffs, it operates to exclude it. This posits that contractual and tortious responsibilities occupy exclusive domains, and that where the complaint is of a failure to do a promised job of work the law of delict must necessarily be the wrong domain. The argument was advanced before your Lordships gave judgment in *Henderson v Merrett Syndicates Ltd.* [1994] 3 W.L.R. 761, and in the light of the conclusions there expressed cannot I think be any longer sustained. This is certainly not to deny that where the act or omission complained of occurs between persons who have deliberately involved themselves in a network of commercial or professional contractual relations, such for example as may exist between the numerous parties involved in contracts for large building or engineering works, the contractual framework may be so strong, so complex and so detailed as to exclude the recognition of delictual duties between parties who are not already connected by contractual links: see for example *Pacific Associates Inc. v Baxter* [1990] 1 Q.B. 993, This aspect of the law is far from being fully developed and I need not explore it here. Whatever rationalisation is preferred as a means of justifying tortious liability for a failure to act causing pure financial loss - whether a voluntary assumption of an obligation, or the existence of a special situation, or the simple filling of an unacceptable gap - there may be situations where the parties have erected a structure which leaves no room for any obligations other than those which they have expressly chosen to create. On this view the express and implied terms of the various contracts amount between them to an exhaustive codification of the parties' mutual duties. This particular problem does not arise here, for there is no consciously created framework of contractual relationships between the three parties principally concerned. There was only one contract."

(emphasis added)

It is obvious that in the instant case, there was indeed a consciously created framework of contractual relationships.

134. I was also referred to ***Williams v Natural Life Health Foods Ltd*** [1998] UKHL 17, [1998] 1 WLR 830. In that case the House of Lords allowed an appeal by a director and principal shareholder of a company who had been found personally liable both at first instance, and by the Court of Appeal, to franchisees of his company. The claim against him personally (and also against the company itself, although that was later wound up) was one of assumption of responsibility under ***Hedley Byrne*** principles. In allowing the appeal, Lord Steyn stated (at 835):

"The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff. Sometimes such an issue arises in a simple bilateral relationship. In the present case a triangular position is under consideration: the prospective franchisees, the franchisor company, and the director. In such a case where the personal liability of the director is in question the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The enquiry must be whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees. An example of such a case being established is *Fairline Shipping Corp. v. Adamson* [1975] Q.B. 180. The plaintiffs sued the defendant, a director of a warehousing company, for the negligent storage of perishable goods. The contract was between the plaintiff and the company. But Kerr J. (later Kerr L.J.) held that the director was personally liable. That conclusion was possible because the director wrote to the customer, and rendered an invoice, creating the clear impression that he was personally answerable for the services. If he had chosen to write on company notepaper, and rendered an invoice on behalf of the company, the necessary factual foundation for finding an assumption of risk would have been absent. A case on the other side of the line is *Trevor Ivory Ltd. v. Anderson.* This case concerned negligent advice given by a one-man company to a commercial fruit grower. Despite proper application of the spray it killed the grower's fruit crop. The company was found liable in contract and tort. The question was whether the beneficial owner and director of the company was personally liable. The plaintiff had undoubtedly relied on the expertise of the director in contracting with the company. The New Zealand Court of Appeal unanimously concluded that the defendant was not personally liable. McGechan J., who analysed the evidence in detail, said, at p. 532, that there was merely "routine involvement" by a director for and through his company. He said that there "was no singular feature which would justify belief that Mr. Ivory was accepting a personal commitment, as opposed to the known company obligation." That was the basis of the decision of the Court of Appeal. In his 1997 Hamlyn Lecture Lord Cooke of Thorndon commented that if the plaintiff in *Trevor Ivory Ltd. v. Anderson* "had reasonably thought that it was dealing with an individual, the result might have been different:" see *Taking Salomon Further, Turning Points of the Common Law*, p. 18, note 50. Such a finding would have required evidence of statements or conduct crossing the line which conveyed to the plaintiff that the defendant was assuming personal liability."

(emphasis added)

135. This speech uses the term "crossing the line" when considering the statements, meaning those between the defendant and the plaintiff in that case. Here, that means statements crossing the line between RNP and Multiplex. Ms Colter relies on this concept in Argo's favour. She submits that there were no such statements that crossed the line between RNP and Multiplex. Mr Nissen maintains that the certificates did "cross the line", or at least were intended to (wishing, as he does, to restrict consideration to the certificates being passed to Dunne for onward transmission to Multiplex, rather than whether the certificates in fact reached Multiplex, in what form

and – importantly - when). The agreement of the experts that a Category 3 checker would know that the certificates would form part of the information provided to the TWC rather undermines the assertion that nothing was ever intended to cross the line. However, the primary focus ought to be, in my judgment, upon the fact that the certificates were to be provided by RNP to Dunne to demonstrate that its design had been checked independently.

136. Reliance was also placed by Ms Colter on ***Marc Rich & Co AG v Bishop Rock Marine Co Ltd ("The Nicholas H")*** [1995] UKHL 4 [1996] 1 AC 211. In that case, it was held that a classification society did not owe a duty of care to cargo owners in respect of statements made by its surveyor concerning the seaworthiness of a vessel, a bulk carrier. Under the bills of lading which incorporated the Hague Rules, the shipowners owed the cargo owners a non-delegable duty to make the vessel seaworthy at the inception of the voyage. The vessel put into port during a voyage when she developed a crack in her hull. The surveyor of the classification society inspected the vessel, instructed repairs and permitted onward continuation of the voyage, which sank with the total loss of the cargo. The House of Lords decided the case on the basis of proximity and whether it would be fair, just and reasonable to impose a duty of care of this nature upon classification societies. One feature that I would emphasise in this case is the statement (at 230) in the speech of Lord Steyn of the purpose of classification societies. "My Lords, for more than 150 years classification societies have classified merchant ships in the interests of safeguarding life and ships at sea". I draw attention to this because there is a safety element, too, in the performance of a Category 3 check. This is both clear from the terms of the British Standard and is also agreed by the experts. It is clearly sensible, for the design of complex and/or innovative temporary works, to have those checked by an independent entity, in this case (namely Category 3) by a professional wholly independent of the designing organisation. It is also a requirement of the British Standard that this be done. It is clear from the ratio of ***The Nicholas H*** that the safety aspect of this is not a determinative factor in favour of there being a duty of care.

137. Lord Steyn also stated (at 237), when considering a number of factors "to put the case in its right perspective" including the issue of reliance:

> "It is possible to visualise direct exchanges between cargo owners and a classification society, in the context of a survey on behalf of owners of a vessel laden with cargo, which might give rise to an assumption of responsibility in the sense explained by Lord Goff in *Henderson v. Merrett Syndicates Ltd.* [1994] 3 W.L.R. 761, 773, 789-791, in the passages previously identified. In the present case there was no contact whatever between the cargo owners and the classification society. Moreover, as Saville L.J. pointed out in this case it is not even suggested that the cargo owners were aware that N.K.K. had been brought in to survey the vessel: see [1994] 1 W.L.R. 1071, 1082B. The cargo owners simply relied on the owners of the vessel to keep the vessel seaworthy and to look after the cargo. Saville L.J., at p. 1082C and Balcombe L.J., at p. 1089A, regarded this feature as sufficient to demonstrate that the necessary element of proximity was absent. I would approach the matter differently. In my view this feature is not necessarily decisive but it also contributes to placing the claim in the correct perspective".
>
> (emphasis added)

138. This demonstrates that the requirement of communications "crossing the line" may not be entirely decisive, but remains important in order to place the claim in its correct perspective. Different phraseology was used in the ***The Nicholas H*** but the concept is the same. Consideration must be given to direct exchanges (if there are any) between RNP and the party seeking to establish the direct duty of care, and the nature of those exchanges.

139. Lord Steyn also considered (at 241) the issue of policy factors. He stated:

> "At present the system of settling cargo claims against shipowners is a relatively simple one. The claims are settled between the two sets of insurers. If the claims are not settled, they are resolved in arbitration or court proceedings. If a duty is held to exist in this case as between the classification society and cargo owners, classification societies would become potential defendants in many cases. An extra layer of insurance would become involved. The settlement process would inevitably become more complicated and expensive. Arbitration proceedings and court proceedings would often involve an additional party. <u>And often similar issues would have to be canvassed in separate proceedings since the classification societies would not be bound by arbitration clauses in the contracts of carriage.</u> If such a duty is recognised, there is a risk that classification societies might be unwilling from time to time to survey the very vessels which most urgently require independent examination. It will also divert men and resources from the prime function of classification societies, namely to save life and ships at sea. These factors are, by themselves, far from decisive. But in an overall assessment of the case they merit consideration."
>
> (emphasis added)

140. It is not generally productive for first-instance judges to indulge themselves by considering policy. However, in some cases it is unavoidable. Where, as here, a novel duty of care is advanced, it is important that all the material factors, both for and against the imposition of such a duty, are considered. The above passage makes it clear that policy, and the consequences in terms of litigation and settling of claims, require consideration and that these are material factors. I return to this at [180] below.

141. Turning to more modern cases, of the numerous ones cited, I shall concentrate on only five. The reason that I have done so is to demonstrate that the law in this area moves consistently. The other cases to which I do not refer, but which were argued, restate and apply the same principles, in a variety of different factual circumstances. I have considered them all, but many of them recite the same passages from the earlier authorities in any event.

142. The first is ***Customs and Excise Commissioners v Barclays Bank plc*** [2006] UKHL 28. In that case, the House of Lords heard an appeal by the defendant bank. The Court of Appeal had overturned the decision of the first-instance judge on a preliminary issue, after he had held that the bank did not owe a duty of care to the Commissioners, who had obtained a freezing injunction against two companies for unpaid VAT. The bank had notice of the injunctions but failed to prevent payment out of the accounts in breach of the injunctions. The Court of Appeal rejected the bank's submission that it could not be regarded as assuming responsibility to the commissioners. The House of Lords did not agree, and allowed the appeal.

143. The House of Lords held that the 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, and the court would focus its attention on the detailed circumstances of the case and the particular relationship between the parties in the context of their legal and factual situation taken as a whole.

144. Lord Bingham stated the following:

"[4] …..I content myself at this stage with five general observations. First, there are cases in which one party can accurately be said to have assumed responsibility for what is said or done to another, the paradigm situation being a relationship having all the indicia of contract save consideration. *Hedley Byrne* would, but for the express disclaimer, have been such a case. *White v Jones* and *Henderson v Merrett*, although the relationship was more remote, can be seen as analogous. Thus, like Colman J (whose methodology was commended by Paul Mitchell and Charles Mitchell, "Negligence Liability for Pure Economic Loss (2005) 121 LQR 194, 199), I think it is correct to regard an assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further enquiry. If answered negatively, further consideration is called for.

[5] Secondly, however, it is clear that the assumption of responsibility test is to be applied objectively (*Henderson v Merrett*, p 181) and is not answered by consideration of what the defendant thought or intended. Thus Lord Griffiths said in *Smith v Bush*, p 862, that

"The phrase 'assumption of responsibility' can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice."

Lord Oliver of Aylmerton, in *Caparo v Dickman*, p 637, thought "voluntary assumption of responsibility":

"a convenient phrase but it is clear that it was not intended to be a test for the existence of the duty for, on analysis, it means no more than that the act of the defendant in making the statement or tendering the advice was voluntary and that the law attributes to it an assumption of responsibility if the statement or advice is inaccurate and is acted upon. It tells us nothing about the circumstances from which such attribution arises."

In similar vein, Lord Slynn of Hadley in *Phelps v Hillingdon*, p 654, observed:

"It is sometimes said that there has to be an assumption of responsibility by the person concerned. That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility. It is, however, clear that the test is an objective one: *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 181. The phrase means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by law."

The problem here is, as I see it, that the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of

responsibility becomes, the less difference there is between this test and the threefold test.

[6] Thirdly, the threefold test itself provides no straightforward answer to the vexed question whether or not, in a novel situation, a party owes a duty of care. In *Caparo v Dickman*, p 618, Lord Bridge, having set out the ingredients of the three-fold test, acknowledged as much:
"But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, 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."

Lord Roskill made the same point in the same case at p 628:

"I agree with your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as 'foreseeability', 'proximity', 'neighbourhood', 'just and reasonable', 'fairness', 'voluntary acceptance of risk', or 'voluntary assumption of responsibility' will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty. If this conclusion involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care, as my noble and learned friend Lord Bridge of Harwich suggests, I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty."

[7] Fourthly, I incline to agree with the view expressed by the Messrs Mitchell in their article cited above, p 199, that the incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation. The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be, on the approach of Brennan J adopted in *Caparo v Dickman*, to find that there has been an assumption of responsibility or that the proximity and policy conditions of the threefold test are satisfied. The converse is also true.

[8] Fifthly, it seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and

need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole."

(emphasis added)

145. A further passage in the same case in the speech of Lord Hoffmann states:

"[35] There is a tendency, which has been remarked upon by many judges, for phrases like "proximate", "fair, just and reasonable" and "assumption of responsibility" to be used as slogans rather than practical guides to whether a duty should exist or not. These phrases are often illuminating but discrimination is needed to identify the factual situations in which they provide useful guidance. For example, in a case in which A provides information to C which he knows will be relied upon by D, it is useful to ask whether A assumed responsibility to D: *Hedley Byrne & Co Ltd v Heller & Partners* Ltd [1964] AC 465: *Smith v Eric S Bush* [1990] 1 AC 831. Likewise, in a case in which A provides information on behalf of B to C for the purpose of being relied upon by C, it is useful to ask whether A assumed responsibility to C for the information or was only discharging his duty to B: *Williams v Natural Life Health Foods Ltd* [1998] AC 830. Or in a case in which A provided information to B for the purpose of enabling him to make one kind of decision, it may be useful to ask whether he assumed responsibility for its use for a different kind of decision: *Caparo Industries plc v Dickman* [1990] 2 AC 605. In these cases in which the loss has been caused by the claimant's reliance on information provided by the defendant, it is critical to decide whether the defendant (rather than someone else) assumed responsibility for the accuracy of the information to the claimant (rather than to someone else) or for its use by the claimant for one purpose (rather than another). The answer does not depend upon what the defendant intended but, as in the case of contractual liability, upon what would reasonably be inferred from his conduct against the background of all the circumstances of the case. The purpose of the inquiry is to establish whether there was, in relation to the loss in question, the necessary relationship (or "proximity") between the parties and, as Lord Goff of Chieveley pointed out in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 181, the existence of that relationship and the foreseeability of economic loss will make it unnecessary to undertake any further inquiry into whether it would be fair, just and reasonable to impose liability. In truth, the case is one in which, but for the alleged absence of the necessary relationship, there would be no dispute that a duty to take care existed and the relationship is what makes it fair, just and reasonable to impose the duty.

[36] It is equally true to say that a sufficient relationship will be held to exist when it is fair, just and reasonable to do so. Because the question of whether a defendant has assumed responsibility is a legal inference to be drawn from his conduct against the background of all the circumstances of the case, it is by no means a simple question of fact. Questions of fairness and policy will enter into the decision and it may be more useful to try to identify these questions than simply to bandy terms like "assumption of responsibility" and "fair, just and reasonable." In *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295, 300-303 I tried to identify some of these considerations in order to encourage the evolution of lower-level principles which could be more useful than the high abstractions commonly used in such debates".

(emphasis added)

146. This passage leads to the following important question being posed in this case, namely (to use the words of Lord Hoffmann) the following. It is critical to decide whether RNP (rather than someone else) assumed responsibility for the accuracy of the information (in the certificates) to Multiplex (rather than to someone else), or for its use by Multiplex for one purpose (rather than another). I answer that question below at [172](14).

147. The second more modern case is ***Riyad Bank v Ahli United Bank (UK) plc*** [2006] EWHC Civ 780. That case concerned an appeal in respect of instruments constructed to avoid the prohibition in Islam of usury, which includes the charging of interest. Banks offering what are called "Sharia-compliant" funds must structure them in such a way as to comply with these principles. The claimants were commercial banks based in Saudi Arabia and London; the second claimant was the subsidiary of the first. The defendant was a bank which established an income fund which invested in commercial equipment and received rental payments. The claimants and the bank cooperated in the establishment of a fund. The issues in the case were that the claimants asserted that the bank failed to exercise the necessary degree of care in analysing and evaluating the information about the leases which it received from the asset managers, and hence negligently advised the fund to pay more for the leases than they were, in reality, worth. They also asserted that the bank owed a duty of care in tort directly to the fund.

148. Moore-Bick J at first instance held that the bank did owe a duty of care to the fund. This duty was not to be negligent in the giving of advice on the value of the leased assets, and was of the kind sanctioned in the ***Hedley Byrne***, and ***Henderson v Merrett*** cases. The Court of Appeal dismissed the appeal, holding that given the profession of expertise by the bank, the known dependence of the claimants in what was a specialised field, the circumstances in which the advice was tendered by the bank, and the reasons why there was no contractual relationship between the fund and the bank, a duty of care was owed in the provision of investment advice.

149. Longmore LJ stated the following:

"[32] Mr Howard [for the appellant] then relied on building cases such as *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988 QB 758 and *Pacific Associate Inc v Baxter* [1990] 1 QB 993 for the proposition that where there is a contractual chain, that chain should not be by-passed by a claim in tort. As Lord Goff said in *Henderson v Merrett* that is, indeed, the usual position. But neither of those authorities considered a case where discussions and representations were made directly to the party who, in the event, suffered loss. 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. As the judge said in paragraph 67 of his judgment:-

". . . the manner in which much of that advice was expected to be and was given, namely by the attendance of Mr Weist at meetings of the Fund's board, reinforces the conclusion that it did, in fact, assume such a responsibility."

[33] I entirely agree and would hold that UBK did indeed owe a duty of care to the Fund in relation to the valuation of the leases it offered to RBE for the Fund to buy."

150. The judgment of Neuberger LJ (as he then was) considered the question of "gaps" in the contractual structure. This is a lengthy series of paragraphs, and ordinarily,

lengthy citation of previous authority should be avoided. However, in my judgment it is helpful to set these out in more detail than I would otherwise to make clear the analysis in terms of this aspect of the case, as the different arguments and advantages of two different approaches are weighed up:

"[36]…..That argument was that it is inappropriate to permit the Fund to invoke the law of tort in order to sue UBK direct for negligent valuation advice, when the parties (i.e. the Fund, RBE and UBK) had structured their contractual relationship so that UBK's duty in respect of that advice was not owed to the Fund, but to RBE, who in turn owed a similar duty to the Fund.

[37] There is, at any rate at first sight, attraction in the notion that, where, in a purely commercial context, parties have voluntarily and consciously arranged their affairs so that there is a contractual obligation on A to give advice to B, and on B to consider and pass on that advice, to the extent that it sees fit, to C, there should normally be no part for the law of tort to play. In other words, that

i) There should be no tortious duty in relation to the advice, either as between A and B or as between B and C, because those parties have identified the extent and ambit of the respective rights and duties between them in their respective contracts; and

ii) There should be no tortious duty in relation to the advice given by A, as between A and C, because the three parties have intentionally structured their relationships so that there is no direct duty between A and C, but separate duties between A and B, and between B and C.

[38] The justifications for each of these two points might appear to be the converse of each other. Point (i) is based on the contention that the raising of a tortious duty is inappropriate because the parties have agreed a contractual duty. Point (ii) is based on the contention that the raising of a tortious duty is inappropriate because the parties have decided that there should be no contractual duty. However, as I see it, despite this apparent paradox, both points essentially rest on the same proposition, namely that a tortious duty should not be invoked between parties to commercial contracts at least where there is no "liability gap".

[39] In relation to point (i), it would be surprising (save perhaps in unusual circumstances) if the law of tort imposed greater liability on A or B than they had agreed to accept, either expressly or impliedly, in their respective contracts, and it might appear pointless and confusing if there was a tortious liability which was simply co-extensive with the contractual liability. Of course, tortious liability is generally subject to less strict statutory limitation bars than contractual liability (as is demonstrated in the Henderson case at 174F to G), but that may seem a questionable reason, in terms of principle, for justifying a co-extensive tortious duty where there is a contractual duty.

[40] So far as point (ii) is concerned, it may be thought to be questionable whether the law of tort should normally be capable of being invoked in order to found a duty of care in circumstances where the parties have intentionally set up a contractual structure which avoids such a contractual duty. Especially so when there is no "gap" which requires "filling"; in this case C, the Fund, could have sued B, RBE, who could in turn have sued A, UBK. The only reason that that course cannot now be taken is that, for commercial reasons, Riyad Bank was not prepared to sue (or let the Fund sue) RBE, and it is now too late for it to do so, because of a limitation bar.

[41] Some apparent support for the view that a tortious duty of care normally has no part to play in the context of a commercial contractual relationship may be found in observations of the Privy Council in a judgment given by Lord Scarman in Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80 at 107, quoted by Lord Goff of Chieveley in the Henderson case at 186C to F. Further, in the Williams case at 837F, Lord Steyn said that, at least in the current state of English contract law, "the law of tort, as the general law, has to fill an essential gap-filling role".

[42] On the other hand, there are strong countervailing arguments the other way, which appear to me, again, to apply equally to points (i) and (ii). If a duty of care would otherwise exist in tort, as part of the general law, it is not immediately easy to see why the mere fact that the adviser and the claimant have entered into a contract, or a series of contracts, should of itself be enough to dispense with that duty. If a claimant is better off relying on a tortious duty, it is not readily apparent why a claimant who receives gratuitous advice should be better off than a claimant who pays for the advice (and therefore would normally have the benefit of a contractual duty), unless, of course, the contract so provides. One might expect the question to be determined by reference to the contractual relationship on the normal basis, namely whether the nature terms and circumstances of the contract(s) expressly or impliedly lead to the conclusion that the parties have agreed that there will be no tortious duty.

[43] These arguments have to be assessed in the light of the decision of the House of Lords and, in particular the analysis of Lord Goff, in the Henderson case. It seems clear from the closely reasoned passage in his speech at 184B to 194E that the issue has been resolved, at least in principle, in favour of the latter of the two views that I have summarised. In other words, "the common law is not antipathetic to concurrent liability". At 186C to F, Lord Goff considered and explained Lord Scarman's observation in the Tai Hing case. He went on to say that a claimant who is owed a contractual duty of care may also (or alternatively) be entitled to invoke a tortious duty of care, unless it would be "so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded" – see at 193H and 194A to B.

[44] Those observations are clearly appropriate to what I have called point (i), but, while it is not immediately clear that they apply to point (ii), in my view they do. As mentioned above, the principle upon which both points (i) and (ii) rest is essentially this, that the law of tort should not be invoked in a commercial context, at least where there are no gaps, where the parties have contractually provided for a duty, or a chain of duties. More importantly, Lord Goff's reasoning in relation to point (ii) appears to embody the same approach as that he applied to point (i).

[45] At 193B to C, Lord Goff said "the law of tort is the general law out of which the parties can, if they wish, contract", and that the correct approach is to determine whether there would otherwise be a tortious liability arising out of an assumption of responsibility and concomitant reliance, and "then to inquire whether or not that liability is excluded by the contract because the latter is inconsistent with it". That is essentially the approach he adopted when he turned to consider the contention that "the indirect Names and the managing agents, as parties to the chain of contracts…must be taken to have thereby structured their relationship so as to exclude any duty of care owed directly by the managing agents to the indirect Names in tort" – 195A to B. He then said that he saw "no reason in principle" why an adviser could not owe, at the same time, a contractual duty of care to the next person in the chain and a

tortious duty of care to another person further along the chain. He went on, in a passage more fully quoted by Longmore LJ, to observe at 195G that "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…short-circuiting the contractual structure put in place by the parties".

[46] So far as "gap-filling" is concerned, Lord Steyn's observation in the Williams case cannot mean that a tortious duty can only arise where there is a "liability gap": that would be inconsistent with the whole basis of the reasoning and decision in the Henderson case. Lord Steyn's point in this connection was, I think, that there are cases involving contractual duties, where, if the law of tort cannot be invoked, as a matter of policy, there would be a "liability gap" which would be unacceptable (as in Smith v Eric S Bush [1990] 1 AC 831 and White v Jones [1995] 2 AC 207). That aspect of the law of tort has no bearing on the present case: the fact that the law of tort can be invoked where there is a "liability gap" in certain exceptional cases does not mean that it can never be invoked in a case where there is no "liability gap".

[47] Thus, the question in a point (ii) case, as in a point (i) case, is whether, in relation to the advice he gave, the adviser assumed responsibility to the claimant, in the light of the contractual context, as well as all the other circumstances, in which the advice was given. The way in which Lord Goff expressed himself in more than one place in his speech in the Henderson case, including some of the brief passages I have quoted, suggests that it is for the adviser to establish that the contractual context negatives an assumption of responsibility, not for the claimant to show that the assumption survives notwithstanding that context.

[48] Like Longmore LJ, I do not think that the answer can depend on whether one asks first whether, absent the contractual context, there would be an assumption of responsibility, and secondly whether the positive answer to that question is vitiated by the contractual context; or whether one asks the single question whether, in all the circumstances, including the contractual context, there was an assumption of responsibility. Whether or not one adopts the two-stage approach may depend on the facts of the particular case, or even on the way the case has been argued.

[49] In the present case, there were a number of factors which together satisfy me that Moore-Bick J was quite right to conclude that UBK assumed responsibility to the Fund in relation to the advice and other assessments it agreed to provide under the TSA, notwithstanding the contractual structure the parties adopted."

151. He then identified the factors which he considered justified that finding. There were nine of them, including that the bank held itself out as experienced and expert in a specialised field (at [49](i)) and also that there was a "logical conceptual or commercial conflict between either or both of the contractual duties owed" by the bank to the claimants, the claimants to the fund, and the tortious duty said to be owed by the bank to the fund.

152. It is therefore plain that a "gap" is not essential, but whether there is a gap or not is a relevant consideration. Here, as I have explained at [58] above, in this case there is no gap.

153. The next two cases are both first-instance, the first arising in the construction field. I shall deal with them in chronological order. In ***Galliford Try Infrastructure Ltd (Formerly Morrison Construction Ltd and Morrison Construction Services Ltd) v Mott MacDonald Ltd*** [2008] EWHC 1570 (TCC) Akenhead J considered similar

claims in relation to the re-development of the former Victorian Birmingham Children's Hospital for commercial purposes between 1998 and 2002. Mott MacDonald were the consulting engineers retained by a company associated with the employer and the main contractor, all of whom were members of the same group (or at least, associated companies). The main contractor, the claimant, brought a claim directly against the engineers in relation to alleged failures in relation to the horizontal forces from the piling walls and how they were to be addressed. Another issue in respect of which complaint was made against the engineers related to the way in which the Victorian façade, which had to be retained, was expected to be supported during the works. The issue of a duty of care owed by the engineers was considered.

154. Having analysed the authorities, Akenhead J stated the following:

"[190] I draw all these eminent authorities together in the following summary in the context of this case:

(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 misstatement 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 London Borough of Merton***, 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 inter-relationship between the parties to and by whom tortious duties are said to be owed arises. Thus, it is not every careless misstatement 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 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.

[919] One needs to determine what responsibility, if any, judged objectively was assumed by MM towards MCL in this case. One can have regard, amongst other matters, to:

(a) The contractual nexus or lack of contractual nexus between the party said to owe the duty of care and the party said to have been owed it;

(b) What was said in writing and orally by [the engineers] to [the main contractor] and in what context it was said;

(c) Any disclaimers issued by [the engineers] to [the main contractor] in relation to what was said;

(d) What was said to [the engineers] or mutually understood by [the main contractor] and [the engineers] as to why information was sought; put another way, what was the express or necessarily implied purpose for the information being sought and supplied."

(emphasis added)

155. I accept that analysis. In the instant case, the statement within the certificate that the Category 3 check had been performed using reasonable skill and care was not given by RNP to Multiplex; it was given to Dunne. It was required by Dunne in order that Dunne could comply with the CDM Regulations, and also its own obligations to Multiplex, and so Dunne could provide the TWC with the package of documents necessary in order for the TWC to issue a permit for the temporary works to commence. It was one piece of the information required by Dunne in order to comply with the British Standard, and so it could properly apply for the permit to load from the TWC. RNP was not being asked to give, and was not giving, advice to Multiplex at all.

156. The second first-instance case is ***Arrowhead Capital Finance Ltd (In Liquidation) v KPMG LLP*** [2012] EWHC 1801 (Comm); [2012] PNLR 30, a decision of Stephen Males QC (as he then was) sitting as a Deputy High Court Judge. In that case, Arrowhead, an investment fund that had loaned money to a special purpose vehicle that in turn loaded it to KPMG's client Dragon Futures Ltd ("Dragon"), brought a claim against KPMG. The overall subject matter of the case was trade in mobile telephones, an activity that could potentially be the subject of carousel fraud due to the way that VAT was dealt with. The basis of the claim was that Dragon had

engaged KPMG to provide advice on the "implementation of a due diligence strategy to address the threat posed by HM Customs & Excise (HMCE) and its approach to companies dealing in the mobile phone industry". That is taken from the engagement letter set out at [9] in the judgment.

157. In considering KPMG's application to strike out the claim on the grounds that it disclosed no reasonable cause of action, the judge considered whether KPMG owed Arrowhead a duty of care. The judgment considers this between [41] to [60], considering both the assumption of responsibility test and the three-part test, and the judge concluded that no duty of care arose under either. At [41] to [47] the judge considered the cases, in particular ***Customs and Excise v Barclays*** and ***Williams v Natural Life Foods***. He explained at [49] that KPMG assumed responsibility to Dragon for the proper performance of its services, on the terms of its engagement letter including the limitations contained with that. He went on to find:

"[50] In such circumstances it is inconceivable, in my judgment, that any reasonable businessman would have considered that KPMG was voluntarily assuming an unlimited responsibility towards potential investors in Dragon. This would apply to direct investors, but applies with even greater force to an investor such as Arrowhead which was investing at several removes. If the question had been raised in some notional conversation between Arrowhead and KPMG, it is obvious that KPMG would not have been prepared to accept such an unlimited responsibility. This is underlined by Mr. Simmonite's reference in his e-mail dated 9 December 2003 (see [14] above) to the "high risk nature of the business", as a result of which it would be unusual for a bank to be willing to treat VAT repayments as an asset for the purpose of lending. While this was not a communication to Arrowhead, the information which it contains must have been obvious to Arrowhead whose role was to provide finance which was not obtainable from more readily available sources, and is therefore part of the relevant background against which the parties' conduct is to be assessed. Similarly, while Arrowhead probably did not know of the particular express exclusion in KPMG's general terms of business of any third party rights, this was not an unusual term and was the sort of term which a reasonable businessman would expect to find there.

[51] Although KPMG knew that its involvement was being described to potential investors by Dragon, there is objectively no reason to suppose that it was prepared to accept any responsibility other than its responsibility to Dragon in accordance with the terms of its engagement letter, let alone responsibility to a whole chain of investors such as was put in place in this case. KPMG in my judgment did not assume responsibility to Arrowhead, but (in Lord Hoffmann's terms) was only discharging its duty to Dragon. Far from the relationship between Arrowhead and KPMG having all the indicia of contract save for consideration, there was no direct contact between them until a relatively late stage and one of the obvious and important indicia of a contractual relationship in such a context, namely an engagement letter defining KPMG's services and the extent of its liability, was missing.

[52] Accordingly, to hold that there was a voluntary assumption of responsibility by KPMG towards Arrowhead would fly in the face of the reasonable expectations of businessmen. The only reasonable inference from the parties' conduct against the background of all the circumstances of the case is that no such responsibility was assumed."

(emphasis added)

158. He then turned to the three-fold test. Having considered the cases relied upon by Arrowhead, he concluded:

> "[59] I would accept that in some contexts the defendant's knowledge of and consent to the fact that his advice is being passed on by his client to a third party, who will rely on it for the purpose of making an investment (using that word in a broad sense), may be sufficient to enable the third party 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 the third party. That is generally more likely to be the case when the third party claimant is a consumer and the context is an ordinary transaction such as the purchase of a house (as in *Smith v. Bush*) than in a carefully structured business context such as the present case, where the claimant was a sophisticated investor dealing with the known risk of not recovering VAT repayments as a result of the "HMCE threat". As the cases make clear, in determining what is fair, just and reasonable, context is all important.
>
> [59] I would be prepared to assume for present purposes that Arrowhead is able to satisfy the requirements of foreseeability and (though with some hesitation) proximity. Even so, however, in my judgment it would not be fair, just and reasonable to impose a duty of care on KPMG. This is for essentially the same reason that I have concluded that the case based on assumption of responsibility must fail. That is to say, it would not be fair, just and reasonable to impose a duty of care on KPMG which could result in unlimited liability (or at any rate, liability up to the full amount of the loans to be advanced by Arrowhead, together with a high rate of interest on such loans) when it would have been obvious to all concerned, first that KPMG's relationship with its client, Dragon, was governed by an engagement letter which was likely to contain limitations on the extent of KPMG's liability and very possibly an exclusion of liability to third parties, second that the business in which Dragon proposed to engage was a high risk business, and third that KPMG would not have been prepared to accept such a responsibility to Arrowhead if it had been asked to do so."
>
> (emphasis added)

159. I agree with the approach of the judge in that case. I accept, as he did, that in some contexts the defendant's knowledge of and consent to the fact that his advice is being passed on by his client to a third party, who will rely on it for a specific purpose, *may* be sufficient to enable the third party (here, Multiplex) 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. That is generally more likely to be the case when the third party claimant is a consumer and the context is an ordinary transaction. It is not likely to be the case where the third party is a main contractor, with detailed contractual provisions governing all of its relationship with others (such as the employer, sub-contractors, its own professionals if it has engaged any) that do not include the defendant.

160. The fifth case is ***Burgess v Lejonvarn*** [2017] EWCA Civ 254; [2017] PNLR 25, where Hamblen LJ (as he then was) upheld the decision of the Deputy High Court Judge on preliminary issues that held there was a duty of care, on the assumption of responsibility basis, owed by a professional garden designer to neighbours and social friends, for whom she had performed gratuitous services. Hamblen LJ listed at [72] all of the different features of that case that had led the judge to conclude that there was

an assumption of responsibility. There were 10 of them, and they were all very fact specific. Although the judge had found that there was no contract between the parties, and therefore that there was no obligation upon Mrs Lejonvarn to undertake *any* services, those that she had undertaken had to be performed with reasonable care and skill.

161. Two important parts of the judgment for the purposes of the instant case are the following. At [75], Hamblen LJ stated:

"the fact that the judge found that there was no contract does not mean that the parties' relationship could not be akin to a contractual one. The judge found at [182] that it was so akin, observing that the services "were all provided in a professional context and on a professional footing"

and that the services were

"freely accepted by the Burgesses. The Burgesses were her clients (albeit not in a contractual sense) and they owned the land in respect of which the services were performed."

The reason this is important is as follows. That case involved a very close relationship that was not contractual. It *could* (given slightly different circumstances) have been contractual, but was not. It was akin to a contractual relationship.

162. The second part is at [89] where Hamblen LJ stated that "a duty expressed in these terms does not trespass on the realm of contract". This shows the careful and justified reluctance of the courts to allow the law of tort to be used by claimants to "trespass" on contracts entered into freely by the parties.

163. These two passages also make it clear that the particular features of that case are highly unusual. There was a professional relationship between the parties, albeit one that was not governed by a contract. That is a rather different scenario to the instant case, where there was an express contractual relationship to which RNP was a party, but it was one which RNP consciously and deliberately entered into with Dunne, and not with Multiplex. The decision in ***Burgess*** is most fact specific[2]. I find the case wholly distinguishable.

164. These five cases demonstrate that, often, the result will be the same whether one adopts the assumption of responsibility test, or the three-fold test. They also demonstrate that, in some unusual factual situations (such as ***Riyad Bank***, or ***Burgess***) it may be the unique facts themselves – the context within which the duty has to be considered – that lead to the imposition of the duty of care. 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.

165. Turning to reliance, in ***Hunt v Optima (Cambridge Ltd)*** [2014] EWCA Civ 714 the Court of Appeal upheld an appeal from findings at first instance that purchasers of newly constructed apartments could sue on architects' certificates on the basis of negligent misrepresentation, even though the certificates had not been received by the purchasers until after contracts for sale of the apartments to them had been exchanged.

166. The certificates had been issued for the benefit both of the purchasers and their lenders, as they all purchased their properties using mortgages. Christopher Clarke LJ dealt with reliance at [52] to [67]. He stated the following:

"[54] 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 Ld 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: *Chitty* 31st Ed 6-035; *Smith v Chadwick* [1884] 9 App Cas 187,195/6.

[55] In the present case the negligent statements relied on were the statements contained in the signed Certificate eventually provided to the relevant claimant. But the claimants cannot have relied on such statements in committing themselves to the agreements to purchase because those statements were not then in existence."

(emphasis added)

167. Here, it is plain that in terms of *factual* reliance, Multiplex faces a difficulty, given it did not receive the first certificate in its form as produced by RNP, receiving only a version of it that had the notes and comments box itself (and the notes and comments contained therein) entirely removed. Multiplex only received the second certificate some months later, after the temporary works had been progressed to an appreciable degree and ten separate permits to load had been produced.

168. In my judgment, it does not matter, for the purposes of answering the preliminary issues, whether I approach the issues strictly on the basis of the wording approved by the court and which I have produced at [11] above (thus not dealing with factual reliance, as urged by Mr Nissen) or whether that point is also considered. This is because the answer is the same whichever approach is used.

169. The first preliminary issue is drafted by reference to the certificates "provided by the Third Defendant to the First Defendant on 25 January 2016 and 4 February 2016." As a matter of strict black letter interpretation of that issue, therefore, it does not invite consideration of what happened to the certificates after they were provided to Dunne. I will, therefore, deal with that scenario first. I invited both parties to consider, during the hearing, whether they wished to propose alternative agreed wording for that issue, but they both declined.

170. I do not consider it makes any difference to the answer whether one considers what happened after the certificates reached Dunne. Multiplex, as the main contractor and TWC with authority to permit the temporary works to commence, did not allow the certificate to "operate upon his mind in such a way that he suffers loss on account of his reliance", to adopt and apply the phrase of Christopher Clarke LJ in ***Optima v Hunt***. This is because of the purpose for which the Category 3 check is produced. There are a variety of documents that Dunne had to produce to Multiplex in order to be permitted to commence the temporary works; the certificate was but one part. In terms of legal reliance, Multiplex did not allow the issuing of the certificate to operate upon its mind in such a way that the economic loss that was suffered by it was on account of that reliance.

171. Given that finding, it does not matter that the first certificate never, in its unadulterated form, reached Multiplex at all; or that the second certificate did not reach Multiplex until June 2016, by which time the temporary works were well

underway. Although if one approaches the matter as one of factual (rather than legal) reliance, then Multiplex plainly did not in fact rely upon the certificates, the issue of a duty of care can be considered sufficiently by taking account of the certificates that reached Dunne, rather than what happened to the certificates (or did not happen) after that.

172. I consider that RNP did not assume responsibility to Multiplex for the statements in the certificates, whether as the main or principal contractor, or as the TWC (Multiplex advances both in its pleadings). The following are relevant matters that lead me to this conclusion. I have considered the full factual background, the evidence and the areas of agreement of the engineering experts in their joint statement. These are the specific features that lead me to this conclusion:

(1) Dunne had full design responsibility for the sub-contract works to Multiplex under the sub-contract it entered into with Multiplex. This is accepted by both parties before me. This included responsibility for the design of the temporary works, of which the slipform rig was a part.

(2) 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.

(3) There was no direct contractual link between RNP and Multiplex in respect of the obligation upon RNP to perform the Category 3 design check.

(4) The consciously created contractual relations between the parties did not include any direct contractual responsibility between RNP and Multiplex.

(5) The role fulfilled by RNP was limited to performing a Category 3 check upon the design that was produced by the entity with design responsibility, and for doing so using the documents that were provided to RNP by that same entity. That entity was Dunne, who had sub-contracted the design responsibility it had to BRM.

(6) 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. These included complying with all Statutory Requirements. Multiplex accepted that the CDM Regulations are part of the Statutory Requirements, and it is a part of the CDM Regulations that a Category 3 check is obtained. Dunne could not comply with its own contractual obligations to Multiplex without such a check having been done by an independent design checker.

(7) 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.

(8) There was no direct contact between RNP and Multiplex at all prior to the issue of the certificate of 25 January 2016.

(9) Indeed, even that document did not "cross the line", as it was not passed on to Multiplex by Dunne intact, but in an adulterated form. However, this latter point does not, in my judgment, make any difference in any event, in the sense that even if that certificate had been passed on unchanged, it would not lead to an assumption of responsibility to Multiplex by RNP.

(10) No services were provided directly to Multiplex by RNP.

(11) 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*** set out at [132] above.

(12) It would also be inconsistent with the contractual structure to make such a finding in Multiplex's favour, a point made in the quotation from Lord Goff in ***Henderson*** set out at [131] above. A different way of expressing this would be to use the words of Lord Mustill in ***White v Jones*** at [133] above, where he said the parties could deliberately involve themselves in contractual relations that were "so strong" as to exclude the imposition of a duty of care.

(13) 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.

(14) 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. Thus the "critical" question posed by Lord Hoffmann in ***Customs & Excise v Barclays Bank*** set out at [146] above is answered in favour of RNP (and therefore Argo).

(15) Returning to Lord Hoffmann's speech in that case (which I set out at [145]) and his analysis of situations involving A, B and C, I find the following. Here, A (RNP) was contracted by B (Dunne) to provide B with a certificate checking certain features of B's design of part of the temporary works (whether prepared directly and solely by B, or by another entity Z – also directly contracted by B - does not for these purposes matter). B also had a contract direct with C (Multiplex) to provide a far wider design and scope of works, of which the temporary works formed but one part. A knew that the certificate was to be (or should have been) provided by B to C, to form part of the material necessary for C to conclude that B's temporary works design was complete, and thereafter C would provide permission to B for the temporary works to commence. C was not involved in providing any information to A, nor was C involved in what B chose to provide to A for the purpose of the check. A did not know the extent of C's wider obligations to the employer, or to other sub-contractors. Therefore, in

providing the certificate, A did not assume responsibility to C for the accuracy of the information in the certificate, and was only discharging its duty to B when it produced the certificate.

173. I have also considered these conclusions against Lord Bingham's five observations in ***Customs and Excise Commissioners v Barclays Bank plc.*** These are set out at [144] above. Firstly, this is not a situation where the parties have a relationship with all the indicia of a contract, save consideration. The relationship between "the parties" (that term applying to RNP and Multiplex) does not have the indicia of a contract. This is a situation where the parties do indeed have an actual contract; however, neither of those parties is Multiplex, as the contract is between RNP and Dunne. Secondly, application of the objective test does not assist Multiplex. Objectively, construction professionals would expect the framework of carefully organised contractual obligations to govern their legal relations with one another. Thirdly, this is a novel situation and the three-fold test is accepted by Lord Bingham as providing no straightforward answer. Proximity and fairness are merely convenient labels to attach to the different circumstances which require detailed examination. Matters of wide generalisation do not greatly assist. Even if the three-fold test is adopted, and considering each and every one of the convenient labels, it would not be just, reasonable, or fair to impose a duty of care of the type contended for by Multiplex upon RNP. Fourthly, the incremental test does not provide any assistance to Multiplex, and to be fair to Mr Nissen, he does not rely upon it. Fifthly, the outcome that I have identified is sensible and just. It also results in a situation where RNP is not held liable, for a potentially unlimited liability (in this case said by Multiplex to be restricted to the level of its insurance cover, but only as a result of RNP's liquidation) on a major and very complex construction project, the details of which were never provided to RNP at all. All RNP was ever provided with (by Dunne) was a very limited set of design information so that it could check the calculations.

174. 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 following point should be borne in mind. 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 has a cause of action against Dunne, a company that is still in legal existence (albeit one which is in administration). Denial of a duty of care does not mean Multiplex is left without any remedy. Although enforceability of that remedy against Dunne may be a different matter, the law does not determine matters such as justness, and fairness, based on the financial durability of a sub-contractor such as Dunne.

175. I am reinforced in my conclusions above that RNP did not (on an objective test) assume responsibility to Multiplex, by considering the very modest level of the fee. Of course, that is not a determinative factor; in many of the cases, no fee at all was charged (such as the ***Burgess v Lejonvarn*** case, or in ***Hedley Byrne*** itself). However, it is part of the factual circumstances in this case. Further, this is an entirely conventional engagement by a sub-contractor of a design checker to carry out one specific task, namely the Category 3 check of the slipform rig, required by the British Standard in order that the sub-contractor, with full design obligations to the main contractor, could produce a design of the temporary works (of which the slipform rig formed a part) which complied with the CDM Regulations and which the main contractor would then permit to commence. This is not a factually unusual, or less conventional case in the same way that, for example, some of the cases such as

Burgess v Lejonvarn, Hedley Byrne itself, or ***Riyad Bank v Ahli United Bank*** could be described. Those were rather more unusual situations. The instant case with RNP, Dunne and Multiplex is not unusual, and is an entirely conventional arrangement in a major project such as this. Construction projects often involve a great many parties, and the careful arrangement of obligations between them all, one with another, are contained in highly complicated contractual provisions. Some of those parties are central players in the project, such as the main contractor and sub-contractor. Some are players with lesser roles. I would characterise RNP's role in the latter category.

176. Where this case does, perhaps, fall out of the norm is the sequence of events following production of the certificates themselves by RNP. One would hope that it would be unusual that sub-contractors such as Dunne remove or delete parts of such certificates, before providing them to the main contractor to obtain permission to commence the temporary works. However, that unusual feature does not form part of my analysis of a duty of care above, which has been performed on the basis of the certificates as produced and provided to Dunne. I accept that there are factually specific issues that occurred after 25 January 2016 that would, if the answers to the preliminary issues were different, require careful resolution at a subsequent trial.

177. In parallel with the conclusions reached in the ***Arrowhead*** case, RNP knew that a Category 3 check was required by Dunne, and included in the British Standard, for certain types of design, and that it was important that this check was independent (indeed, this is the definition of Category 3). Further, to adopt the wording of the judge in that case, it is inconceivable that a reasonable businessman (as it is an objective test) would have considered that RNP was voluntarily assuming an unlimited responsibility towards the main contractor on a highly complex construction project, or to any other party involved in that project other than the one with whom RNP was in direct contract, namely Dunne. If the question had been raised in some notional conversation between RNP and Multiplex, it is obvious that RNP would not have been prepared to accept such an unlimited responsibility.

178. The same considerations apply in respect of the three-fold test.

179. Continuing the parallel from the ***Arrowhead*** case in [59] of that judgment (set out at [158] above), I accept that RNP knew that the certificates were intended to be forwarded to the TWC as part of the material required for approval of the temporary works. This much is clear from the British Standard. However, that is not sufficient to justify the imposition of a duty of care. I do not consider that, for the three-part test, Multiplex satisfies the proximity test in any event. On a major construction project such as this, with a careful and interlinked series of different contracts between main contractor, sub-contractor and consultants (and also potentially sub-sub-contractors too), in my judgment RNP was not sufficiently proximate to the main contractor (or to the TWC, if a distinction is to be made between them). However, even if I am wrong about that, and if Multiplex were to be considered sufficiently proximate, I have found that it would not be fair, just and reasonable to impose a duty of care on RNP which could result in unlimited liability to Multiplex when it would have been obvious, to all concerned, that RNP chose to contract only with Dunne. It would also have been similarly obvious that RNP's contractual relationship with Dunne may contain limitations on the extent of RNP's liability, and potentially an exclusion of liability to third parties. It would also be obvious that a Category 3 check, which is essentially a desk-top exercise performed on a limited range of documents sent to the checker, is itself a limited exercise in terms of assessing the validity of the

calculations. The project upon which Dunne was engaged was highly complex, with a great number of parties involved, on a variety of different contractual bases. Failure or defects in the temporary works could potentially have very widespread consequences on the entire project.

180. Turning to consider policy in terms of consequences in litigation and settlement, which Lord Steyn referred to in ***The Nicholas H*** case at [139] and [140] above, if a duty of care to the main contractor were to be imposed upon a Category 3 checker, this would have potentially serious consequences. The function of such a checker is to assess whether the design brief has been complied with, and if the calculations are correct, or lead to supportable conclusions (the experts agree that an alternative route to the original calculations may be used, which is one of the reasons the checker is not supposed to be given the original calculations from the designer). A main contractor with a detailed and comprehensive contract with its sub-contractor including design obligations would normally be expected to issue proceedings directly against that sub-contractor. There may be an arbitration clause, something present in many construction contracts. If in litigation, the main contractor could bring in other entities directly, including a design checker, with whom it has never had direct contractual relations, then this will complicate the recovery process enormously. Fairness and justness would be achieved by the sub-contractor defendant, if so advised in litigation, bringing in parties with whom it has contractual relations by way of Part 20 proceedings. The extra complications identified by Lord Steyn in ***The Nicholas H*** would occur if a duty of care were constructed artificially to assist Multiplex to proceed directly against RNP.

181. Additionally, the extra insurance costs that would undoubtedly occur in terms of increased premiums payable by the checker would be formidable. The checker (and therefore his or her insurer) would potentially be incurring liability directly to a main contractor for economic loss due (for example) to delay to the entire project. This liability could be vast, and involve costs, and loss and expense, to a wide variety of other parties, including the employer, and other sub-contractors or sub-sub-contractors. This is both a policy consideration, and also a factor to be considered when deciding whether it is just, fair, and reasonable to impose a duty of care to Multiplex upon RNP.

182. Dunne contracted with RNP on the terms that I have identified at [25] and [26] above. These did not include the disclaimer which Argo sought to rely upon to demonstrate that RNP had limited or excluded its liability to third parties. Those terms imposed (or sought to impose) a restriction on its extent of liability. Clause 13.3 stated that the contract was "for the sole benefit of the Client" (the Client being Dunne) and that no third party would have "any benefit or right to enforce" any part of the agreement. Dunne was also prohibited from assigning or transferring any benefit or obligation under the agreement without the consent of RNP under clause 13.1.(3). Multiplex advanced an argument in respect of this based on the Contracts (Rights against Third Parties) Act 1999. It is not necessary to address either of those matters, given my finding that the contract terms upon which Argo sought to rely were not incorporated. For completeness, however, I have listed the terms relied upon at the end of this judgment.

183. I have also not, therefore, focused, in what I accept is a lengthy consideration of the authorities above, upon the extent to which disclaimers by a defendant resisting the imposition of a duty of care have an effect upon the imposition of such a duty. All it is

necessary to observe for these purposes, is that the presence of a disclaimer or limitation sought by RNP would be a further obstacle to the imposition of a duty of the nature sought by Multiplex. Given I have found that there is none in any event, my findings on the contract terms do not have an effect upon the answer.

184. I would add that I do not consider that knowing the actual identity of the main contractor is of direct relevance to the imposition of a duty of care. To find to the contrary would introduce into the test for a duty of care, a subjective element that would effectively incorporate what could be a random feature, namely whether the checker knew (or was told) that the main contractor was Company X, Company Y, or simply "the main contractor". It is plain that it is to be an objective test. In my judgment, an objective test does not leave room for the subjective knowledge of the person performing (or supervising) the check, in terms of main contractor identity, to be relevant. Therefore, the fact that Mr Markham did not know that the main contractor was Multiplex, until after the certificates had been issued would not, in my judgment, affect the answer to this issue.

185. Given my findings, it is not necessary to consider Argo's alternative case that if it did owe Multiplex a duty of care, this was a limited one only in respect of safety. That alternative case does not arise. However, I would simply point out that the function – if not the primary function – of the certificate issued by the classification society in ***The Nicholas H*** case was seaworthiness, which is another way of referring to safety, in a maritime context. A vessel that is not seaworthy is an unsafe vessel. Yet no duty of care was found to exist in that case to the cargo owners. Safety, though a relevant consideration, is not a determinative factor. In this case, safety is not the real issue. The issue is economic loss suffered by Multiplex.

186. In my judgment, therefore, the answer to the first preliminary issue is "No", whether the route adopted is the assumption of responsibility test, or the three-part test, and whether the duty of care is the "free-standing" duty contained in the pleading by Multiplex, or that based upon a claim in negligent misstatement which was also pleaded, and the point that was most fully argued.

H: Preliminary Issue 2 – Warranties

187. This issue did not take up as much time, either in oral or written submissions during the trial, as the first preliminary issue. The basis of this claim by Multiplex is weak, and there was no evidence called by either party relating to any direct contract between RNP and Multiplex. Indeed, there was no direct contact between those parties until sometime in June 2016, after the second certificate had been issued. Both the certificates were sent directly by RNP to Dunne. Mr Markham did not know that Multiplex was the main contractor until much later.

188. Further, paragraph 6 of the Reply states "….whilst it is admitted that RNP had a contractual relationship only with Dunne, and gave no collateral warranties….." Therefore Multiplex accepts in its pleading that there was no contract between it and RNP, and no collateral warranties were provided by RNP, yet it also seeks a positive answer "yes" to the second preliminary issue, and therefore effectively seeks to maintain a claim that warranties were provided by RNP to it.

189. There are some basic requirements for contractual relations between two parties. These are generally seen as offer, acceptance, intention to create legal relations between the parties and consideration. Mr Nissen submitted that there was a sufficient

contractual relationship for the statements in the certificates to constitute warranties given by RNP to Multiplex.

190. Mr Nissen approached these elements in the following way. He submitted that Dunne made an offer, on Multiplex's behalf, for RNP to enter into a contract with Multiplex, and that this offer by Dunne was done with Multiplex's authority. He submitted that RNP accepted this offer when it agreed to perform the Category 3 check at Dunne's request. He submitted that there was an intention on the part of both Multiplex and RNP to enter into direct contractual relations between them, and that there was consideration provided by Multiplex for this. This consideration was payment by Multiplex to Dunne of the sums paid for the temporary works design (as that design required a Category 3 check).

191. I am unable to accept that analysis. There is no evidence of any authority being provided by Multiplex to Dunne, the sub-contractor, for Dunne to enter into any contract on Multiplex's behalf. Indeed, the structure of the sub-contract between Multiplex and Dunne is contrary to any such authority having been provided to Dunne to do so. Mr Bailey's own witness statement contains evidence that Multiplex contemplated entering into a contract directly with a Category 3 checker, and he even went so far as obtaining a fee proposal from RBG for that purpose. However, his colleague told him that Dunne had contractual responsibility for this under the terms of the Sub-Contract. He therefore proceeded no further. This evidence is inconsistent with an analysis of Dunne contracting with RNP on behalf of Multiplex, and is also inconsistent with any authority having been provided to Dunne to do so.

192. Under the terms of the sub-contract between Dunne and Multiplex, Dunne assumed full design responsibility to Multiplex in respect of the slipform rig, including warranting and undertaking that it would exercise "*all the reasonable skill, care, and diligence to be expected of a properly qualified and competent architect or other appropriate designer experienced in designing work of a similar size, scope, nature and complexity*" (this is an extract from clause 2.13.1 of the JCT form). Dunne also contracted with Multiplex to ensure that all "*temporary works and structural work method statements and temporary works design submissions should as a minimum receive a complete and independent third party check*" (this is from paragraph 21.16.18; Part 1 of the Contractor's Requirements). Dunne, therefore, expressly contracted to take full responsibility for obtaining the checks required including the Category 3 check of the slipform rig. That is a different contractual structure to that which would pertain were Dunne to have been granted specific authorisation by Multiplex to conclude a contract between RNP and Multiplex. This is again reinforced by the fact that Multiplex advanced a case against Dunne in these proceedings in contract for precisely the failures in the Category 3 check in respect of which it <u>also</u> pursues RNP. Nor is there any scope for any finding that Dunne had implied authority as a function of being Multiplex's sub-contractor, and indeed the JCT terms of that contract would not permit of such an implication in any event.

193. The analysis provided by Mr Nissen would conventionally be categorised as Dunne acting as an agent for Multiplex as an undisclosed principal. There is nothing in the evidence in this case to justify this, and it would be contrary to the structure of the sub-contract as a whole. As a single example, in clause 2.1.3 it is agreed that "The Sub-Contractor shall pass to the Contractor all approvals received by the Sub-Contractor in connection with the Statutory Requirements". Were Multiplex's analysis to be correct, these approvals would (in the case of RNP) not be an approval

received by Dunne, but would be an approval provided to Multiplex pursuant, not to the sub-contract, but to the contract said to have been created between Multiplex and RNP. The words "approval received by the Sub-Contractor" make little sense if Dunne had contracted with RNP on Multiplex's behalf.

194. More importantly, under Relevant Sub-Contract Events in clause 2.19, there is a list of matters that would entitle Dunne to an extension of time under clause 2.18. One of these is clause 2.19.8, which is "any impediment, prevention or default" by "the Contractor or any of the Contractor's Persons". The definitions in clause 1.1 specify Multiplex as the Contractor, and Multiplex's "employees and agents and all other persons employed or engaged on or in connection with the Main Contract Works or any party of them…..excluding….Sub-Contractor's persons". If Dunne were contracting with RNP as Multiplex's agent, Dunne would become both the Sub-Contractor and one of the Contractor's Persons, a wholly novel and, in my judgment, untenable status.

195. Similar objections arise in respect both of acceptance by RNP of Dunne's offer made on Multiplex's behalf, and also any intention on the part of anyone at either RNP or Multiplex to create legal relations with one another.

196. Multiplex contended in its written submissions that "the construction industry largely operates within contractual settings". That statement is correct; it is insufficient to assist Multiplex in this respect. In particular, where, as here, there are detailed contractual arrangements in place between different parties, with multiple contracts and multiple parties, the "contractual setting" must be considered carefully. Such a setting does not, of itself, justify imposing contractual relations where there are none. In this case, the conscious allocation of contractual responsibility by the parties specifically imposed upon Dunne the obligation of obtaining a Category 3 check, a sub-contractor to Multiplex. By Dunne having performed that obligation, the law does not impose contractual liability to Multiplex upon RNP, or clothe statements made by RNP in the certificates as warranties given directly to Multiplex.

197. Turning to consideration, in my judgment – and regardless of the other difficulties to there being any contractual relationship between RNP and Multiplex - it is stretching the boundaries of what can be, admittedly sometimes, a flexible concept to find any consideration for such a direct contract. Mr Nissen suggested the consideration comprised payment by Multiplex to Dunne for Dunne's own sub-contract works (including design) that would somehow cover, or include as an element within it, the payment Dunne would be making, or would have made, to RNP, for RNP's services. However, I reject that analysis. I do not consider that payments made by Multiplex to Dunne under the sub-contract, to which Dunne was contractually entitled in its own right as sub-contractor for works done, can properly be categorised as consideration for a separate contract between Multiplex and RNP.

198. In those circumstances, and the unpromising background to the existence of any intention on the part either of RNP, or indeed Multiplex, in respect of contractual purpose, it is an entirely predictable conclusion that there was no direct contract between these two parties, a view shared in the pleading of Multiplex's case.

199. The question therefore arises, can RNP have provided any warranties direct to Multiplex in the absence of any contractual relationship between RNP and Multiplex? Warranties are statements made with a contractual purpose. Multiplex also relied upon the admission by RNP in paragraph 22(b)(ii) of its Amended Defence where it

was admitted that it provided the certificates "for the purposes of the Project". However, simply because RNP knew there was a sizeable construction project underway is not sufficient to justify a finding that the statements in the certificates were warranties provided to Multiplex. There would be a wide variety of entities involved in such a project. Design checks of this nature could, potentially, be required by a wide variety of entities on such a project, for example by a sub-contractor (as here), or a specialist sub-sub-contractor, the main contractor, or even another design consultant. Simply because RNP knew there was a project underway, and that its certificates were required for the purposes of the project, does not assist Multiplex in its case on warranties.

200. I find that RNP did not provide any such warranties in either of the two certificates. There was no contractual purpose in doing so, at least so far as Multiplex was concerned. There is nothing in the contractual arrangements between Dunne and RNP in this case that would take the case, in any way, out of the norm for conventional construction projects, namely that Dunne was the sub-contractor to Multiplex, and utilised the services of others (whether as sub-sub-contractors, designers or consultants) to perform the sub-contract works, including obtaining a Category 3 check from RNP. The scope and extent of Dunne's contractual obligations is clearly set out in the sub-contract itself. The JCT form of sub-contract is a highly developed and complex arrangement of contractual obligations and allocation of risk, as is the main contract too. It would go entirely outside that detailed contractual framework to construe statements by RNP within the certificates, or the certificates themselves, as constituting warranties given directly by RNP to Multiplex. The fact that RNP knew the certificates were required for the design does not lead to the finding that Multiplex seeks.

201. There is nothing on the face of the certificates to constitute a warranty to Multiplex. It is difficult to see, on the facts of this case, how RNP can have given any warranty to Multiplex at all, and I find that RNP did not do so. Multiplex's route to recovery against RNP, if there were to be such a route in law, would have been through the avenue of the first preliminary issue. I have rejected that in my answer to that issue. The second route contended for by Multiplex, that the certificates contain warranties in Multiplex's favour given directly to it by RNP, is one that is not open to Multiplex as a matter of conventional analysis. In my judgment there is no basis for such a contention.

I: Conclusions

202. I therefore find that the answers to the two preliminary issues are as follows.

203. (1) No

204. (2) No

205. At [39] above I identified that there was a difference between Multiplex and Argo as to whether "the statement" made by RNP was the certifying words within the certificate, or all of the certificate including the notes and comments. I held that the statement was the certificate as a whole. Having decided the answers to the preliminary issues on that basis, however, it is clear to me that even if the contrary were to be the case – in other words, even had I accepted Mr Nissen's construction that "the statement" by RNP was solely the passage he extracts from it, rather than the certificate as a whole – this would make no difference to the answers to the preliminary issues. The same analysis of the requirements of a duty of care would

apply, and my findings on assumption of responsibility, duty of care and negligent misstatement would be the same. My finding on that point therefore makes no difference to the outcome.

206. I am grateful to all counsel for their helpful submissions, and also for their cooperative and constructive approach to the substantive hearing. The clarity of their submissions and their excellent and comprehensive skeleton arguments have been of considerable assistance.

Appendix - RNP Terms of Business

A. I have found that the RNP Terms of Business did not form part of the contract between RNP. The question of a disclaimer does not therefore arise. However, the terms upon which Argo sought to rely as constituting that disclaimer are as follows. They are provided for completeness:

1. "Client" means "the person to whom the Consultant sends the Offer provided that where such person acts as an agent, the Client shall be the principal" and "Consultant" means "RNP Associates Limited (Company No 6245121)" (contained in clause 1). The client here would mean Dunne.

2. "The Consultant shall exercise reasonable skill, care and diligence in performing the Services. Notwithstanding any responsibilities and obligations which the Client may have under any other contract or at law, nothing in this Agreement or in any proposal, report or other document is to be construed as a warranty or guarantee by the Consultant other than to use (or to have used) reasonable skill, care and diligence" (clause 2.2);

3. "The Client shall not, without the written consent of the Consultant assign or transfer any benefit or obligation under this Agreement" (clause 13.1);

4. "Nothing in this Agreement confers, or purports to confer on any third party any benefit or any right to enforce any term of this Agreement. In particular any advice provided by the Consultant is for the sole benefit of the Client and may not be used or relied upon by third parties" (clause 13.3).

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[1] The circumstances of that latter event are more fully explained in ***Multiplex Construction Europe Ltd v Dunne*** [2017] EWHC 3073 (TCC), an earlier and different claim by Multiplex against Mr Dunne personally, which did not concern the 100BG project.

[2] Another interesting (though wholly tangential) feature of the ***Burgess*** case is that, after the designer's unsuccessful appeal against the imposition of a duty of care, the full trial of liability led to the claim, in the event, wholly failing on the facts. This second judgment is at [2018] EWHC 3166 (TCC). There was then also a second appeal, which succeeded, dealing with the appellant's claim for indemnity costs, which is at [2020] EWCA Civ 114. Coulson LJ described the case as a whole, in that second appellate judgment, as having "echoes of the bad old days".