Multiple Construction Europe Limited v (1) Bathgate realisations Civil Engineering Limited (in administration) (2) BRM Construction LLC (3) Argo Global Syndicate 1200 [2021] EWHC 590 (TCC)

This claim arose out of the construction of the 40-storey tower at 100 Bishopsgate in the City of London. The Claimant, Multiplex, was the main contractor on the 100 Bishopsgate project. It appointed the First Defendant, Dunne, as the design and build sub-contractor for the concrete package of works. That package of works included the design of a slipform rig, a self-climbing temporary formwork system which allows the concrete core of the building to be constructed incrementally.

Dunne, in turn, sub-contracted the design of the slipform rig to the Second Defendant, BRM. Under the relevant British Standard, BS 5975, the design of the slipform rig required a "Category 3 check" by an independent party before the rig could be put in to use. Dunne contracted with RNP, a firm of consulting engineers, to carry out the Category 3 check of BRM's design. Pursuant to carrying out that check, RNP provided Dunne with two Category 3 check certificates. RNP was paid approximately £4,000 by Dunne for its services.

Multiplex subsequently alleged that the design of the slipform rig was defective and the rig had failed in use, necessitating its replacement on site. This was said to have caused losses to Multiplex of in excess of £12m. It brought its claim against Dunne under the sub-contract and against BRM in tort and for breach of warranty. RNP had gone into liquidation in 2018. Multiplex therefore brought its claim directly against the Third Defendant, Argo – RNP's professional indemnity insurer – under the Third Parties (Rights Against Insurers) Act 2010.

Dunne went into administration in 2016 and was, for the purposes of Multiplex's claim, uninsured. BRM is a firm domiciled in Dubai. Neither Dunne nor BRM played any substantive role in the proceedings and Multiplex obtained default judgment against each of them. However, it experienced difficulty in enforcing such judgments and continued to pursue its claim against Argo alone.

While RNP had contracted only with Dunne for the provision of the Category 3 check, Multiplex alleged that RNP had owed it a duty of care in the provision of the Category 3 check and the certificates, arising out of an assumption of responsibility to Multiplex. It further alleged that the Category 3 check certificates contained warranties to Multiplex which had

been breached by RNP. Argo denied both that any duty of care was owed by RNP to Multiplex, and also that any warranties had been given by RNP to Multiplex. A preliminary issues trial was ordered to take place to determine these matters.

After a three day trial in the TCC, Fraser J answered both preliminary issues in the negative, holding that RNP owed no duty of care to Multiplex and gave it no warranties.

On the duty issue, Fraser J carried out a detailed survey of the authorities, at both appellate and first-instance level. He concluded at [172] that there had been no assumption of responsibility on RNP's part and no duty was owed to Multiplex. The judgment reaffirmed the established position in the authorities. Where, as on large construction projects, the parties have deliberately entered into a complex and interlocking series of contractual relationships, the Court will be slow to super-impose additional, tortious duties onto that contractual chain. Fraser J rejected Multiplex's contention that this was not a contractual chain case and that there was a "liability gap." The specific facts of this case militated against a duty being owed, including the finding that contrary to Multiplex's arguments on this issue, Multiplex did have a complete cause of action against Dunne in respect of the design of the slipform rig and the contents of the Category 3 check certificates, and the lack of any direct contact between RNP and Multiplex prior to the provision of the certificates. A further interesting issue on the facts arose in respect of unilateral alterations made to one of the certificates by Dunne, without RNP's knowledge.

On the warranties issue, Fraser J found (at [200]) that in circumstances where there was no direct contract between Multiplex and RNP, nothing in the certificates provided by RNP to Dunne constituted a warranty to Multiplex.

The judgment will be welcomed by construction professionals and their professional indemnity insurers. It confirms that parties providing design checks or other design services in respect of a discrete aspect of a construction project will not, without more, assume duties to parties with whom they have not contracted to prevent economic loss. As Fraser J put it at [177], citing *Arrowhead Capital Finance Ltd v KPMG LLP* [2012] EWHC 1801 (Comm), it was "*inconceivable*" that any reasonable businessman would have considered RNP to have been "*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*".

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