

## Construction Law Update

### The TCC consider the circumstances in which an independent Category 3 design checker may owe a duty of care to a main contractor

In the recent case of *Multiplex Construction Europe Limited v (1) Bathgate Realisations Civil Engineering Limited (in administration) (2) BRM Construction LLC (3) Argo Global Syndicate 1200* the TCC considered the scope of a professional design checker's duty of care to a main contractor where no contractual relationship existed between the two.

#### Background

Multiplex Construction Europe Limited ("**Multiplex**") was engaged to carry out the design and construction of a substantial project at 100 Bishopsgate, London (the "**Main Contract**"). The project comprised of three main buildings around an enlarged public space. The tallest of these three buildings 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 the first building at the podium level.

Further to the Main Contract, Multiplex entered into a sub-contract (the "**Sub-Contract**") with Dunne Building and Civil Engineering Limited (which later changed its name to Bathgate Realisations Civil Engineering Limited) ("**Bathgate**") for the design and construction of the concrete package of works (the "**Sub-Contract Works**").

Subsequently, Bathgate engaged BRM Construction LLC ("**BRM**") to design the slipform rig which formed part of the Sub-Contract Works. The relevant British Standard required the design of the slipform rig to receive an independent "Category 3 check" and Bathgate engaged RNP Associates Ltd ("**RNP**") to provide the same. RNP entered liquidation on 1 October 2018.

#### Multiplex's Claim

Multiplex alleged that the design of the slipform rig was defective and needed to be replaced. This was said to

have caused losses to Multiplex of more than £12 million.

Multiplex brought a claim against Bathgate under the Sub-Contract and against BRM in tort and for breach of warranty. In addition, irrespective of the lack of a direct contractual link between Multiplex and RNP, Multiplex sought to advance a claim against RNP's professional indemnity insurers, Argo Global Syndicate 1200 ("**Argo**") under the Third Parties (Rights Against Insurers) Act 2010 on the basis that RNP was said to owe Multiplex duties of care and/or had provided warranties to it.

Multiplex obtained default judgment against Bathgate and BRM but incurred difficulties in enforcing these judgments. Multiplex therefore continued to pursue its claim against Argo alone.

The present proceedings were to decide two preliminary issues critical to Argo's potential liability to Multiplex. These were:

- 1) Did RNP owe Multiplex duties and/or obligations in respect of the Category 3 Design Check Certificates it provided to Bathgate (the "**Certificates**"); and
- 2) Did RNP provide any warranties to Multiplex?

#### Did RNP owe Multiplex any duties and/or obligations?

The Court considered various authorities in detail but concluded that no duty was owed and that RNP had not assumed responsibility to Multiplex for the statements in the Certificates.

Key reasons noted were that: the contractual matrix, which had been consciously created, did not include any direct contractual responsibility between RNP and Multiplex; it would not be just, reasonable or fair to impose a duty of care upon RNP of the nature contended for by Multiplex; Bathgate had full design responsibility for the Sub-Contract Works to Multiplex

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under the Sub-Contract meaning there was no “*liability gap*”; and Multiplex had a remedy against Bathgate in any event (albeit one that may be difficult to enforce).

### Did RNP provide warranties to Multiplex?

In its pleadings Multiplex accepted that there was no contract between it and RNP and that no collateral warranties were provided.

Multiplex nevertheless submitted that there was a sufficient contractual relationship for the statements in the Certificates to constitute warranties given by RNP to Multiplex. However, the Court would not accept this analysis and concluded that there was nothing in the Certificates given by RNP to Bathgate that constituted a warranty to Multiplex. In reaching this decision, the Court noted that “*it would go entirely outside [the] detailed contractual framework to construe statements by RNP within the certificates, or the certificates themselves, as constituting warranties given directly by RNP to Multiplex*”.

### Analysis

In deciding these preliminary issues, the Court undertook a detailed review of the authorities relating to duty of care and the circumstances in which one may be imposed upon a professional where a contractual relationship does not exist. This decision reiterates the established position that where parties have intentionally entered into a complex series of contractual relationships, the Court will be reluctant to superimpose additional, tortious duties onto the parties in the chain.

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