Professional negligence in construction contracts

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A Duties of Care owed by Construction Professionals (i.e. architects, quantity surveyors, engineers, project managers)

1 Contractual duties

1.1 Forms of building contract:

(a) Traditional building contract

Employer enters into building contract with the contractor and makes separate contract with architect and/or other professionals or design and/or supervision of the works. Price fixed by reference to specification and drawings and works valued in certificates or valuations as the works proceed.
(b) 'Design and build' contract

Architect is involved as part of a professional team. Employer contracts with contractor, both to design and build. Contractor contracts to produce works fit for purpose.

(c) Management contract

Management contractor is paid the actual cost of the works plus a fee. He enters into a contract with the contractor. Professional consultants may still be employed by the employer.
1.2 **Contractual duties:**

With express contracts the primary contractual duties will be set out in a standard form of contract – e.g. RIBA or ACE (engineers), or RICS (surveyors or QS). These standard forms of contract define the scope of the services undertaken in terms of advising, preparing drawings, plans, supervising works, certifying costs.

1.3 **Implied terms:**

(a) **Terms implied at common law from the relationship of agency:**

Duty to exercise reasonable care and skill and diligence in good faith. Authority to bind the employer. The professional owes a duty to act within the scope of his agency and not exceed his authority. (This issue is addressed further in section B).

(b) **Supply of Goods and Services Act 1982 section 13:**

A supplier of services acting in the course of a business owes a duty to exercise reasonable skill and care. Other duties may also arise, for example to carry out works within a reasonable time.

A parallel duty is owed at common law.
Duty to review design:

The architect’s duty of care may extend in a long-running contract to a duty to review the design up to the date of practical completion or even beyond. A duty may arise reactively, i.e. duty to review when asked to do so or as a result of some external event which makes it apparent that further advice is needed:


Architects retained to design and supervise in contract for indoor swimming pool. After practical completion but before final certificate, cracks discovered in suspended ceilings. Architect allegedly failed to consider whether the material was appropriate. Court of Appeal held architect’s duty was a continuing one owing to the subsequent discovery of the defect.

Conflicting authorities on the scope of the duty to review considered by Dyson J in:

**Chesham Properties Ltd v Bucknall** [1996] 82 BLR 92.

Architects engaged to supervise construction of flats. After practical completion but before final certificate, complaints received from tenants about soundproofing. Architects
failed to review the design of the soundproofing. The Claimant contended that the architect's duty of care continued to the end of the retainer and issue of final certificate.

Dyson J rejected the claim, finding as follows:

(i) An architect is generally required to review his design of an element of the works up to completion of that part of the works.

(ii) Otherwise his duty to review only arises if the architect had good reason to reconsider the original design, e.g. if inadequacy of the foundations causes stress to the structure.

(iii) An architect engaged under the RIBA standard conditions to design and supervise construction of the whole works owes a duty to review the design up until practical completion. Thereafter there is no duty save to react to any particular request for review.

(c) Does the statutory and common law duty to exercise reasonable care and skill extend in special circumstances to a warranty of reasonable fitness?
In the circumstances of a particular case or on the construction of a particular contract, a duty may arise to ensure that the works are fit for purpose. This is however entirely exceptional.

**Greaves & Co v Baynham Meikle** [1974] 1 WLR 1261: the Claimant subcontracted structural design of a warehouse to the Defendant engineers. The Defendants were instructed that the first floor had to take the weight of loaded forklift trucks. After construction, the first floor began to crack owing to vibration caused by truck movement. Held by Kilner Brown J: the Defendants were not in breach of their duty to exercise reasonable care and skill, but owed a higher duty to ensure that the works were fit for purpose.

The Court of Appeal disagreed with the judge over the higher duty but held in the circumstances of the case there was an implied term that the design should be fit for the purpose of use by forklift trucks.

This issue was considered further by the Court of Appeal and House of Lords in:

**IBA v EMI & BICC** [1980] 14 BLR1 HL.
IBA engaged EMI as main contractor for the design, construction and erection of a television mast. EMI in turn subcontracted design to BICC. There was no contract between IBA and BICC. At the request of IBA, BICC gave a direct assurance that the mast would not oscillate dangerously. The assurance proved false and the mast collapsed.

BICC contended a duty of care was no higher than the usual one applicable to a designer, i.e. reasonable care and skill. The Court of Appeal disagreed and held:

(i) There should be imported into the contract between IBA and EMI and the secondary subcontract between EMI and BICC an obligation as to reasonable fitness for purpose.

(ii) There were good commercial reasons for imposing a liability for fitness for purpose so that the ultimate liability if something went wrong rested where it properly belonged.

The case went to the House of Lords, which held BICC liable in negligence under the *Hedley Byrne* principle. It was not therefore necessary to consider the extent of the contractual implied term. The view was expressed however
by Lord Scarman that there was no reason why the designer during the course of a contract to design, supply and erect a TV aerial should not be under a duty to ensure that it was reasonably fit for purpose.

However, an attempt to extend the obligation of fitness for purpose to a professional who designs, inspects and rectifies a structure failed in:

**Payne v John Setchell Ltd** [2002] PNLR 7. The Claimants were purchasers of cottages. The original owner, W, engaged the Defendant, an engineer, to design raft foundations, to inspect the construction and certify as satisfactory and suitable for the support of the cottages. Claimants, being subsequent purchasers, sued the Defendants in tort under *Hedley Byrne v Heller*, alleging an inappropriate design and structural problems. The claim in tort failed. In addition the Claimant contended that the Defendant had certified the foundations as fit for purpose. This argument was rejected by the judge Lloyd QC. He held that a certificate issued by a contractor who has undertaken the work may be taken as a warranty, but a professional who expresses his judgment or opinion on a construction matter does not necessarily give a warranty, but simply
undertakes to exercise reasonable professional skill and care.

1.4 Statutory obligations:

(a) Defective Premises Act 1972 section 1:

“A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty: (a) if the dwelling is provided to the ordinary person, to that person; (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling; to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner with proper materials as regards that work the dwelling will be fit for habitation when completed”.
The difference of view over whether section 1 creates three separate duties, or a single duty to ensure fitness for habitation, was resolved in:

**Harrison v Shepherd Homes Ltd** [2012] EWCA Civ 904.

Ramsay J in the TCC held that the section creates a single duty. His finding is not challenged in the Court of Appeal.

(b) **Construction (Design and Management) Regulations 2007:**

These impose statutory duties on professionals involved in construction, (i) to ensure that any design avoids foreseeable risks to health and safety of any person carrying out construction work or likely to be affected by it, (ii) to ensure that the design takes account of the Workplace (Health, Safety and Welfare) Regulations 1992, (iii) to provide design information.

A breach of the Regulations does not give rise to a civil claim, but is likely to be relevant to any claim for breach of common law duties.

1.5 **The concurrent duty of care in tort:**

(a) **Limitation:**
The significance of seeking to establish a duty of care in tort arises in relation to limitation.

(i) The extension of the limitation period for claims for negligence by the Latent Damage Act 1986 (importing sections 14A and 14B into the Limitation Act 1980 by way of amendment) does not apply to contractual claims. Thus many construction claims are limitation-barred in contract before the Claimant becomes aware of them. Hence the significance of the concurrent duty of care in tort which gives the Claimant an additional three years from the date of knowledge.

(ii) Section 3 of the Latent Damage Act 1986 makes special provision for successive owners of property affected by latent damage as follows:

"Subject to the following provisions of this section where:

(a) a cause of action (the 'original cause of action') has accrued to a person in respect of any negligence to which damage to a property in which he has
an interest is attributable (in whole or in part) and

(b) another person acquires an interest in that property after the date on which the original cause of action accrued but before the material facts about the damage have become known to a person, who at the time when he first has knowledge of those facts, has any interest in the property,

a fresh cause of action in respect of that negligence shall accrue to that other person from the date on which he acquires his interest in the property”.

(b) The concurrent duty of care in tort: the law in respect of the concurrent duty of care was settled in:

**Henderson v Merrett Syndicates** [1995] 2 AC 145.

The House of Lords held that a claim in professional negligence against managing agents of Lloyds Names could be pursued in tort as well as in contract. This case had already been preceded by architects’ negligence cases in
which a concurrent remedy had not been questioned, notably:

*Pirelli General Cable Works Ltd v Oscar Faber* [1983] 2 AC 1.

Here, building owners had sued consulting engineers for negligent design of a chimney. The claim was for the cost of rectification. The case is difficult to reconcile with the decision of the House of Lords in *Murphy v Brentwood* [1991] 1 AC 398, which excludes claims in tort for economic loss, but has in subsequent cases been explained as an illustration of the *Hedley Byrne* principle.

The House of Lords in *Henderson* made the following points:

(i) The Defendant's arguments were dictated by a desire to preserve limitation defences. This could have been achieved by an extension of the Latent Damage Act 1986 to contractual claims. On a pragmatic basis however the courts could not ignore the fact that the Act did not apply in contractual claims.

(ii) Many of the arguments revolved around the exclusion of claims for economic loss. There was no
reasonable why recourse should not be had to the principle in *Hedley Byrne*, namely that where a person assumes responsibility to another for advice or services, he should be liable in damages in respect of economic loss flowing from the negligent performance of those services. Thus, once a case is identified as falling within the *Hedley Byrne* principle, there is no need to embark on a further enquiry as to whether it is just and reasonable to impose liability for economic loss.

(iii) Anomalous results flowed from the fact that doctors and dentists were liable in tort because they caused physical damage, whereas other professionals caused economic loss. This was anomalous and in any event architects may in particular circumstances be responsible for physical damage.

(c) What is the scope of the concurrent duty in tort? The principal contentious issue is whether the duty of care extends beyond personal injury / damage to property claims to economic loss.

In *Henderson v Merrett*, Lord Goff suggested that the principle can be extended from advice to the provision of
services if there has been an assumption of responsibility for those services:

"However, at least in cases such as the present ... there seems to be no reason why recourse should not be had to the concept, which appears after all to have been adopted in one form or another, by all of their Lordships in **Hedley Byrne** ... in addition the concept provides its own explanation why there is no problem in cases of this kind about liability for pure economic loss; for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the **Hedley Byrne** principle, there should be no need to embark upon any further enquiry whether it is ‘fair, just and reasonable’ to impose liability for economic loss".

Where there is a concurrent claim the duty of care in tort will be by analogy with a contractual claim and therefore will be to exercise reasonable care and skill.
Notwithstanding the dictum of Lord Goff, there has been a conflict of authority in subsequent case law:

**Storey v Charles Church Development Ltd** [1995] 73 Con LR1.

The Defendant designed and built a house for the Claimant. Structural faults appeared as a result of defective design of the foundations. The Claimant claimed damages for breach of the Defendant's concurrent duty of care in tort. This was a claim for economic loss. Judge Hicks QC held: the Defendant did owe a duty of care in respect of this loss. He applied the reasoning of Lord Goff in **Henderson** and found that the Defendant had assumed responsibility to exercise reasonable care and skill in designing the house. That assumption of responsibility and reliance occurred because there was a contractual relationship between the parties, but the duty of care in tort was not necessarily limited by the terms of the contract. The judge distinguished **Murphy** on the basis that there was no contract in the **Murphy** case. Reference was made to **Pirelli** in which an assumption was made that the designer owed a concurrent duty of care in tort for economic loss.

**C F Payne v John Setchell** [2002] PNLR 7:
In this case Judge Lloyd QC declined to follow *Storey*.

The facts of this case are set out above on page 6. The direct claim in tort by the subsequent purchasers failed as explained above. In addition there was a claim for breach of a concurrent duty of care owed to W in tort to design the foundations so that the Claimants acquired identical cause of action on acquisition of the cottages under section 3 of the LDA 1986. The Judge took the view that in accordance with *Murphy* a designer is not liable in negligence either to the client or to a subsequent purchaser if there is no physical injury or damage. Thus the Claimant had acquired no cause of action under section 3 of the LDA 1986.

The ruling in *Payne* is difficult to reconcile with the dicta of Lord Goff in *Henderson*, and the analysis of the duties in the *Payne* case ignores the fact that there is a contractual relationship between the parties.

The Court of Appeal has since considered this issue in: *Robinson v P E Jones (Contractors) Ltd* [2011] EWCA Civ 9. This case involved a claim against a building contractor (not a professional). The Judge concluded that a builder will normally owe a duty of care to the client to whom he is contracted to carry out the works with reasonable skill and
care and avoid economic loss. The Court of Appeal disagreed and held that a building contractor will normally be held not to have undertaken responsibility for economic loss, distinguishing however the position of a professional person who will have undertaken such a duty.

Jackson LJ: "It is perhaps understandable that professional persons are taken to assume responsibility for economic loss to their clients. Typically, they give advice, prepare reports, draw up accounts, produce plans and so forth. They expect their clients and possibly others to act in reliance upon their work product, often with financial or economic consequences".

1.6 Duty of care in tort to third parties for personal injury and physical damage:

(a) Architects and other construction professionals owe a duty of care not to cause personal injury to those who could be foreseeably injured:

*Clay v A J Crump & Sons Ltd* [1964] 1 QB 533 CA.
(b) Physical damage to property: the duty of care not to cause physical damage extends not only to the client's property but to other property other than that in respect of which the architect is engaged. The extent of that duty of care was considered by the Court of Appeal in the following recent cases:

**Bellefield Computer Services Ltd v Turner** [2000] BLR 97 CA.

Here a subsequent purchaser of a dairy processing plant claimed damages in tort against a builder for damage caused by a fire which spread from the storage area to the rest of the plant. The Court of Appeal upheld the judgment at first instance that the duty of care was owed in respect of all damage to plant, equipment etc in the storage area, but held that the damage to the fabric of the building was economic loss.


The Claimant was the lessee of a warehouse and used it to store electrical goods. The Defendants were architects engaged for the design and construction of the warehouse. Owing to the inability of the syphonic roof drainage system
to cope with the rainfall, rainwater flooded through the roof damaging the Claimant’s goods. The Claimant alleged the Defendant had failed to design the roof drainage system adequately.

The Court of Appeal upheld the ruling at first instance that an architect, like a builder, owes, following Murphy, a duty of care to avoid physical damage. That duty did not apply however if there was a possibility of inspection by a subsequent occupier. The fact of a likely inspection meant that there was a lack of sufficient proximity in the relationship between the parties. The Claimant on the facts had a reasonable opportunity to inspect before he took the lease.

**Bellefield Services v Turner No.2** [2002] EWCA Civ 1823.

Here, the Court of Appeal considered contribution proceedings resulting from the Bellefield dispute and applied the same reasoning as in the Baxall case, holding:

(i) whether a particular defect comes within the scope of an architect’s duty of care depends upon the original design and/or supervising functions of the architect;
(ii) a duty of care will apply in the case of a subsequent occupier in respect of latent defects of which there is no reasonable possibility of inspection.

1.7 Application of the *Hedley Byrne* principle to claims by third parties in tort

(a) Economic loss can be recovered if it is possible to apply directly the *Hedley Byrne* reliance principle. Although the *Hedley Byrne* case is regarded as requiring the giving of information or advice, the speech of Lord Goff indicates that it extends to situations in which special skill is exercised and extends to the performance of services.

(b) Illustrations of the application of the *Hedley Byrne* principle to advice:

*Machin v Adams* [1997] 84 BLR 79:

Here an architect was asked to write a letter for the benefit of his client, who was selling a house, setting out the state of the alteration and refurbishment works. The Defendant architect knew the letter would be shown to third parties. The Court of Appeal held on the facts that no duty of care arose in relation to the letter. The Defendant understood he would be required to return to the house before
completion of the works and would not anticipate that any irrevocable step would be taken on the basis of the letter.

(c) The extent of the *Hedley Byrne* duty will be limited by the extent of foreseeable reliance on the advice and information:


The Claimant alleged it had purchased a site for development of a supermarket in reliance on advice given by the Defendant engineers, as to the level of ground contamination and cost of decontamination. That advice was given by the Defendant gratuitously at a meeting. The court held that there was a duty of care since it was foreseeable there would be reliance for the purposes of making an offer to purchase the site. The extent of that duty however was limited by the purpose of the meeting. It was not intended for a comprehensive investigation of the site. Therefore the Claimant failed to establish reliance for the purposes of the case.

(d) The relevance of the contractual chain in establishing the *Hedley Byrne* duty:
Lord Goff in *Henderson* stated that there is generally no assumption of responsibility by a subcontractor direct to a building owner, the parties having structured their relationship in a manner inconsistent with such assumption of responsibility.

This was considered in:

**Ove Arup & Partners International Ltd v Mirant Asia Pacific Construction** [2004] EWHC 1750 (TCC).

The Defendant engineers were alleged to have designed defective foundations for a power station. A series of companies had been formed and linked to the employer, this being a deliberate creation of an intricate contractual chain which meant there was no direct contract between the employer and the engineers. The chain was constructed for tax reasons. The court held the chain was inconsistent with the assumption of responsibility by the engineers to the Claimant for the proper performance of his services.

A chain of companies will not necessarily exclude a duty of care, but will do so if it indicates that the parties' intentions were inconsistent with the assumption of risk.
1 The certification procedure

The standard building and engineering contract forms provide for certificates to be issued and paid at monthly or other intervals. The architect or engineer is obliged to inspect the work to ensure that it has been completed in accordance with the contract before issuing the payment certificate. Interim certificates are issued up to practical completion followed by a final certificate.

2 Duty of care in issuing the certificate

The architect or engineer is not immune from liability in negligence to the employer in issuing the certificate:


In this case architects negligently over-certified work on interim certificates. The contractors subsequently went into liquidation. The Court of Appeal reversed the decision at first instance that the architects were acting in an arbitral capacity, and held that the architect did not enjoy an arbitrator’s immunity unless certain criteria were met. The circumstances in which there is immunity are set out in the indices summarised by Lord Wheatley in *Arenson v Arenson* [1977] AC 405 and are as follows:

(a) There is a dispute or difference between the parties that has been formulated in some way or another.
(b) The dispute or difference has been remitted by the parties to a person to resolve in such a manner that he is called upon to exercise a judicial function.

(c) Where appropriate the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute.

(d) The parties have agreed to accept his decision.

3 The duty of care owed by the architect or engineer in the issue of certificates

3.1 As stated in Sutcliffe v Thackrah by Lord Salmon, the fact that an architect's certificate was for the wrong amount does not in itself prove negligence. The architect must take reasonable care to ensure that the claims for payment are reasonable and justified in terms of the amount of work done and the quality of the work.

3.2 Interim and final certificates:

At interim stage a detailed inspection or measurement of the work is not required or expected. The architect should first satisfy himself as to the quality of the work. The consequences of negligent issue of a final certificate will be serious. In general, the final certificate will be binding and conclusive as between the parties, depending upon the terms of the particular building contract, but may be set aside for fraud or collusion.
3.3 **Liability of the architect for negligent over-valuation of the work:**

An architect is of course liable to the employer for negligent over-valuation. In limited circumstances he may also be liable in tort to the contractor for under-valuation. In carrying out the valuation exercise, the architect will issue certificates in accordance with the terms of the building contract. Where however contractual provisions are varied, by agreement between the employer and contractor during the course of the works, it will be for the architect to act on the instructions of the employer. Where those instructions are given by a partnership, LLP or limited company, the architect will act upon the instructions given to him by the person having actual or apparent authority to bind the entity concerned. This may however give rise to issues of ostensible authority in circumstances in which it is apparent or ought to be apparent to the architect that the partner or director giving the instructions does not in fact have authority. This issue arose in:


(Bristol Mercantile Court). The Claimants brought derivative proceedings in the name of Rivercraft Developments LLP, a limited liability partnership formed by the Claimants and Mr Rivers, a builder and developer. The Chalcrafts and Mr Rivers had entered
N.B. While every effort is made to ensure the accuracy of the information given in these notes, they are not intended to be relied upon as legal advice and no liability will be accepted in relation to such reliance.

into a partnership deed and agreed to carry out major property development. The deed specified how the affairs of the LLP should be managed. The parties agreed to appoint John Tompkins (JTA) as architects and JCT contracts were entered into. Under the terms of those contracts it was for JTA to issue interim certificates. When the works were almost complete, instructions were given to JTA by Mr Rivers to revalue the works on an entirely different contractual basis, the revaluation resulting in additional sums of over £1m being payable to a company operated by Mr Rivers, which was carrying out the work. The Claimants contended there was an inherent conflict of interest in that Mr Rivers was both a partner in the LLP and the builder carrying out the work, and that in these circumstances it ought to have been apparent that Mr Rivers did not have ostensible authority to give JTA instructions to revalue the work. The Claimants in that respect relied on a case on partnership law, namely *J J Coughlan v Ruparelia* [2003] EWCA Civ 1057. The issue in the *Coughlan* case arose under section 5 of the Partnership Act 1890 as to whether a high yield investment scheme was within the ordinary course of business of a firm of solicitors. The Judge described the scheme as abnormal and incredible and on that basis concluded that it was not a normal transaction falling within the course of business of a solicitor. The issue to be decided on the summary judgment application in the *Chalcraft* case was whether it was arguable that the instructions
given by one partner to JTA were outside his ostensible authority to act on behalf of the limited liability partnership on the basis that JTA either knew or must have known that Mr Rivers either (a) did not have actual authority under the terms of the deed, or (b) could not have had such authority having regard to the fact that the instructions were likely to give rise to enormous additional sums being certified as payable to his company. The Judge reached the conclusion that the point was arguable and the case proceeded no further and reached terms of settlement. The case indicates the need for architects to take care in acting upon instructions given by a partnership, limited partnership or corporate body where there appears to be a potential conflict of interest.

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