

**Galliford Try Infrastructure Ltd v Mott MacDonald Ltd**  
**Rachel Barnes, August 2008**

At the start of his 155-page judgment (given on 17 July 2008), the judge in this case says that it raises interesting issues about whether and, if so, the extent to which, tortious duties arise between non-contracting parties involved in the design and construction of building developments.

Later on in the judgment, there are 26 pages of extracts from most of the leading cases on tortious duties to avoid economic loss, from *Hedley Byrne v Heller & Partners* onwards.

The judge's eventual conclusions in the case are likely, therefore, to come as a bit of a let-down, as far as the law is concerned. In essence, following a detailed analysis of the factual evidence, the judge rules emphatically that no such duties arose in this case.

The building development in question involved the demolition of the Birmingham Children's hospital, with the preservation of its façade, and the construction of a development including car parks, shops, residential units, a cinema and a leisure centre. The non-contracting parties in question were the party that eventually took on the role of design and build contractor and the structural engineers for the development. In the judgment, the former, who were then called Morrison Construction Ltd, are referred to as MCL and the latter as MM.

One of the two joint venture companies that constituted the developer was a wholly owned subsidiary of MCL. MCL's relationship with the developer was said to have been kept strictly at arm's length, not least presumably because of the interest of the other joint venturer, a Bank of Scotland subsidiary. Nonetheless, this connection meant that MCL were involved in the planning of the project from a relatively early stage, although their eventual role was then uncertain. It may also help to explain why MCL later took the risk that they did in entering into a design and build contract with the developers when the design was incomplete.

MM were also appointed, as structural engineers, at an early stage, as is normal, along with other consultants. Thus the engineers attended regular meetings and otherwise communicated with MCL, as well as with other members of the team, as the planning and design of the project developed. MM were formally appointed, on ACE conditions, by a wholly owned subsidiary of one of the two joint venture companies that constituted the developer (the one which in turn was owned by MCL); but for all practical purposes, MM was engaged by and at all times acted on behalf of the developer.

After a while, it was decided that MCL would be appointed as contractor, on the basis of a negotiated bid, rather than the work going out to tender. At first, a traditional JCT contract seems to have been envisaged, and then later it was decided to have a design and build contract. Novation of the engagements of the consultants was then envisaged. MM's contract said nothing about a novation (although an ingenious argument seems to have been put forward – but rejected by the judge – that the terms of the ACE agreement permitting the client to “assign or transfer” the appointment would cover a novation) but MM were willing in principle to agree. However, the terms were never agreed and no novation took place.

Some months before the design and build contract was executed, there seems to have been some tension between MCL and MM over the supply of information by the latter. It was decided that the company that was to be the steelwork subcontractor would take over the whole of the design of the structural steelwork, with MM dealing only with co-ordination and checking of this part of the design.

After the design and build contract had been executed (the fixed contract price have been agreed, though on what basis it had been calculated was never clear) and during construction, two problems arose, which led to these proceedings. The main problem concerned the treatment of horizontal or prop forces at ground level from piled walls, which were also retaining walls, at one part of the site. These forces needed to be restrained by the diaphragm action of the floor spanning the walls. MM

advised that the prop forces needed to be carried within the steelwork in the floor. It seems that MCL had not realised this and therefore not allowed for it, which would mean extra steel having to be ordered. In the event, the problem was resolved by the provision of an independent steelwork bracing system for the walls. This is likely to have involved extra cost and delay, and, this being a design and build contract, MCL were not entitled to any extra payment for this.

MCL's case against MM was that, during the planning and design stages, prior to the execution of the contract, MM had on various occasions advised or intimated that the prop forces could be taken by the concrete slab part of the floor and/or that the steelwork would not be required to perform this function. They argued that these representations gave rise to a tortious duty owed by MM to MCL, of which MM was in breach. MCL relied specifically on nine alleged representations made by MM to this effect.

The judge considered each of these representations, and concluded in each case that:

- (a) there had been no material representation of the sort alleged
- (b) there had been no reliance by MCL on any such representation
- (c) MM had not been negligent.

The judge concluded on the evidence that, prior to the contract being executed, MM had not yet decided how the prop forces in question would be addressed, in particular, whether the steelwork would be affected.

The judge rejected any argument that MM may have owed a duty to MCL arising out of their communications generally during the planning and design stages:

*In the ordinary course of events, I have no doubt that an architect or engineer engaged by a developer would not owe any duty of care (at least in relation to economic loss) to tendering contractors even though the latter had been supplied by the architect or engineer with tender information, drawings and specification upon which to base their tenders. The successful tenderer would be considered to have taken the risk in respect of that information. In many contracts, minutes of meetings and correspondence passing between the professional team during the tender process are incorporated. It is very common for there to be oral and written pre-contract exchanges between the consultants and the contractor in connection with the tender. Architects and engineers would, I suspect, be surprised and not a little concerned, if it was established that they owe duties of care in effect in the context of preventing contractors under-pricing building jobs, except possibly in exceptional circumstances.*

Although it could be said that there were probably more such pre-contract communications between designers and prospective contractor on this project than on most (because of the relatively early involvement of the prospective contractor), the judge did not think that there were any exceptional circumstances here or any reason to think that the surprise or concern to which he referred would be misplaced.

Points that he made in this connection included the following:

- (a) Although novation was anticipated, this was not to be what the judge called a simple novation, with MCL simply being substituted for MM's client; there were to be further services and obligations to be agreed and incorporated.
- (b) There was never any transfer of control of MM from developer to MCL.
- (c) Even when MM was communicating directly with MCL, it was only doing what it was employed by its client to do
- (d) MCL assumed that MM's responsibilities would be resolved by way of novation

(e) MCL did not involve MM in contract pricing or programming, and did not ask whether the design was complete, or whether further developments of the design during construction were likely

(f) MCL and its key personnel were experienced in structural engineering construction and design.

MCL's other complaint concerned support for the preserved hospital façade during construction. MCL were advised by MM during construction (and therefore after executing the contract) that special support for the façade would be needed. MCL contended that they had been advised to the contrary by MM during the pre-contract stages. The judge examined the evidence and concluded that no such advice had been given. As with the steelwork issue, therefore, the question of a tortious duty did not in reality arise.

## Disclaimers

The judge said that the disclaimers on some of MM's documents and drawings were also pointers to there being no duty of care. These disclaimers contained wording such as:

"Mott MacDonald accepts no responsibility or liability for the consequences of this document being used for a purpose other than the purposes for which it was commissioned".

Such wording is sometimes used to protect the owner's copyright in the document and, in particular, to make it clear that there is no permission for its use on another project, for example. Here, the wording turned out to have a further, useful purpose.

This gave rise to an argument over whether the disclaimers could be justified under the Unfair Contract Terms Act. The judge held that, as a duty of care did not arise, partly because of the disclaimers, the Unfair Contract Terms Act did not apply. However, if it did apply, he would unhesitatingly hold that the disclaimer satisfied the requirement of reasonableness under the Act.

## The judge's comments on novation

MM pleaded contributory negligence against MCL. This did not, of course, arise as an issue, as MCL's case against MM failed. However, the judge made findings on this issue, while cautioning that it was difficult to address the issue, even in theory. One of the points that he made, in dismissing the case for contributory negligence, was:

*Where a contractor reasonably anticipates that the project engineer will be novated to it on its appointment as the design and build contractor, it is reasonable to rely on that engineer and not employ an independent engineer to review the design. This accords not only with common sense but with what happens in practice. It is consistent with the expectations of both MM and MCL and what happened in this case. MCL would have reasonably relied upon MM; there would be no need to review MM's design; MM is and was a well-known engineer of great standing.....*

It may be important to bear in mind that this passage is directed to refuting the allegation that MCL had been (contributorily) negligent in not carrying out a full review of the design. Further, although the judge's use of the conditional tense towards the end is a bit confusing, it is reasonably clear that the judge is describing what actually happened. MCL, in the judge's view, reasonably relied on MM's design. However, we know that this reasonable reliance did not give rise to any duty owed by MM to MCL – at least, not in the context of the complaints that were later made.

It is difficult to take away from this case any inferences as to how a novation of MM's engagement might have affected the situation. The judge emphasised that what was expected was not what he called a simple novation – where MCL would have been simply substituted for MM's client - but one where further terms would have had to be agreed. It may be that the judge is wrong in apparently thinking that such a form of simple novation is commonplace in this situation. However, the judge's

comments were relevant only to the question of whether a duty arose prior to MCL's appointment as design and build contractor, and therefore prior to (and independent of) any novation, if there had been a novation.

The judge also said, when considering the issue of a duty of care:

*In the period leading up to MCL's contract with MPS [i.e. the Developer], and indeed thereafter, MCL's thought process was that it assumed that there would be a novation with MM and that it would be through that route that any responsibility of MM would be resolved.*

Again, this comment went purely to the issue of whether a duty was owed prior to and independent of any novation that might have taken place (but did not in fact do so). Also, the judge was referring only to MCL's thought process about the effect of a novation, not saying whether he thought that that thought process was correct.

The judge clearly did not think that MM's performance was beyond criticism. He says that some aspects of their performance were unimpressive and that there was under-resourcing, but that it was unnecessary and probably undesirable (not having heard argument on the topic) to decide whether they were in breach of their contract with their client. However, there is no clear indication in the judgment as to whether a novation agreement would have enabled MCL to recover from MM in respect of the problems that arose and it is probably not worthwhile to seek for any such indications.