SPECIAL RELATIONSHIPS, HOME-MADE WINE, CONSENTING ADULTS AND GAP FILLING

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This paper examines the tortious liability of professionals concerned in novated design and build arrangements in respect of pre-novation design functions. The catalyst for the paper was the reaction of the construction industry to the judgment of Lord Eassie, sitting in the Outer House of the Court of Session, in *Blyth & Blyth Ltd v Carillion Construction Ltd.*[1]

Blyth & Blyth Ltd were a firm of consulting engineers, engaged around January 1997 by an employer, THI, to prepare, amongst other things, sufficient drawings, estimates of reinforcement and final specifications for inclusion in the Employer's Requirements for a project to construct a leisure facility in Edinburgh. The Deed of Appointment between THI and Blyth & Blyth empowered the employer to instruct and require the engineers to enter into a novation agreement with the successful contractor, once appointed. Carillion was the successful contractor, and on 30th April 1998 duly entered into a Scottish version of the JCT81 (With Contractor's Design) with THI. As is not uncommon, the terms of the contract had been amended: any mistake, inaccuracy, discrepancy or omission in the design contained in the Employer's Requirements was at Carillion's risk. Thereafter, on 29 June 1998, the employer THI, Carillion and Blyth & Blyth entered into what was called a 'novation agreement'. (It is not necessary for present purposes to consider whether this agreement actually constituted a true novation of the original Deed of Appointment between Blyth & Blyth and THI.)

Disputes arose between Blyth & Blyth and Carillion. Carillion stopped paying Blyth & Blyth and Blyth & Blyth duly commenced an action for recovery of its outstanding fees. Carillion defended the action by way of a counterclaim against Blyth & Blyth alleging that it was in breach of the terms of the novation agreement. The basis of Carillion's counterclaim related to a number of alleged failures on the part of Blyth & Blyth while engaged by THI, before the novation agreement. One of these was that in certain drawings, followed by faxes and telephone conversations in April 1997, Blyth & Blyth had provided incorrect information regarding the quantity of steel bar reinforcement needed. This allegedly amounted to a breach of Blyth & Blyth's Deed of Appointment with THI. Carillion contended that the novation agreement entitled it to recover damages from Blyth & Blyth for the losses arising from this breach.

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1 *Blyth & Blyth Ltd v Carillion Construction Ltd* (2001) 79 ConLR 147, Ct of Session (Outer House).

In court Lord Eassie was required to address certain preliminary issues, one of which was whether Carillion had a cause of action as a matter of principle, ie assuming that Blyth & Blyth were in breach of their contractual duty to the employer in respect of any 'pre-novation' breaches. Lord Eassie found that the terms of the novation agreement were such that any pre-novation breaches by Blyth & Blyth entitled Carillion to recover any resulting losses which the employer would have been able to recover, but for the 'novation'. However, as a result of the amendments to the design and build contract the employer THI would have suffered no losses resulting from any mistakes, inaccuracies or discrepancies in Blyth & Blyth's design, since these were expressly at Carillion's risk. Accordingly, Carillion could recover no 'losses' associated with the increased quantity of steel bar reinforcement that was required, the quantity of reinforcement in the Employer's Requirements being incorrect.

The reaction to *Blyth & Blyth* has been divided. Some consider that the result effectively gives a licence to professionals engaged in novated design and build arrangements to act negligently. Others consider that the decision simply reflects the allocation of risk under a design and build contract and that the contractor should therefore satisfy itself that the design contained in the Employer's Requirements is correct. Whilst I accept that the case was decided under Scots law and is also effectively a first instance opinion, my view is that Lord Eassie's analysis of the contractual position is correct. However, I do not share the view that the case effectively gives professionals engaged in novated design and build arrangements a licence to act negligently. In particular, I consider that the principles enunciated in the speeches of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[2] its subsequent development and application to the construction industry form a basis for founding an action in tort against professionals in novated design and build arrangements.

Hedley Byrne established for the first time outside the law of contract that a tortfeasor could be liable for financial or economic loss, ie loss without physical damage or personal injury being present. *Hedley Byrne* introduced the principle of liability in tort for a negligent misrepresentation (or some form of active intervention, advice or conduct amounting to a representation) made in circumstances where, whilst there was no contract between representor and the representee, there was nevertheless a 'special relationship' involving a high degree of proximity between them.

Lord Reid, in his speech in *Hedley Byrne*, weaving the backcloth for why negligent words should be treated differently from negligent acts, mused:

> 'I would think that the law must treat negligent words differently from negligent acts … Quite careful people often express definite opinions on social or informal occasions even when they see that others are likely to be influenced by them; and they often do that without taking that care which they would take if asked their opinion professionally or in a business connection … A man might give a friend a *negligently-prepared bottle of home-made wine* and his friend's guests might drink it

2 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, HL.

> with dire results. But it is by no means clear that those guests would have no action against the negligent manufacturer.'[3] [*emphasis added*]

The nature of the 'special relationship' required to establish liability for a negligent representation or 'mis-statement' has been said to be one not far removed from contract.[4] There must be reliance on the negligent statement, advice or conduct by the representee, an inferred assumption of responsibility by the representor and a set of circumstances where, if the representation was inaccurate and was acted upon, it would foreseeably cause financial loss. In particular, there must be a positive statement, act or intervention (as opposed to an omission to tell or advise), in a setting where it is clear from the nature of the enquiry and importance attached to it and from the relative special knowledge or skill of the representor, that a high degree of reliance will be placed upon him and therefore an assumption of responsibility by the representor can be inferred upon him from his decision to make the representation or advice in the particular circumstances in question.

Since 1964, the *Hedley Byrne* principle has developed, specifically in *Caparo Industries plc v Dickman*,[5] *Henderson v Merrett Syndicates Ltd*[6] and *Williams v Natural Life Health Foods Ltd*.[7] In *Caparo*, Lord Oliver summarised the effect of *Hedley Byrne*:

> 'What can be deduced from the *Hedley Byrne* case, therefore, is that the necessary relationship between the maker of the statement or a giver of advice ('the adviser') and the recipient who acts in reliance upon it ('the advisee') may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the advisor at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent enquiry, and (4) it is so acted upon by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive, but merely that the actual decision in the case does not warrant any broader propositions.'[8]

In his speech in *Williams v Natural Life Health Foods*, Lord Steyn, with whom Lords Goff, Hoffmann, Clyde and Hutton all concurred, noted the extension of the *Hedley Byrne* principle, by virtue of *Henderson v Merrett Syndicates*,[9] in the following way:

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3 See note 2 at pages 482 and 483.
4 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, HL.
5 *Caparo Industries plc v Dickman* [1990] 2 AC 605, HL, at page 638B.
6 See note 4.
7 *Williams v Natural Life Health Foods Ltd*, [1998] 1 WLR 830, HL.
8 See note 5 at page 638B.
9 See note 4.

'First, in [Lord Goff's speech in] *Henderson's* case it was settled that the assumption of responsibility principle enunciated in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[10] is not confined to statements but may apply to any assumption of responsibility for the provision of services. The extended *Hedley Byrne* principle is the rationalisation or technique adopted by English law to provide a remedy for damages in respect of economic loss caused by the negligent performance of services. Secondly, it was established that once a case is identified as falling within the extended *Hedley Byrne* principle, there is no need to embark on any further enquiry whether it is 'fair, just and reasonable' to impose liability for economic loss: page 181. Thirdly, and applying *Hedley Byrne*, it was made clear that:

> "reliance upon [the assumption of responsibility] by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect) …" (page 180).

'Fourthly, it was held that the existence of a contractual duty of care between the parties does not preclude the concurrence of a tort duty in the same respect.' [11]

'The practical application of the extended* Hedley Byrne *principle

'Not surprisingly, opposing counsel approached the application of the principle of assumption of risk from different perspectives. Counsel for the plaintiffs concentrated in his argument on the pivotal role of Mr Mistlin [the second defendant and only appellant, a director of the company] in the affairs of the company. Counsel for Mr Mistlin concentrated on the absence of direct dealings between the respondents and Mr Mistlin. The practical application of the extended *Hedley Byrne* principle was not agreed. Before I turn to the facts of the present case it is therefore necessary to explore this aspect. Two matters require consideration. First, there is the approach to be adopted as to what may in law amount to an assumption of risk. This point was elucidated in *Henderson's* case by Lord Goff of Chieveley. He observed, at p 181:

> "especially in a context concerned with a liability which may arise under a contract or in a situation 'equivalent to contract', it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff: …"

'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.[12]

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10 See note 2.
11 See note 7 at page 834E.
12 See note 7 at page 835C.

> ‘That brings me to reliance by the plaintiff upon the assumption of personal responsibility. If reliance is not proved, it is not established that the assumption of personal responsibility had causative effect. In his Hamlyn Lecture Lord Cooke of Thorndon referred to two judgments of La Forest J in the Canadian Supreme Court on the element of reliance. In *London Drugs Ltd v Kuehne & Nagel International Ltd*[13] La Forest J emphasised in the context of an issue of personal liability of a company’s employee the distinction between ‘mere reliance in fact and *reasonable* reliance on the employee’s pocket-book’ [*original emphasis*]. The second case is *Edgeworth Construction Ltd v ND Lea & Associates Ltd*[14] The plaintiff company had made a successful bid for a road-building contract with a province. The plaintiffs allegedly lost money as a result of errors in the specifications and drawings prepared for the province by an engineering company. The Supreme Court held that the plaintiffs had a prima facie cause of action against the engineering company for negligent misrepresentation. *I do not pause to consider that part of the decision.* [*emphasis added*] But the Supreme Court unanimously held that by affixing their seals to the drawing the individual engineers did not assume personal responsibility to the plaintiffs. La Forest J said, at page 212:
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> > “The situation of the individual engineers is quite different. While they may, in one sense, have expected that persons in the position of the appellant would rely on their work, they would expect that the appellant would place reliance on their firm’s pocketbook and not theirs for indemnification; see *London Drugs*, at pages 386-387. Looked at the other way, the appellant could not reasonably rely for indemnification on the individual engineers. It would have to show that it was relying on the particular expertise of an individual engineer without regard to the corporate character of the engineering firm. It would seem quite unrealistic, as my colleague observes, to hold that the mere presence of an individual engineer’s seal was sufficient indication of personal reliance (or for that matter voluntary assumption of risk).”

[I interject here that the effect of the majority in the later Court of Appeal decision in *Merrett v Babb*[15] may have a bearing on this point now].

> ‘This reasoning is instructive. The test is not simply reliance in fact. The test is whether the plaintiff could *reasonably* [*original emphasis*] rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company. To that extent I regard what La Forest J said in *Edgeworth’s* case as consistent with English law.

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13 *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299, Supreme Ct of Canada, at page 387.

14 *Edgeworth Construction Ltd v ND Lea & Associates Ltd* [1993] 3 SCR 206, 66 BLR 56, Supreme Ct of Canada.

15 *Merrett v Babb* [2001] EWCA Civ 214, [2001] BLR 483, [2001] QB 1174, CA.

'Academic criticism of the principle of assumption of risk

'Distinguished academic writers have criticised the principle of assumption of responsibility as often resting on a fiction used to justify a conclusion that a duty of care exists: see Barker, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 LQR 461; Hepple, 'The Search for Coherence' (1997) 50 Current Legal Problems 69, at page 88; Cane, *Tort Law and Economic Interests* (2nd ed, 1996), pages 177 and 200. For this criticism two [House of Lords] cases which were decided on special facts are cited: *Smith v Eric S Bush*;[16] *White v Jones*.[17] In my view the general criticism is overstated. Coherence must sometimes yield to practical justice. In any event, the restricted conception of contract in English law, resulting from the combined effect of the principles of consideration and privity of contract, was the backcloth against which *Hedley Byrne* was decided and the principle developed in *Henderson's* case. In *The Pioneer Container*,[18] Lord Goff of Chieveley (giving the judgment of the Privy Council in a Hong Kong appeal) said that it was open to question how long the principles of consideration and privity of contract will continue to be maintained. It may become necessary for the House of Lords to re-examine the principles of consideration and privity of contract. *But while the present structure of English contract law remains intact the law of tort, as the general law, has to fulfil an essential gap-filling role.* [*emphasis added*] In these circumstances there was, and is, no better rationalisation for the relevant head of tort liability than assumption of responsibility. Returning to the particular question before the House it is important to make clear that a director of a contracting company may only be held liable where it is established by evidence that he assumed personal liability and that there was the necessary reliance. There is nothing fictional about this species of liability in tort.'[19]

I make no apologies for setting out within this paper such extensive quotations from Lord Steyn's speech in *Williams*. There are a number of points that are particularly relevant to the situation of designers involved in novated design and build arrangements. The first was the approval, albeit in part, of the Canadian case of *Edgeworth Construction Ltd v ND Lea & Associates Ltd*,[20] which I shall deal with later. Second was the reminder of the essentially progressive nature of tort law in so far as it develops to fill perceived gaps. The reference by Lord Steyn to gap-filling reminded me of how readily the law adapts to changing values in society. I recall, in particular, the question of the development over the years of a 'consent' defence by an accused when facing a charge of actual bodily harm and how changes in society's values can affect what constitutes an acceptable defence, as a matter of public policy. For example, nowadays, a charge of actual bodily harm is unlikely to succeed against a body piercer who, with his client's consent, punctured parts of the body that in years gone by would not, as a matter of public policy, have been

16 *Smith v Eric S Bush* [1990] 1 AC 831, HL.
17 *White v Jones* [1995] 2 AC 207, HL.
18 *The Pioneer Container* [1994] 2 AC 324, PC, at page 335.
19 See note 7 at page 836E.
20 See note 14.

acceptable. In time, perhaps the consent defence adopted by the accused sado-masochists in *R v Anthony Brown, Laskey, Jaggard, Lucas & Carter*, refused by a majority of the House of Lords,[21] as well as later by the European Court of Human Rights,[22] may eventually succeed in English law.

Turning back to construction professionals concerned with novated design and build arrangements, I am unaware of any reported case law which has considered the question of whether a professional in a situation like *Blyth & Blyth* can be liable in tort under the extended *Hedley Byrne* principle. Whilst parties and their lawyers have sought to circumvent the 'problem' and fill the gap highlighted in *Blyth & Blyth* by drafting appropriate clauses in their contracts,[23] I see no reason why a contractor faced with the same facts as reported in *Blyth & Blyth* could not succeed, as a matter of principle, in an action in tort under English law against a professional in respect of negligent representations made to the contractor before a novation was effected. I also see no reason why the same principle would not also apply under Scots law.

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21 *R v Brown (Anthony), Lucas, Jaggard, Laskey and Carter* [1994] 1 AC 212, HL, in which Lord Jauncey at page 238D said: 'Your Lordships were further informed that the activities of the appellants, who are middle aged men, were conducted in secret and in a highly controlled manner, that code words were used by the receiver when he could no longer bear the pain inflicted upon him and that when fish-hooks were inserted through the penis that they were sterilised first. None of the appellants however had any medical qualifications and there was, of course, no referee present such as there would be in a boxing or football match.' And at page 246F: 'If it is to be decided that such activities as the nailing by A of B's foreskin or scrotum to a board or the insertion of hot wax into C's urethra followed by the burning of his penis with a candle or the incising of D's scrotum with a scalpel to the effusion of blood are injurious neither to B, C and D nor to the public interest then it is for Parliament with its accumulated wisdom and sources of information to declare them to be lawful.'

22 *Laskey, Jaggard and Brown v UK* (1997) 24 EHRR 39, where the ECHR held unanimously that article 8 (Right to private life) was not necessarily engaged at all; and, if it were, the interference with it in these circumstances was not beyond what is necessary in a democratic society. There was therefore no violation of article 8.

23 For example see clause 1.4 of the latest standard form of novation agreement published by the City of London Law Society (the Standard Form of Novation Agreement): 'Without prejudice to clause 1.2, the consultant warrants to the contractor that it shall be liable for any loss and or damage suffered or incurred by the contractor arising out of any negligent act, default or breach by the consultant in the performance of its obligations under the appointment prior to the date of this agreement. Subject to any limitation of liability in the appointment, the consultant shall be liable for such loss or damage notwithstanding that such loss or damage would not have been suffered or incurred by the employer (or suffered or incurred to the same extent of the employer.' and also clause 4 of the Construction Industry Council's Standard Novation Agreement – '(a) Insofar as the contractor is responsible under the main contract for services that have been performed by the consultant prior to the date of this agreement, the consultant warrants to the contractor that all such services have been performed for the employer in accordance with the terms of the appointment. (b) In any claim for loss suffered by the contractor that is alleged to have arisen as a result of a breach of the warranty in this clause, the consultant shall be entitled to rely on any limitation in the appointment (including without restriction any limitation or exclusion of liability therein) and to raise the equivalent rights in defence of liability for such loss as if the claim were being brought by the employer rather than the contractor, save that the consultant shall not be absolved from liability to the contractor for such loss merely by virtue of the fact that the loss has not been suffered by the employer.'

The closest situation where reported case law does exist is in relation to actions by contractors in tort against professionals for negligent representations or actions made whilst carrying out their duties for the employer or client under traditional contractual arrangements. Specifically, in *Pacific Associates Inc v Baxter*,[24] which concerned a claim by the contractor against an engineer under a FIDIC 2nd edition 1969 contract, the Court of Appeal held that the engineer owed no tortious duty of care under *Hedley Byrne* principles to the contractor in certifying or making decisions.

In *Pacific Associates*, Purchas LJ considered that the courts should be slow to superimpose a duty of care in tort upon the engineer to the contractor which was in excess of the rights of the contractor against the employer. The *ratio* of this judgment appears to be that, as the contractual provisions between the contractor and employer enabled the contractor to pursue a claim against the employer,[25] there could not be the same proximity of relationship between the contractor and the engineer (in the *Hedley Byrne* sense), as the ingredient of reliance by the contractor was not present. Ralph Gibson LJ pointed out that, on the facts, there was no express or implied assumption of responsibility by the engineer, in that there was no approach or request by the contractor inviting the provision of a service, advice or information directly to the engineer. On the question of proximity, Ralph Gibson LJ also observed that the contractor would not be expected to suffer harm from a careless act of the engineer, since the contractor knew at once whether or not to claim against the employer and that, further, the imposition of a duty would be inconsistent with the structure of the contractual relationship. However, Russell LJ considered that the proximity test was satisfied. He was in no doubt that an engineer in preparing tender and contract documents held himself out as an expert on whom the contractor was entitled to rely, but held that it was not just and reasonable to impose a duty as the parties had chosen not to make their relationship contractual as (a) a disclaimer clause[26] was part of the relationship between the parties, and (b) an arbitration clause provided an adequate remedy in the event of under-certification.

Ian Duncan Wallace QC summarised the questions of law in *Pacific Associates* as follows:

> '… whether, under the two essential *Hedley Byrne* criteria of voluntary assumption of responsibility and reliance, a contractor in a typical contract structure or setting could be said to rely on, and the engineer to assume responsibility for, a duty to safeguard the contractor from economic loss, so as to produce or superimpose a remedy available

24 *Pacific Associates Inc v Baxter* (1988) 44 BLR 33, [1990] 1 QB 993, CA.

25 Albeit that an action against the employer was no longer viable.

26 'Neither any member of the employer's staff nor the engineer nor any of his staff, nor the engineer's representative shall be in any way personally liable for the acts or obligations under the contract, or answerable for any default or omission on the part of the employer in the observance or performance of any of the acts matters or things which are herein contained …'

against the engineer in tort in addition to the remedies available against the owner in contract.'[27]

The interpretation of *Pacific Associates* and its application has been the subject of extensive debate in Construction Law Journal between Ian Duncan Wallace QC and Nicholas Lane. Lane in his article 'Constructive Acceleration'[28] suggested that the reasoning and denial of any duty in *Pacific Associates* was explained by the existence of the disclaimer clause. This interpretation was criticised by Duncan Wallace in a letter to the editor.[29] In reply, Lane alleged that Duncan Wallace had misinterpreted the *ratio* of *Pacific Associates*,[30] which then provoked Duncan Wallace to publish '*Pacific Associates* Revisited: A Rejoinder'.[31] Finally, Lane, in '*Pacific Associates*: Charter for Professional Negligence?'[32] suggested that if Duncan Wallace's interpretation of *Pacific Associates* was correct, it would effectively represent a charter for professional negligence and partiality.

Although Messrs Lane and Duncan Wallace cannot agree on the *ratio* of *Pacific Associates*, both appear to acknowledge that this case does not preclude an employer's architect or engineer from owing an economic loss duty, under the *Hedley Byrne* principle, to a contractor, in a traditional – as opposed to a novated design and build – contractual arrangement. However, it appears that any imposition of a duty would need to be consistent with the contractual framework that existed, in that the contractor had no available contractual remedy to recover its losses from either the employer or the professional. This is supported by authority from other jurisdictions, for example *Leon Engineering & Construction Co Ltd v Ka Duk Investment Co Ltd* from Hong Kong.[33]

The liability of a professional for the provision of negligent mis-statements at tender stage to a contractor with responsibility for design was considered by the Court of Appeal in *J Jarvis & Sons Ltd v Castle Wharf Developments Ltd.*[34] Peter Gibson LJ (with whom Arden LJ and Collins J concurred) held that, although Gleeds did owe Jarvis a duty of care, Jarvis's claim failed due to

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27 Ian Duncan Wallace QC, 'Charter for the Construction Professional' (1990) 6 Const LJ 207 at page 209.

28 Nicholas Lane, 'Constructive Acceleration' (2000) 16 Const LJ, 231.

29 Ian Duncan Wallace QC, Letter to the Editor (2001) 17 Const LJ 90.

30 Nicholas Lane, Letter to the Editor (2001) 17 Const LJ 572.

31 Ian Duncan Wallace QC, '*Pacific Associates* Revisited: A Rejoinder' (2003) 19 Const LJ 303.

32 Nicholas Lane, '*Pacific Associates*: Charter for Professional Negligence?' (2003) 19 Const LJ 311.

33 *Leon Engineering & Construction Co Ltd v Ka Duk Investment Co Ltd* 47 BLR 143, High Court of Hong Kong. Bokhary J said at page 151: 'The principle I extract from the Court of Appeal's decision in *Pacific Associates v Baxter* is one which I would state in these terms: Where, first, there is an adequate machinery under the contract between the employer and a contractor to enforce the contractor's rights thereunder and, secondly, there is no good reason at tender stage to suppose that such rights and machinery would not together provide the contractor with an adequate remedy, then, in general, a certifying architect or engineer does not owe to the contractor a duty in tort coterminous with the obligation in contract owed to contractor by the employer.'

34 *J Jarvis & Sons Ltd v Castle Wharf Developments Ltd* [2001] EWCA Civ 19, (2001) 17 Const LJ 430, CA.

lack of causation between the breach of duty and the losses claimed. Relevant extracts from this judgment follow:

> '52. Mr Stewart submitted that the weight of English authority was against the imposition of a duty of care to a contractor, or prospective contractor, upon a member of the employer's professional team rather than the employer itself. He relied on the observations of this court in *Pacific Associates v Baxter*,[35] in which it was held that an engineer to the contractor, while certifying for an interim payment, owed a contractor no duty of care in relation to the content of tender documents supplied by the engineer to the contractor. But that was a case where there was a contract between the employer and the contractor which contained a general disclaimer of liability, and the actual decision was based on inconsistency created by the chain of contracts with a duty of care. Mr Stewart further relied on the views of the editor of *Hudson on Building and Engineering Contracts* (11th edition, 1995) at paragraph 1-288:
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> > "An essential consideration in rejecting a proposed generalised or affirmative duty of care owed by an owner's construction professionals to a contractor within the framework of a typical construction project is the element of conflict of interest, calculated to detract from the whole-hearted performance of a professional's duty to his client, which the incorporation of such a duty into the parties' relationships must inevitably create, it is submitted."
>
> 'But in the present case there was no contract between the employer and the contractor at the relevant time of the alleged misstatements, and, as the editor recognises at paragraphs 1-290 and 1-293, where there is a specific negligent misstatement which is relied on, undoubtedly liability may arise.
>
> '53. The position, as it appears to us, is this. *There is no reason in principle why the professional agent of the employer cannot become liable to a contractor for negligent misstatements made by the agent to a contractor to induce the contractor to tender, if the contractor relies on those misstatements. But whether a duty of care in fact arises in any given situation must depend on all the circumstances, including in particular the terms of what was said to the contractor*.' [*emphasis added*]

In the Canadian case of *Edgeworth Construction Ltd v ND Lea & Associates Ltd*,[36] the Supreme Court of Canada accepted that a drawing was a statement which could found an action for negligent misrepresentation, that an exclusion clause for the employer in the main contract did not cover the engineer and, whilst dismissing an appeal against individual engineers in respect of their personal liability, found that on the facts of that case the engineering firm had a case to answer in tort in respect of errors in the specification and construction drawings. As MacLachlin J put it:

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35 See note 24; the page reference to the QB report of *Pacific Associates Inc v Baxter* in the Const LJ report of *J Jarvis & Sons Ltd v Castle Wharf Developments Ltd* is incorrect.

36 See note 14; the case was referred to by Lord Steyn in *Williams* (see note 7 and linked main text), without commenting on the issue of liability of the engineer for negligent misrepresentation.

> 'The engineers undertook to provide information (the tender package) for use by a definable group of persons with whom it did not have any contractual relationship. The purpose of supplying the information was to allow tenderers to prepare a price to be submitted. The engineers knew this. The plaintiff was one of the tenderers. It relied on the information prepared by the engineers in preparing its bid. Its reliance upon the engineers' work was reasonable. It alleges it suffered loss as a consequence. These facts establish a prima facie cause of action against the engineering firm.'[37]

Returning to the facts of *Blyth & Blyth*, it appears from the law report that in relation to the quantity of steel bar reinforcement, the engineer provided faxes, letters and advised on the quantities. From a review of the law, it appears that in order for a liability in tort to have arisen under the extended *Hedley Byrne* principle, the following criteria needed to be fulfilled:

1. Objectively viewed, Blyth & Blyth had to know at the time that the information contained in the faxes, letters and advice on quantities was given to Carillion, and that Carillion would rely on that information to prepare and provide its bid;
2. Objectively viewed, Blyth & Blyth had to know that the information contained in the faxes, letters and advice would be acted upon by Carillion without independent enquiry;
3. Carillion in fact acted upon the information contained in the faxes, letters and advice to their detriment;
4. Objectively viewed, Blyth & Blyth had to know that if the information contained in the faxes, letters and advice was inaccurate, Carillion would incur financial loss;
5. Blyth & Blyth must not have excluded its liability for negligence in respect of the accuracy of the information contained in the faxes, letters and advice;
6. Carillion had to have no *contractual* remedy to make a claim for any losses arising from the inaccuracy of the information contained in the faxes, letters and advice;
7. The information contained in the faxes, letters and advice had to be so inaccurate as to constitute negligence on the part of Blyth & Blyth; and
8. If the information contained in the faxes, letters and advice had been accurate, Carillion would have increased its bid but would have still secured the design and build contract.

Assuming, for the time being, that there was no exclusion of liability clause for negligence in the 'novation agreement' (point 5),[38] and that the inaccuracy in the information contained in the faxes, letters and advice did constitute negligence (point 7), I see no good reason why Carillion could not have

37 *Edgeworth Construction Ltd v ND Lea & Associates Ltd* 66 BLR 56, Supreme Ct of Canada, at page 65F.

38 There is no information in the law report whether Blyth & Blyth had excluded any liability for negligence.

satisfied the remaining criteria. Surely an engineer, when asked to provide an estimate of steel bar reinforcement to a design and build contractor, would know that the contractor would be relying on that information to prepare its bid (points 1 and 2)? Clearly, by virtue of the terms of the novation agreement and the contract between the employer and Carillion, there was no contractual remedy available to Carillion to recover its 'losses' (point 6). Assuming that the same information was provided to each of the tendering contractors, it must also be a fair assumption that, had the information been correct, each of the tendering contractors would have increased their bids to take into account the increased quantities that were stated to apply and that Carillion would still have secured the design and build contract (point 8): the measure of loss would be the difference between Carillion's accepted tender amount and the amount that would have been accepted, had the correct quantities been advised.

By applying these principles in a wider context to any professional concerned in a novated design and build contractual arrangement, it follows that, contrary to the opinions of some commentators, in a situation where a contractor is precluded from making a claim in contract for errors in the Employer's Requirements, professionals will still need to exercise reasonable skill and care in preparing information for tendering contractors, whether as part of the Employer's Requirements or in response to specific queries or requests received from tendering contractors. Whether or not a case will reach the English courts and provide us with the benefit of judicial consideration of this issue in the near future remains to be seen. In the meantime, I am not aware of any authority that acts to prevent a claim in tort under the extended *Hedley Byrne* principle from succeeding. Indeed, on the contrary, in my submission the authorities support my proposition that a professional *can* be held liable in tort to a tendering contractor for negligent misstatements or representations made during a pre-novation period.

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is to promote the study and understanding of
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