Case No: HT-2019-000425

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2020] EWHC 2049 (TCC)

Rolls Building
Fetter Lane, London, EC4Y 1NL

Date: 30/07/2020

Before:

MRS JUSTICE O'FARRELL DBE

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Between:

RSK ENVIRONMENT LIMITED **Claimant**

- and -

HEXAGON HOUSING ASSOCIATION LIMITED **Defendant**

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Paul Cowan (instructed by **Kennedys Law LLP**) for the **Claimant**
Paul Reed QC and Emma Hynes (instructed by **DWF Law LLP**) for the **Defendant**

Hearing date: 16th June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 30th July 2020 at 10:30am"**

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This claim concerns a geotechnical investigation and report prepared by the Claimant ("RSK") in respect of a site at 52-54 Kings Highway in Plumstead, London. The Defendant ("Hexagon") carried out a residential housing development at the site. Hexagon asserted a claim in negligence against RSK for damages, following ground collapse at the site causing damage to the housing.

2. By these Part 8 proceedings, RSK claims declaratory relief that, if and insofar as RSK assumed a common law duty of care to Hexagon in respect of the ground investigation and report, the nature, scope and extent of such duty was circumscribed by the limitations of liability provisions contained in RSK's proposal document.

3. Hexagon opposes RSK's claim for relief on the grounds that use of the Part 8 procedure is inappropriate in all the circumstances; further, Hexagon was not bound by the limitations of liability in RSK's proposal because they were not brought to Hexagon's attention and it did not agree to be so bound.

Background

4. By letter dated 21 November 2013 from RSK to Skillcrown Homes Ltd ("Skillcrown"), RSK submitted its proposals and budget costs for undertaking geoenvironmental and geophysical investigations at the site:

> "Based on the information of the proposed development available to us, our recommended approach to providing advice on geotechnical and geoenvironmental/contamination aspects or the site is detailed below.
>
> We would recommend a phased approach to investigating the presence of mine workings beneath the site, as outlined below:
>
> 1. A desk based review of all available information on mine workings in the area;
>
> 2. A non-intrusive geophysical micro-gravity survey of the site to identify any possible voids or anomalies;
>
> 3. Sinking of three percussive boreholes to confirm the general ground conditions and depth to Chalk;
>
> 4. A targeted intrusive investigation of any anomalies using dynamic probing techniques for shallow anomalies and rotary probing techniques for anomalies at depth; and
>
> 5. If any voids are encountered, downhole CCTV camera and laser surveys could be employed to assess their condition and extent. (Please note that we have not made allowance for conducting these surveys within the current schedule of costs)."

5. RSK stated that the results of the investigation would be compiled into a combined factual and interpretative site investigation report.

6. Having set out the proposed scope of the work and its estimated fees, RSK stated:

> "The fee estimate is subject to acceptance of the RSK Group Terms & Conditions, a copy of which is attached, and we cannot proceed with the work until such acceptance has been confirmed in writing or alternative conditions agreed with us and confirmed in writing."

7. RSK's terms and conditions were enclosed with the proposal letter and included the following provisions:

> "These terms and conditions ("Conditions") are to be read in conjunction with the RSK Proposal.
>
> …
>
> Definitions and Interpretation
>
> 1. In these Conditions:
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> …
>
> "Client" means the contracting party for whom Work is performed by RSK and the party responsible for payment of the Fee;
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> …
>
> "Work" means the scope of work detailed in the Proposal;
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> …
>
> RSK Obligations
>
> 4. RSK will exercise reasonable skill, care and diligence in the performance of the Work and in accordance with the provisions of the Proposal. RSK will undertake the Work in accordance with current health, safety and environmental legislation available at the time the Contract is agreed.
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> …
>
> Liability Limitation
>
> 6. This Condition 6 sets out the entire financial liability of RSK (including any liability for the acts or omissions of its employees, agents, consultants and subcontractors) to the Client in respect of any breach of the Contract; any use made by the Client of the Work, the Deliverables or any part of

them; and any representation, statement or tortious act or omission (including negligence) arising under or in connection with the Contract.

6.1 All warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract.

6.2. Nothing in these Conditions limits or excludes RSK's liability for death or personal injury resulting from negligence, or for any damage or liability incurred by the Client as a result of fraud or fraudulent misrepresentation by RSK.

6.3. Subject to Conditions 6.1 and 6.2:

(a) RSK shall not be liable for Indirect Loss;

(b) The total liability of RSK under or in connection with the Contract for all claims, whether in contract, tort (including negligence), breach of statutory duty or otherwise, will be limited to the lesser of (i) £1 million; or (ii) the amount recoverable by RSK under professional indemnity insurance maintained in accordance with these Conditions and in force at the time the claim, or (if earlier) circumstances that may give rise to the claim is, or are, reported to the insurers in question;

(c) RSK's liability to the Client shall be limited to such proportion of the Client's loss and damage as it would be just and equitable for RSK to pay having regard to the extent of its responsibility for the loss and damage and on the assumption that (i) all other consultants contractors, subcontractors, project managers and advisers engaged in connection with the project have provided contractual undertakings on terms no less onerous than those set out in this Contract to the Client in respect to their obligations in connection with the project; and (ii) all the parties referred to in this clause have paid to the Client such proportion of the loss or damage that it would be just and equitable for them to pay, having regard to the extent of their responsibility for the loss or damage;

(d) Subject to the other limitations contained in this Condition 6, if RSK is in breach of its obligation under Condition 4 to exercise reasonable skill,

> care and diligence in the performance of the Work, RSK's liability will be limited to the reasonable cost of correcting or completing the relevant part of the Work or, if necessary, the cost of obtaining replacement work of equivalent standard as that provided for in the scope of the Work.
>
> 6.4. No action or proceeding for any breach of this Contract will be commenced against RSK after the expiry of six years from the date of the completion of the Work, as indicated by the provision of the final Deliverable."

8. The proposal was formally accepted by Skillcrown on 4 December 2013 by signing the agreement form sent with the proposal letter, stating:

> "The scope of services, costs, and Terms and Conditions for the proposed transaction as described in the RSK proposal is hereby accepted. RSK Environment Limited is authorised to perform the services as specified in the Scope of Work for the client below."

9. By email dated 28 April 2014 from Skillcrown to RSK, Skillcrown notified RSK that Hexagon was happy to wait for the final version of the report to be in joint names.

10. On 30 April 2014 RSK published its site investigation report, in which the client was identified as Skillcrown and Hexagon.

11. The general notes to the report included the following:

> "RSK Environment Limited (RSK) has prepared this report for the sole use of the client, showing reasonable skill and care, for the intended purposes as stated in the agreement under which this work was completed. The report may not be relied upon by any other party without the express agreement of the client and RSK. No other warranty, expressed or implied, is made as to the professional advice included in this report."

12. The introduction to the report included the following:

> "RSK Environment Limited (RSK) was commissioned jointly by Skillcrown Homes Limited and Hexagon Housing Association Limited to carry out a geo-environmental assessment of the land at Brickfield Cottages, Plumstead, London, SE18 2BJ. It is understood the site is being considered for redevelopment with low rise housing and flats.
>
> This report is subject to the RSK service constraints given in Appendix A.
>
> …

> The project was carried out to an agreed brief as set out in RSK's proposal (ref. 371086 L01 (01), 21 November 2014)…"

13. The service constraints set out in Appendix A included the following:

> "1. This report and the site investigation carried out in connection with the report (together the "Services") were compiled and carried out by RSK Environment Limited (RSK) for Skillcrown Homes Limited and Hexagon Housing Association Limited (the "client") in accordance with the terms of a contract between RSK and the "client", dated 4 December 2013. The Services were performed by RSK with the skill and care ordinarily exercised by a reasonable environmental consultant at the time the Services were performed. Further, and in particular, the Services were performed by RSK taking into account the limits of the scope of works required by the client, the time scale involved and the resources, including financial and manpower resources, agreed between RSK and the client.
>
> 2. Other than that expressly contained in paragraph 1 above, RSK provides no other representation or warranty whether express or implied, in relation to the Services.
>
> 3. Unless otherwise agreed the Services were performed by RSK exclusively for the purposes of the client. RSK is not aware of any interest of or reliance by any party other than the client in or on the Services. Unless expressly provided in writing, RSK does not authorise, consent or condone any party other than the client relying upon the Services. Should this report or any part of this report, or otherwise details of the Services or any part of the Services be made known to any such party, and such party relies thereon that party does so wholly at its own and sole risk and RSK disclaims any liability to such parties. Any such party would be well advised to seek independent advice from a competent environmental consultant and/or lawyer.
>
> …
>
> 6. The observations and conclusions described in this report are based solely upon the Services which were provided pursuant to the agreement between the client and RSK. RSK has not performed any observations, investigations, studies or testing not specifically set out or required by the contract between the client and RSK
> …

> 7. The Services are based upon RSK's observations of existing physical conditions at the Site gained from a walk-over survey of the site together with RSK's interpretation of information including documentation, obtained from third parties and from the client on the history and usage of the site. The Services are also based on information and/or analysis provided by independent testing and information services or laboratories upon which RSK was reasonably entitled to rely. The Services clearly are limited by the accuracy of the information, including documentation, reviewed by RSK and the observations possible at the time of the walk-over survey…"

14. In about June 2014 Hexagon purchased the site.

15. By a contract dated 4 July 2014, executed as a deed, Hexagon engaged Skillcrown to complete the design and carry out the construction of residential housing on the site.

16. Practical completion of the works was certified on or about 30 November 2015.

17. On 2 May 2016 a ground collapse occurred, damaging some of the dwellings. Remedial works were carried out to stabilise the ground and make the site safe.

Proceedings

18. By a letter of claim dated 16 October 2017, Devonshires, solicitors acting for Hexagon, asserted that RSK owed a common law duty of care to Hexagon, RSK was negligent in carrying out its investigations and/or preparing the site investigation report, and its failure to advise as to the risk of voids associated with chalk mines at the site caused Hexagon to suffer loss and damage.

19. The following matters were relied on by Hexagon as giving rise to a duty of care:

> "21.1 Hexagon and Skillcrown are both named as RSK's clients on the front cover of the RSK's Report in the following terms "Skillcrown Homes Limited and Hexagon Housing Association Limited". Therefore, RSK knew or ought reasonably to have known that Hexagon would rely upon the advice provided in the RSK Report and by identifying Hexagon as a client on the front page of the RSK Report RSK voluntarily assumed a duty of care to Hexagon.
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> …
>
> 21.3 At the bottom of the first page of the RSK Report it is stated that "RSK … has prepared this report for the sole use of the client …" Accordingly, having identified Hexagon as RSK's client on the first page of the RSK Report, RSK then stated that Hexagon was

> entitled to 'use' the RSK Report. Therefore RSK represented to Hexagon and it accepted that Hexagon could rely upon the advice contained in the RSK Report.
>
> …
>
> 21.6 At paragraph 3 of Appendix A to the RSK Report it stated that "the Services were performed by RSK exclusively for the purposes of the client" representing to Hexagon (as an identified "client") that it accepted that Hexagon could rely upon the RSK Report.
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> …
>
> 22. In the circumstances the relationship between Hexagon and RSK was one where RSK, who prepared the RSK Report, was aware of Hexagon and the purpose for which the RSK Report was to be used and voluntarily assumed responsibility towards Hexagon with respect to the RSK Report and financial loss and damage that Hexagon may suffer in the event that the RSK Report was not prepared with reasonable skill and care. Furthermore, financial loss was reasonably foreseeable as resulting from the geotechnical report if it was prepared without adequate skill and care. In the circumstances it is fair, just and reasonable to impose liability on RSK for resulting financial loss."

20. By letter dated 11 December 2017 Kennedys, solicitors acting for RSK, responded to the letter of claim, disputing liability for any losses suffered by Hexagon. In response to the assertion of a duty of care, they stated:

> "3. To the extent that your client is able to piggy-back onto the appointment of our Client by Skillcrown, that arrangement is pursuant to the terms and conditions under which our Client was appointed. Any appointment of our Client by your client and Skillcrown was subject to the service constraints set out at Appendix A of the Report. Paragraph 1 of the 'RSK Service Constraints' states that the Report was prepared in accordance with the terms of a contract dated 4 December 2013 ("the December Agreement"). The terms and conditions appended to the December Agreement exclude RSK's liability for economic loss and limit RSK's overall liability to £1 million. Any such liability is subject to a net contribution clause…
>
> …

> 8. It is acknowledged that your client is named as the 'client' in the Report. It is admitted that our Client was aware that your client was considering purchasing the site for the purpose of constructing residential properties. It is not admitted that the decision as to whether to purchase the site and the purchase price was dependent upon our Client's advice. That was not at any time communicated to our Client. Our Client is unable to comment on the motivation driving your client's decisions.
>
> …
>
> 20. The duties owed by our Client were set out in the December Agreement.
>
> 21. It is not in dispute that your client was named as the 'client' in the Report. As such, our Client owed your client certain duties of care. As set out above, the contractual relationship between our respective clients was subject to the 'RSK Service Constraints' set out in Appendix A, and in turn subject to the December Agreement.…"

21. By letter dated 14 November 2018, Devonshires replied, stating:

> "6. Our client's claim has not been brought against your client for breach of contract but for breach of a duty of care at common law. Accordingly, your client's terms and conditions (and/or service constraints), namely, the terms seeking to exclude your client's liability for economic loss and the terms regarding the limit of liability, do not apply to our client's claim.
>
> …
>
> 14. Our client was not party to the December Agreement and we note that you do not provide any explanation as to the formation and existence of such contract. We also note that you accept that your client owed our client duties of care. On this basis, the terms of the December Agreement are irrelevant to our client's claim."

22. On 25 November 2019 RSK commenced these Part 8 proceedings, seeking the following relief:

    i) A declaration that, if and insofar as RSK assumed the alleged or any common law duty of care to Hexagon in respect of the Report and the performance of the ground investigations described therein, the terms of the Proposal would

have defined the nature, scope and extent of the services required to be performed by RSK and to be set out in the Report.

ii) A declaration that, if and insofar as RSK assumed the alleged or any common law duty of care to Hexagon in respect of the Report and the performance of the ground investigations described therein, the nature, scope and extent of any such duty of care (and any liability that RSK might have for any breach thereof, if so established) would have been restricted by the limitations of liability set out in the Proposal (subject to their proper construction and effect, as may be determined in due course).

iii) Such further or other relief in favour of RSK as the Court may consider just and appropriate.

23. In support of its claim RSK relies on two witness statements of Ms Nikki Baynes of Kennedys, dated 25 November 2019 and 24 January 2020 respectively.

24. Hexagon relies on the witness statement of Mr Daniel Wilford of DWF Law, dated 20 December 2019.

Assumed facts

25. Mr Cowan, counsel for RSK, confirmed that RSK's position is that there was a contract between RSK and Hexagon, formed when Hexagon was identified as joint client with Skillcrown in the report dated 30 April 2014. Hexagon's position is that there was no contractual relationship between RSK and Hexagon. Mr Cowan accepts that for the purpose of the Part 8 claim, the Court should assume that there was no contract between RSK and Hexagon.

26. The basis of the Part 8 claim is an assumption that RSK owes a duty of care at common law to Hexagon in respect of the site investigation report.

27. The issue in dispute is the nature and scope of that duty; in particular, whether the limitation of liability provisions in RSK's contract with Skillcrown apply to limit RSK's duty in tort to Hexagon.

28. The Court is not asked to construe the meaning and effect of RSK's terms and conditions, including the limitations on liability, for the purpose of this Part 8 claim; the Court is asked to determine whether the nature and scope of any duty of care would be limited by those terms and conditions as a matter of principle.

Parties' submissions

29. Mr Cowan submits that the contractual scope and terms of RSK's professional retainer determined the nature and scope of the services that RSK was required to undertake, the timing and extent of such services, and the standard and terms on which those services were to be performed. The service constraints in the report disclaimed any responsibility or liability outside RSK's duties to the "client" as defined in the proposal and subject to its terms. In the report, the "client" was expressly re-defined to include Hexagon. Accordingly, where the provision of the report to Hexagon as "client" by RSK gave rise to the assumption of a common law

duty of care to Hexagon, it was intended by the parties and objectively clear in all the circumstances that the nature, scope and extent of that common law duty of care should be defined by and subject to the terms of the proposal. Those terms include the limitations of RSK's liability set out in clause 6. Therefore, the limitation of liability set out in the proposal limit the scope and extent of RSK's liability to Hexagon at common law.

30. Mr Reed QC, leading counsel for Hexagon, submits that the claim is not suitable for determination as a Part 8 claim because it raises disputed issues of fact. On the issue of law, he submits that a limitation of liability in contract does not bind a third party in tort. Even if there were a contractual relationship between RSK and Hexagon, which is disputed, Hexagon would not be bound by the limitations of liability relied on because neither the proposal nor RSK's terms and conditions were provided to Hexagon. RSK's terms and conditions were bespoke, rather than standard terms and conditions, and therefore could not reasonably be anticipated. *A fortiori,* RSK's terms and conditions do not bind Hexagon for the purpose of defining the nature and scope of the duty of care at common law or any limitation in respect of such duty.

Applicable legal principles

31. It is common ground that where there are concurrent duties of care at common law and in contract, the contractual obligations will usually define the scope of the tortious duty, unless there is evidence that the party owing the obligations undertook some additional task from which an extended assumption of responsibility can be inferred. In cases concerning concurrent duties, the tortious duty may be limited or excluded where it would be inconsistent with the applicable contract: *Henderson v Merrett* [1995] 2 AC 145 (HL) per Lord Goff at pp.194A-196F. However, such issue does not arise in this case because the Court is asked to assume that there is no contract between RSK and Hexagon. Therefore, the Court must assume there is no concurrent duty of care in contract and tort for the purpose of this claim.

32. RSK's claim depends on the proposition that even where there is no direct contract between A and B, the nature and scope of A's common law duty of care to B may be determined by the terms of A's professional retainer with C.

33. In *Leigh & Sillavan Limited v Aliakmon Shipping co Limited* [1986] AC 785 (HL), the House of Lords rejected the buyer's claim against the shipowner in negligence for loss of the goods because there was no contract between the parties and the buyer had no legal ownership or possessory title to the goods at the time of loss. In rejecting the buyer's attempt to rely on the obiter remarks of Lord Roskill in *Junior Books*, Lord Brandon stated at p.817G:

> "… with great respect to Lord Roskill there is no analogy between the disclaimer in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, which operated directly between the plaintiffs and the defendants, and an exclusion of liability clause in a contract to which the plaintiff is a party but the defendant is not. I do not therefore find in the observation of Lord Roskill relied on any convincing legal basis for qualifying a duty of care owed by A to B by reference to a contract to which A is, but B is not, a party."

34. In *Pacific Associates v Baxter* [1990] QB 993 (CA), the Court of Appeal held that an engineer appointed to supervise works did not owe a duty of care to the contractor on the basis that there was no assumption of responsibility, having regard to the contractual matrix. In considering Lord Brandon's observations in *The Aliakmon*, Purchase LJ stated:

> "There can be no doubt of the force of Lord Brandon's comment as it stands. However, with great respect to Lord Brandon the absence of a direct contractual nexus between A and B does not necessarily exclude the recognition of a clause limiting liability to be imposed on A in a contract between B and C, when the existence of that contract is the basis of the creation of a duty of care asserted to be owed by A to B. The presence of such an exclusion clause whilst not being directly binding between the parties, cannot be excluded from a general consideration of the contractual structure against which the contractor demonstrates reliance on, and the engineer accepts responsibility for, a duty in tort, if any, arising out of the proximity established between them by the existence of that very contract."

35. In *White v Jones* [1995] 2 AC 207 (HL) a solicitor, retained by a testator, was found to owe a duty of care at common law to the intended beneficiaries under the proposed will. Lord Goff's opinion was that this could be achieved (to avoid the claim otherwise falling into a 'black hole') by extending the assumption of responsibility imposed on the solicitor towards his client to the intended beneficiary but stated at p.268G:

> "Such assumption of responsibility will of course be subject to any term of the contract between the solicitor and the testator which may exclude or restrict the solicitor's liability to the testator under the principle in *Hedley Byrne*. It is true that such a term would be most unlikely to exist in practice; but, as a matter of principle it is right that this largely theoretical question should be addressed."

36. And Lord Nolan stated at p.294G:

> "I would for my part leave open the question whether, in either type of case, the defendant who engages in the relevant activity pursuant to a contract can exclude or limit his liability to third parties by some provision in the contract. I would prefer to say that the existence and terms of the contract may be relevant in determining what the law of tort may reasonably require for the defendant in all the circumstances."

37. In *Killick v Pricewaterhouse Coopers* [2001] PNLR 1, the court held that auditors retained by a company to value shares owed a duty of care in tort to the shareholders but declined to give summary judgment as to whether any liability on the part of auditors to the shareholders could be subject to a limitation clause in the contract

between the auditors and the company. Having referred to the relevant authorities, Neuberger J stated:

> "[32] … There is some force in the contention that the parties, when agreeing the Articles … would have envisaged the company agreeing terms with the accountants, and may have envisaged, therefore, that those terms would be binding on the shareholders.
>
> [33] Against that, there is the obvious force in the contention that the parties would not have envisaged a limitation of liability provision being binding on the shareholder, at least in a case where the shareholders did not know about it, on the basis that such a provision was not within their contemplation, judging from the terms of the Articles. That is an issue which could conceivably depend on factual evidence, and even on policy. Thus, there may be an issue as to how common such limitation provisions are in share valuation agreements with accountants, and why they are imposed."

38. In *Riyad Bank v Ahli United Bank (UK) plc* [2006] EWCA Civ 780 the Court of Appeal held that the defendant bank owed a duty of care to the first claimant investment fund for advice given to the second claimant and passed on to the fund based on an assumption of responsibility, despite the contractual context in which the second claimant limited its liability to the fund for such advice. Neuberger LJ stated:

> "[37] There is, at any rate at first sight, attraction in the notion that, where, in a purely commercial context, parties have voluntarily and consciously arranged their affairs so that there is a contractual obligation on A to give advice to B, and on B to consider and pass on that advice, to the extent that it sees fit, to C, there should normally be no part for the law of tort to play. In other words, that
>
> i) There should be no tortious duty in relation to the advice, either as between A and B or as between B and C, because those parties have identified the extent and ambit of the respective rights and duties between them in their respective contracts; and
>
> ii) There should be no tortious duty in relation to the advice given by A, as between A and C, because the three parties have intentionally structured their relationships so that there is no direct duty between A and C, but separate duties between A and B, and between B and C.
>
> [38] The justifications for each of these two points might appear to be the converse of each other. Point (i) is based on the contention that the raising of a tortious duty is inappropriate because the parties have agreed a contractual duty. Point (ii) is based on the contention that the raising of a tortious duty is

inappropriate because the parties have decided that there should be no contractual duty. However, as I see it, despite this apparent paradox, both points essentially rest on the same proposition, namely that a tortious duty should not be invoked between parties to commercial contracts at least where there is no "liability gap".

[39] In relation to point (i), it would be surprising (save perhaps in unusual circumstances) if the law of tort imposed greater liability on A or B than they had agreed to accept, either expressly or impliedly, in their respective contracts, and it might appear pointless and confusing if there was a tortious liability which was simply co-extensive with the contractual liability…

[40] So far as point (ii) is concerned, it may be thought to be questionable whether the law of tort should normally be capable of being invoked in order to found a duty of care in circumstances where the parties have intentionally set up a contractual structure which avoids such a contractual duty. Especially so when there is no "gap" which requires "filling" ...

…

[42] On the other hand, there are strong countervailing arguments the other way, which appear to me, again, to apply equally to points (i) and (ii). If a duty of care would otherwise exist in tort, as part of the general law, it is not immediately easy to see why the mere fact that the adviser and the claimant have entered into a contract, or a series of contracts, should of itself be enough to dispense with that duty. If a claimant is better off relying on a tortious duty, it is not readily apparent why a claimant who receives gratuitous advice should be better off than a claimant who pays for the advice (and therefore would normally have the benefit of a contractual duty), unless, of course, the contract so provides. One might expect the question to be determined by reference to the contractual relationship on the normal basis, namely whether the nature terms and circumstances of the contract(s) expressly or impliedly lead to the conclusion that the parties have agreed that there will be no tortious duty.

[43] These arguments have to be assessed in the light of the decision of the House of Lords and, in particular the analysis of Lord Goff, in the Henderson case. It seems clear from the closely reasoned passage in his speech at 184B to 194E that the issue has been resolved, at least in principle, in favour of the latter of the two views that I have summarised. In other words, "the common law is not antipathetic to concurrent liability". At 186C to F, Lord Goff considered and explained Lord Scarman's observation in the Tai Hing case. He went on to say that a

claimant who is owed a contractual duty of care may also (or alternatively) be entitled to invoke a tortious duty of care, unless it would be "so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded" – see at 193H and 194A to B.

[44] Those observations are clearly appropriate to what I have called point (i), but, while it is not immediately clear that they apply to point (ii), in my view they do. As mentioned above, the principle upon which both points (i) and (ii) rest is essentially this, that the law of tort should not be invoked in a commercial context, at least where there are no gaps, where the parties have contractually provided for a duty, or a chain of duties. More importantly, Lord Goff's reasoning in relation to point (ii) appears to embody the same approach as that he applied to point (i).

[45] At 193B to C, Lord Goff said "the law of tort is the general law out of which the parties can, if they wish, contract", and that the correct approach is to determine whether there would otherwise be a tortious liability arising out of an assumption of responsibility and concomitant reliance, and "then to inquire whether or not that liability is excluded by the contract because the latter is inconsistent with it". That is essentially the approach he adopted when he turned to consider the contention that "the indirect Names and the managing agents, as parties to the chain of contracts…must be taken to have thereby structured their relationship so as to exclude any duty of care owed directly by the managing agents to the indirect Names in tort" – 195A to B. He then said that he saw "no reason in principle" why an adviser could not owe, at the same time, a contractual duty of care to the next person in the chain and a tortious duty of care to another person further along the chain. He went on, in a passage more fully quoted by Longmore LJ, to observe at 195G that "in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of…short-circuiting the contractual structure put in place by the parties".

[46] So far as "gap-filling" is concerned, Lord Steyn's observation in the Williams case cannot mean that a tortious duty can only arise where there is a "liability gap": that would be inconsistent with the whole basis of the reasoning and decision in the Henderson case. Lord Steyn's point in this connection was, I think, that there are cases involving contractual duties, where, if the law of tort cannot be invoked, as a matter of policy, there would be a "liability gap" which would be unacceptable (as in Smith v Eric S Bush [1990] 1 AC

> 831 and White v Jones [1995] 2 AC 207). That aspect of the law of tort has no bearing on the present case: the fact that the law of tort can be invoked where there is a "liability gap" in certain exceptional cases does not mean that it can never be invoked in a case where there is no "liability gap".
>
> [47] Thus, the question in a point (ii) case, as in a point (i) case, is whether, in relation to the advice he gave, the adviser assumed responsibility to the claimant, in the light of the contractual context, as well as all the other circumstances, in which the advice was given. The way in which Lord Goff expressed himself in more than one place in his speech in the Henderson case, including some of the brief passages I have quoted, suggests that it is for the adviser to establish that the contractual context negatives an assumption of responsibility, not for the claimant to show that the assumption survives notwithstanding that context."

39. In *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, Lord Bingham declined an invitation to review all the relevant authorities so as to identify a formula for the relevant test but provided the following helpful observations:

> "[4] … First, there are cases in which one party can accurately be said to have assumed responsibility for what is said or done to another, the paradigm situation being a relationship having all the indicia of contract save consideration. *Hedley Byrne* would, but for the express disclaimer, have been such a case. *White v Jones* and *Henderson v Merrett*, although the relationship was more remote, can be seen as analogous…
>
> [5] Secondly, however, it is clear that the assumption of responsibility test is to be applied objectively (*Henderson v Merrett*, p 181) and is not answered by consideration of what the defendant thought or intended…
>
> [6] Thirdly, the threefold test itself provides no straightforward answer to the vexed question whether or not, in a novel situation, a party owes a duty of care…
>
> [7] Fourthly, I incline to agree with the view expressed by the Messrs Mitchell in their article cited above, p 199, that the incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation. The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be, on the approach of Brennan J adopted in *Caparo v Dickman*, to find that there has been an assumption of responsibility or that the proximity and policy conditions of the threefold test are satisfied. The converse is also true.

> [8] Fifthly, it seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole."

40. In *Galliford Try Infrastructure Limited v Mott Macdonald Limited* [2008] EWHC 1570 (TCC), Akenhead J summarised the approach to be taken in determining whether any duty of care at common law arose in a commercial context:

> "[190] (a) There are in effect two types or manifestations of duties of care which may arise in relation to economic loss, firstly, out of a negligent misstatement or misrepresentation and, secondly, where there is a relationship akin to contract or the non-contractual provision of services. There is no simple formula or common denominator to determine whether a duty of care, in relation at least to economic loss cases, arises or not.
>
> …
>
> (c) It is always necessary to consider the circumstances and context, commercial, contractual and factual, including the contractual structure, in which the inter-relationship between the parties to and by whom tortious duties are said to be owed arises. Thus, it is not every careless misstatement which is actionable or gives rise to a duty of care. Foreseeability of loss is not enough.
>
> …
>
> (h) So far as disclaimers are concerned, they are simply one factor, albeit possibly an important one, in determining whether a duty of care arises. One cannot, usually, voluntarily undertake a responsibility when one tells all concerned that one is not accepting such responsibility. … "

41. An example of the analysis to be undertaken by the court can be found in *Arrowhead Capital Finance Limited v KPMG LLP* [2012] EWHC 1801 (Comm), a case in which the court struck out the claim on the ground that the defendant owed no duty of care to an investment fund that provided loans to the defendant's client. Stephen Males QC (then sitting as a Deputy High Court Judge) explained:

> "[49] Undoubtedly KPMG assumed responsibility to Dragon for the proper performance of its services. It did so on the terms of the contract set out in its engagement letter and in its terms

> and conditions. These included specific limitations on the extent of the responsibility which it was prepared to assume including a cap on its financial liability. It has not been suggested that this cap would not have been effective to limit KPMG's liability towards Dragon, and in my judgment there is no reason to suppose that it would not have been. Although Arrowhead would not have known the precise terms on which KPMG had been engaged by Dragon, Mr. Coppel accepted that any reasonable businessman would have expected that there would be a written engagement of KPMG which would be likely to contain such terms.
>
> [50] In such circumstances it is inconceivable, in my judgment, that any reasonable businessman would have considered that KPMG was voluntarily assuming an unlimited responsibility towards potential investors in Dragon. This would apply to direct investors, but applies with even greater force to an investor such as Arrowhead which was investing at several removes …
>
> [51] Although KPMG knew that its involvement was being described to potential investors by Dragon, there is objectively no reason to suppose that it was prepared to accept any responsibility other than its responsibility to Dragon in accordance with the terms of its engagement letter, let alone responsibility to a whole chain of investors such as was put in place in this case. KPMG in my judgment did not assume responsibility to Arrowhead, but (in Lord Hoffmann's terms) was only discharging its duty to Dragon. Far from the relationship between Arrowhead and KPMG having all the indicia of contract save for consideration, there was no direct contact between them until a relatively late stage and one of the obvious and important indicia of a contractual relationship in such a context, namely an engagement letter defining KPMG's services and the extent of its liability, was missing."

42. A similar exercise was carried out by His Honour Judge Stephen Davies (sitting as a Judge of the High Court) in *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC).

43. The above cases were concerned with the question whether there was any duty of care based on an assumption of responsibility but that question necessarily involves a determination of the nature and scope of any duty of care. A bare finding that a party owes another a duty of care is meaningless in the absence of a finding as to the nature and scope of such duty. In a commercial context, the nature and extent of a common law duty of care will be framed by the contractual nexus or lack of contractual nexus between the parties, together with the wider factual and contractual arrangements, including any stated limitations or exclusions from liability. The cases all serve to emphasise the importance of the factual matrix when considering whether any common law duty of care arises, including the nature and scope of any such duty.

44. Mr Reed submits that for a clause excluding or limiting liability to be effective so as to exclude the imposition of a duty of care, such as the disclaimer in *Hedley Byrne & Co Limited v Heller & Partners Limited* [1964] AC 465 (HL), it must operate directly between the parties.

45. By analogy with the principles applicable to contracts, a party who wishes to rely on its standard terms and conditions must give reasonable notice of the existence of those terms. To be incorporated, the terms must fairly and reasonably be brought to the other party's attention: *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371 (CA).

46. A higher degree of notice is required for unusual and onerous terms: *Interfoto Picture Library Limited v Stiletto Visual Programmes Limited* [1989] 1 QB 433; *Bates v Post Office Ltd* [2019] EWHC 606 (QB) per Fraser J at [979].

47. Where there is a course of dealing, or where industry standard terms and conditions are used, the court will more readily find that the notice is adequate: *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Ll.Rep. 427.

Discussion

48. The difficulty for RSK in this case is that the contractual matrix is in dispute and the Court does not have before it the evidence needed to resolve that dispute. The Court has been asked to assume that there is no contract between RSK and Hexagon but RSK's position is that there is a such a contract. Clearly, the existence of a direct contract between the parties could impact the nature and scope of the duty of care at common law. It might be assumed for the purpose of the claim that the terms of any contract between RSK and Hexagon mirrored the terms of the contract between RSK and Skillcrown. However, the Court has not been asked to construe the relevant provisions and has not had full submissions as to the interpretation and meaning of the same.

49. Hexagon's position is that RSK did not provide either the proposal or RSK's terms and conditions to Hexagon; further, the provisions of clause 6.3 of RSK's terms and conditions would not bind Hexagon (and, therefore, would not limit or exclude any common law duty of care) because the terms were unusually onerous and were not drawn to Hexagon's attention.

50. Mr Cowan accepts that there is no evidence before the Court that Hexagon received a copy of those documents. There is no evidence that Hexagon knew of, or agreed to be bound by, RSK's terms and conditions.

51. The site investigation report did not set out the limitation of liability contained in clause 6.3 of the terms and conditions. Further, there was no reference to such limitation of liability in the body of the report or its appendices.

52. RSK has produced evidence of a number of standard form contracts which contain limitations of liability. However, the terms in this case were bespoke and, as Mr Reed submitted, potentially excluded all substantive liability to Hexagon for any negligence on the part of RSK. Clause 6.3(d) purported to limit liability to the reasonable cost of correcting or completing the relevant part of the work. In circumstances where

Hexagon's losses allegedly were caused by reliance on the work, this could leave it with no effective remedy.

53. Against that background, Mr Cowan's suggestion that the Court could determine this issue on a "quick glance" at the relevant terms and conditions, or carve out from any declaratory relief clause 6.3(d), would be unsatisfactory. The Court cannot determine these issues in a vacuum and certainly cannot determine these issues without proper findings as to the existence of any contract between the parties, the terms and conditions of any such contract and the proper construction of such terms.

54. In those circumstances, this claim is simply not suitable for determination by way of Part 8 proceedings.

Conclusion

55. In my judgment this case is not suitable for a Part 8 determination.

56. For the reasons set out above, the Court will make the following orders:

    i) RSK's claim for relief as set out in the Part 8 Claim is refused.

    ii) All consequential or other matters, if not agreed, will be dealt with by the Court at a further hearing to be fixed by the parties.