Neutral Citation Number: [2022] EWHC 171 (TCC)

Case No: HT-2019-000359

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31/01/2022

Before :

THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

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B E T W E E N : -

(1) AVANTAGE (CHESHIRE) LIMITED
(2) CHESHIRE EAST BOROUGH COUNCIL
(3) YOUR HOUSING LIMITED

Claimants

-and-

(1) GB BUILDING SOLUTIONS LIMITED (IN ADMINISTRATION)
(2) PRP ARCHITECTS HOLDINGS LIMITED
(4) PRESTOPLAN LIMITED
(5) WSP UK LIMITED
(6) MASCOT MANAGEMENT LIMITED

Defendants

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Alison Padfield QC and Tom Asquith (instructed by **Reynolds Porter Chamberlain LLP**) for the Claimants
Simon Hale and Benjamin Fowler (instructed by **Weightmans LLP**) for the Fifth Defendant

Hearing date: 16 November 2021
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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 has been handed down by the judge remotely by circulation to the parties' representatives by email and released to Bailii. The date for hand-down is deemed to be 31 January 2022.

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THE HONOURABLE MRS JUDGICE JOANNA SMITH DBE

MRS JUSTICE JOANNA SMITH:

1. This is an application by the Fifth Defendant to these proceedings ("**WSP**") for reverse summary judgment on the Claimants' claim pursuant to CPR 24.2(a)(i) and (b), alternatively to strike out part of the Claimants' claim pursuant to CPR 3.4(2) ("**the Application**").

Introduction

2. The litigation concerns a fire which substantially destroyed a supported living facility known as Beechmere Retirement Village, Crewe ("**Beechmere**") on 8 August 2019. The fire was ignited during hot works which were being performed by MAC Roofing outside a flat on the top floor of the central part of the building. Fortunately there was no loss of life, but the Claimants contend that in excess of £30 million of losses have been suffered as a consequence of the failings of the various Defendants, all of whom were involved in the construction of Beechmere.

3. The First Claimant ("**Avantage**") was engaged through a PFI agreement as the contractor to build five properties ("**the Project**"), including Beechmere. On 10 October 2007, Avantage entered into a design and build contract as employer, with the First Defendant (formerly known as Gleeson Building Limited, "**Gleeson**") as the main design and build contractor. Avantage also employed the Sixth Defendant ("**Mascot**") as employer's agent and clerk of works. Avantage remains responsible under the PFI agreement for the management and maintenance of Beechmere and it is contractually responsible to the Second Claimant ("**the Authority**") for the reinstatement of Beechmere following the fire. Avantage also has the benefit of a charge over Beechmere.

4. Neither the Authority nor the Third Claimant ("**YHL**") had any contemporaneous involvement in the design and construction of Beechmere. They are respectively the freehold and leasehold owners pursuant to transfers made by predecessor entities (Cheshire County Council and Manchester & District Housing Association Limited ("**MDHAL**")). For the purposes of this application it is accepted by WSP that the pleading of those transfers in the Particulars of Claim is correct and that any cause of action formerly vested in the two predecessor entities was validly transferred to the Authority and to YHL.

5. Gleeson is now in administration and has not been actively participating in the proceedings. The Second Defendant ("**PRP**") was engaged by Gleeson to provide architectural and design services in relation to the construction of Beechmere. The Fourth Defendant ("**Prestoplan**") was employed by Gleeson as a sub-contractor to design, install and commission timber frames.

6. WSP was retained by Gleeson in 2006 as a consultant in relation to fire engineering design ("**the WSP Appointment**") for the Project including the construction of Beechmere. While both PRP and Prestoplan executed collateral warranties in favour of one or more of the Claimants, it is common ground that WSP had no contractual relationship with any of the Claimants and that the claim against WSP is therefore brought only in the tort of negligence.

The WSP Appointment

7. The WSP Appointment with Gleeson arose following a letter sent by WSP to Gleeson dated 29 August 2006 ("**the Fee Proposal**"), setting out the scope of WSP's services and deliverables in a series of seven bullet points. These included producing a detailed fire safety strategy ("**the FSS**") (described in WSP's evidence as "the key deliverable" albeit not identified in such terms in the Fee Proposal), supporting the design team in developing fire strategy plans for submission to the local authority, attending design and project team meetings when required and providing "continuous support" to the project team. In addition, the Fee Proposal identified the importance of "continuity between the design and operation of buildings" with respect to fire safety, and proposed that WSP should also be involved in developing "an operational version of the fire safety strategy" which would "confirm the key responsibilities and ongoing management controls applicable to the scheme". The operators of the scheme would then "develop management plans incorporating the operational fire strategy" and WSP would "review the management plan(s) and support the operator in finalising the management plans".

8. The Fee Proposal stated that "All works are in accordance with WSP standard terms and conditions which can be made available upon request" ("**the WSP Terms**").

9. It is common ground on this application that the reference in the Fee Proposal to "the operators" is a reference to the Claimants and/or their predecessors and further that WSP knew that the Project involved a PFI arrangement.

10. On 6 November 2006, Gleeson confirmed acceptance of WSP's proposal insofar as it related to the production of a detailed fire strategy. Thereafter, WSP prepared the FSS, which it issued in draft on 5 January 2007 and 21 March 2007, and then in final form on 2 October 2007. At the same time, WSP accepts that its services also involved "providing fire safety-related advice, input and support to "the design team"", including at various meetings.

11. The FSS included a disclaimer ("**the Disclaimer**") in the following terms:

> "10.1.2 The report is intended for the sole use of Gleeson Building Ltd. The information contained herein will not be relied upon by any third party and WSP Group will not accept any responsibility for matters arising as a result of third party use".

12. Following an exchange of emails in September and October 2008 between Gleeson and WSP, on 22 December 2008 and 22 September 2009 respectively, WSP issued an Operational Fire Safety Management report ("**the OFSM**") and a Fire Risk Assessment ("**the FRA**") in respect of Beechmere. Gleeson paid additional fees for these services and it is WSP's case that they were entirely independent of its FSS, issued some time earlier. The Claimants say, however, that there was no bright line between the three strands of WSP's work and that those strands were all interdependent. This is an important factual issue in the context of the Application.

The Application

13. Against the background set out above, it is WSP's case on the Application that the Claimants have no real prospect of establishing that WSP owed them (or any of them)

a duty of care at common law to protect them from the economic loss that they have suffered and that there is no other compelling reason for the claim against WSP to go to trial. This case is supported by two witness statements from Ms Helen Turner, in-house solicitor and senior legal advisor employed by WSP.

14. The Claimants oppose the Application on the grounds that they do have a real prospect of establishing a duty of care at trial, that the Application is premature as it is being heard before Extended Disclosure (which, in WSP's case, has been ordered to take place by 18 February 2022) and/or that there are three other compelling reasons why the claims against WSP should go to trial; namely that (i) the duty of care based on an assumption of responsibility is a developing area of law; (ii) it is likely that documents pertinent to WSP's duty of care will be disclosed in due course; and (iii) contribution claims are pursued against WSP such that there is therefore a risk of inconsistent findings. The Claimants rely upon the third witness statement of Mr Michael Allan, a partner at Reynolds Porter Chamberlain LLP, the Claimants' solicitors, together with a fourth witness statement from Mr Allan, correcting some factual evidence given in his third witness statement and providing some additional information.

15. Following the hearing, the Court of Appeal handed down judgment in *Rushbond PLC v The JS Design Partnership LLP* [2021] EWCA Civ 1889, and I invited the parties to make such further short written submissions addressing this case as they thought fit. Both parties provided further submissions and I shall return to these in due course.

The Pleadings

16. I must begin by looking in some detail at the way in which the case is currently pleaded against WSP. That case is set forth between paragraphs 39 and 47 of the Particulars of Claim as follows:

> "WSP
>
> > 39. On 29 August 2006, WSP submitted a fee proposal to Gleeson for advice on fire strategy in two work packages, one for Properties with atria (including Beechmere) and the other for Properties without atria. The fee proposal recorded that one of the purposes for the appointment was to produce a detailed fire strategy report to accompany a formal submission for Building Regulation and/or local authority approval in respect of the Properties. It also recorded that continuity between the design and operation of the buildings was essential with respect to fire safety, and that an operational version of the fire strategy would need to be developed. It said that this operational fire strategy would then be incorporated into the management plans by the operators of the scheme. The "operators" for these purposes were Avantage, Cheshire County Council and/or MDHAL, as WSP was aware.
> >
> > 40. The fee quoted for working on all the projects was £38,000, which was accepted.

41. On 13 November 2006, and on 23 November 2006, meetings took place attended by both WSP and PRP at which fire strategy issues were discussed. The minutes for these meetings were distributed, as WSP was aware, to Mascot, employer's agent for Avantage.

42. The minutes for the 23 November 2006 meeting recorded that WSP was to confirm "with Avantage/CCC" the mobility of occupants of the Properties.

43. On 5 January 2007, WSP produced Issue 1 of their "Detailed Fire Safety Strategy" document in respect of Beechmere.

44. On 21 March 2007, WSP produced Issue 2 of their Detailed Fire Safety Strategy document. This stated:

a. At paragraph 1.1.1 that WSP had been appointed by Gleeson to provide a detailed Fire Safety Strategy report that would support the Building Regulations application for the Cheshire Extra Care PFI scheme at Crewe.

b. At paragraph 2.1.1 that the objectives of the report were to (i) support the Building Regulation application, (ii) to detail performance requirements of fire safety measures to be used by the design team, and (iii) to assist operational management with their understanding of the building function with respect to fire safety. The reference to "*operational management*" was to Avantage, Cheshire County Council and/or MDHAL.

c. At paragraph 2.4.2, that the operational fire safety management plan for the scheme had yet to be developed and that would be done by the building owner in conjunction with the operators and the care staff provider. The report set out recommendations in relation to building management in section 8.

d. At paragraph 2.4.3, that WSP should be consulted during the development of the operational fire safety plan, and that that plan would take into account the building fire safety features as outlined in the report.

e. At paragraph 7.6.1 that sprinklers were not proposed within the atrium or the adjoining spaces.

The Claimants will rely at trial upon this report for its full terms and true effect.

45. In or about early to mid-2007, PRP proposed a change to its original fire strategy documents whereby compartment walls would not in all cases be taken up to the underside of the roof above, but instead a fire-rated ceiling would be installed and the

roof void above treated as a void to be separated by cavity barriers at approximately 20m centres. WSP knew or ought to have known of this change:

a. PRP have alleged that WSP endorsed its amended fire strategy. The Claimants do not know whether this is correct, but if it is will rely upon that fact.

b. On 17 May 2007, a team meeting took place attended by PRP, Prestoplan and Mascot among others. WSP did not attend but were provided with minutes. At paragraph 5.12 reference was made to "plaster board ceiling double thickness to avoid need for party walls in roof void – comment".

46. On 2 October 2007, WSP issued Fire Strategy document 3. WSP continued to be involved in the design of the fire strategy, as evidenced by its email dated 3 March 2008 to PRP. Subsequently, WSP provided the Operational Fire Safety Manual referred to above, together with a fire risk assessment. It knew that both documents were for the use of Avantage, Cheshire County Council and/or MDHAL

47. In the premises, WSP owed Avantage, Cheshire County Council and/or MDHAL a duty of care in tort to exercise reasonable care and skill in the performance of their obligations under their appointment, **which duty extended to protecting those parties from physical damage to property and from pure economic loss**. In support of this duty, the Claimants aver as follows:

a. At all material times:

i. WSP knew that the work that they were carrying out was in respect of Properties that were to be subject to a PFI project in respect of which Avantage, Cheshire County Council and/or MDHAL were to be involved as owners and operators of the Properties.

ii. WSP knew, and intended, that those parties would be made aware of the advice and recommendations that WSP made and that they would rely upon WSP's competent performance of its duties.

iii. WSP knew that it was likely that those parties would have a significant financial interest in the Properties and would suffer loss in the event that the Properties were damaged.

b. WSP's personnel attended meetings at which, to WSP's knowledge, representatives of both Gleeson and Avantage were present and/or received the minutes thereof, including the meetings referred to above, and at which WSP's advice in

respect of fire strategy for the Properties was presented and discussed.

c. In the premises:

i. it was reasonably foreseeable to WSP that Avantage, Cheshire County Council and/or MDHAL would rely on WSP's work;

ii. WSP was in a relationship of proximity with those parties;

iii. WSP assumed responsibility towards those parties in respect of the advice that it gave.

d. Those parties did in fact rely upon the careful and skilful performance by WSP of its duties under its appointment"

(**emphasis added**).

17. Breach of duty is pleaded against WSP in paragraph 123:

"123. In breach of the duty of care owed to Avantage, Cheshire County Council and MDHAL at common law, WSP:

a. Failed to update its Fire Strategy Report in light of changes to PRP's design in July 2007. In particular WSP:

i. Failed to identify or take account of the fact that under the changed design the majority of the compartment walls were no longer to continue up to meet the underside of the roof tiles and instead cavity barriers were to be installed at 20m centres, thus allowing the roof void to span several flats and the corridor in between them.

ii. Failed to identify that the solution proposed by PRP would not comply with the Building Regulations and/or ADB, for the reasons set out in paragraph 121(j) to (o) above.

iii. Failed to identify that the change in strategy for the roof void would deviate from the 'stay-put' strategy for the apartments which was the fundamental basis for the design by WSP.

iv. Failed to report the above to Gleeson and/or Avantage with a recommendation that PRP reinstate the design stipulated by ADB.

b. Deviated, without any adequate justification, from BS5588 Part 7, in:

i. Providing escape distances from some flats which were much longer than the recommended limit of 18 metres for escape via an unenclosed balcony in an atrium.

> ii. Failing to specify that a sprinkler system was required and/or advising Gleeson and/or Avantage that that was the case. In this context, section 5 of BS 5306-2 stipulates, in relevant part, that "Spaces between roofs and ceilings (including those at the apexes and sides of buildings) more than 0.8 m deep, measured between the highest point under the roof and the top of the ceiling, shall be sprinkler-protected." (26.6.1).
>
> c. In the premises, failed to exercise the skill and care of a reasonably competent fire engineer experienced in construction projects of this sort."

18. Pausing there, I observe that the majority of these allegations of breach are formulated as omissions rather than as positive acts. I also observe that insofar as WSP pursues a strike out application in the alternative to its application for summary judgment, it does so in respect only of paragraph 123(b)(i), namely the allegation in relation to inadequate escape route planning.

19. In paragraph 129 of the Particulars of Claim, the Claimants plead that had the Defendants, including WSP, not acted in breach of duty, Beechmere would not have been defective in its design and construction and much of the damage to the building would have been avoided, alternatively there is a substantial chance that it would have been avoided. Quantum is pleaded in paragraph 131: Avantage seeks costs of reinstatement (currently estimated at approximately £28 million), together with business interruption at circa £4 million. Alternatively, the Claimants and each of them claim the diminution in value to Beechmere caused by the fire. Additional losses are intimated arising out of claims made between the Claimants.

20. In its Defence, WSP alleges that the claim against it is "fundamentally flawed" on the grounds of (i) the absence of any plea of an act or statement (or any direct contact whatsoever) which could amount to an assumption of responsibility by WSP to any of the Claimants; (ii) an express confirmation in the WSP Appointment by reference to the WSP Terms that its services were being provided solely for the benefit of Gleeson, as WSP's client, and not for any third party; and (iii) an express provision within the FSS that the information contained within it was for the sole use of Gleeson and could not be relied upon by any third party and that WSP would not accept responsibility for any such third party use.

21. I shall return to grounds (i) and (iii) in more detail later in this judgment. As to ground (ii), WSP spent some time in its skeleton argument for the hearing arguing that there was strong evidence that the WSP Terms had been incorporated into the WSP Appointment with Gleeson. However, during the course of the hearing, Mr Simon Hale, acting on behalf of WSP, acknowledged that there was in fact a clear dispute of fact as to the incorporation of the WSP Terms and that, whilst he was not formally conceding the point, he did not need to have that dispute resolved in order to succeed on the Application. In my judgment this was realistic. As Ms Alison Padfield QC, acting on behalf of the Claimants, pointed out in her skeleton argument, notwithstanding the evidence from Ms Turner in her first statement to the effect that WSP personnel "normally send" a copy of the WSP Terms with any fee proposal, there is no available

evidence to show that this practice was adhered to in 2006 and no evidence that WSP did in fact send out the WSP Terms with the 29 August 2006 Fee Proposal.

22. I accept Ms Padfield's submission that the evidence from Ms Turner is not sufficient to enable the court to decide a disputed issue of fact such as this in WSP's favour on an application for summary judgment and, accordingly, I decline to do so. I also observe that where the question of the terms of WSP's retainer with Gleeson remains extant, that in itself has the potential to create an unsatisfactory evidential vacuum in the context of an application of this sort involving the existence and scope of any duty of care owed by WSP to the Claimants. I note, however, that Mr Hale maintains that he is still entitled to rely on the reasoning set forth in *Arrowhead Capital Finance Limited v KPMG LLP* [2012] EWHC 1801 (Comm), as to the kind of terms that any party in the position of the Claimants would expect to be present in the appointment of a professional consultant, and I shall return to this in due course.

The Applicable Principles

23. The applicable principles on an application for summary judgment and strike out are well known and are not controversial.

24. The parties both rely upon the much-cited judgment of Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 at [15], where he identified seven core principles (approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 per Etherton LJ at [24] and in *Global Asset Capital Inc v Aabar Block Sarl* [2017] 4 WLR 163 per Hamblen LJ at [27]). Particular attention was focused during the hearing upon [15](iv), (v), (vi) and (vii) of the judgment in *Easyair*.

25. I was also taken to a reformulation of the *Easyair* principles in *Aquila WSA Aviation Opportunities II Ltd v Onur Air Tasimacilik AS* [2018] EWHC 519 (Comm) at [27], where Cockerill J noted that "The object of the rule is to winnow out cases that are not fit for trial".

26. A more recent summary of the principles is to be found in *Hamida Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 per Coulson LJ at [22]:

> "As to the applicable test itself:
>
> (a) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91. A realistic claim is one that carries some degree of conviction: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472. But that should not be carried too far: in essence, the court is determining whether or not the claim is "bound to fail": *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1WLR 1804 at [80] and [82].
>
> (b) The court must not conduct a mini-trial: *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, in particular paragraph 95. Although the court should not automatically accept what the claimant says at face value, it will ordinarily do so unless its factual assertions are

> demonstrably unsupportable: *ED & F Man Liquid Products v Patel*; *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, at paragraph 110. The court should also allow for the possibility that further facts may emerge on discovery or at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; *Sutradhar v Natural Environmental Research Council* [2006] 4 All ER 490 at [6]; and *Okpabi* at paragraphs 127-128."

27. Ms Padfield specifically directed my attention to [23] of Coulson LJ's judgment in that case to the effect that "…it is not generally appropriate to strike out a claim on assumed facts in an area of developing jurisprudence. Decisions as to novel points of law should be based on actual findings of fact…". At [24], Coulson LJ went on to set out an extract from the speech of Lord Briggs in *Vedanta Resources PLC & Another v Lungowe & Others* [2019] UKSC 20 as follows:

> "48. It might be thought that an assertion that the claim against Vendanta raised a novel and controversial issue in the common law of negligence made it inherently unsuitable for summary determination. It is well settled that difficult issue of law of that kind are best resolved once all the facts have been ascertained at a trial, rather than upon the necessarily abbreviated and hypothetical basis of pleadings or assumed facts".

28. Mr Hale also referred my attention to *Sainsbury's Supermarkets Limited v Condek Holdings Limited* [2014] EWHC 2016 (TCC) per Stuart-Smith J at [13] to the effect that:

> "Evidence is admissible on an application for summary judgment, with the overall burden of proof resting on the applicant. If the applicant adduces credible evidence in support of the application, the respondent comes under an evidential burden of proving some real prospect of success or some other reason for having a trial".

29. I have regard to the general principles identified in these cases in determining the Application. Insofar as either party made submissions as to points of emphasis, I will deal with them as they arise in the context of this judgment.

Summary of Conclusion

30. As Mr Hale accepted during his submissions, the Application does not give rise to a short point of law or construction (see *Easyair* at [15](vii)). On the contrary, even on Mr Hale's case set out in his dense, 49 page skeleton, it involves detailed argument as to (i) the existence of a duty of care by reference to numerous authorities (between them the parties cited approximately 25 authorities), (ii) the potential for there to have been an assumption of responsibility in respect of WSP's services in providing the FSS, (iii) the incorporation of the WSP Terms (a point I have already indicated is not appropriate for summary judgment), (iv) the impact of the Disclaimer in the FSS, (v) interactions between WSP and agents of the Claimants or their predecessors which may have "crossed the line", and (vi) the status of WSP's OFSM and FRA, in particular whether

these documents, issued some considerable time after the FSS, are properly to be regarded as purely "operational" documents, or alternatively as documents relevant in the context of alleged failures in the design of the fire safety at Beechmere and thus connected with the FSS so as to be relevant in the context of examining the objective question of whether there has been an assumption of responsibility by WSP in this case. The issues were such that, during the course of the one day hearing, it was inevitable that counsel's submissions were made at a relatively high level – there was little time to look in any detail at the cases to which they both referred.

31. In my judgment, the mere identification of so many potentially complex issues (many of which involve disputes of fact) raises an immediate question mark over the suitability of the Application for summary judgment. Indeed, I have reached the conclusion in this case that summary resolution is not appropriate and that the Application has all the hallmarks of an attempt to persuade the court to conduct a mini-trial of the issues (see *Easyair* at [15](iii)).

32. Persuasive as Mr Hale's submissions were, on behalf of WSP, I cannot at this stage of the proceedings determine that the Claimants have no real prospect of success or that their claim is "fanciful" or bound to fail. In my judgment the existence of a duty of care is at least arguable and I note that, as Coulson LJ recently observed in *Rushbond* at [42], this is "a relatively low threshold". I set out my reasons below.

The Law: Duty of Care in cases of economic loss

33. I turn first to the law on the existence of a duty of care. Despite extensive citation of authority, Mr Hale says that the law in cases of economic loss is clear; it is not developing and it is not unsettled. He submits that this case does not include any novel features which would make it unsuitable for summary determination.

34. With the exception of a couple of important points to which I shall return in a moment, I did not understand the parties to differ over the law in relation to a claim in tort for economic loss. Both parties agree that in the context of construction projects, the relevant principles have been summarised in *Galliford Try Infrastructure Ltd v Mott Macdonald* [2008] EWHC 1570 (TCC) per Akenhead J at [190]; *RSK Environment Ltd v Hexagon Housing Ltd* [2020] EWHC 2049 per O'Farrell J at [31]-[47] and *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd* [2021] EWHC 590 per Fraser J at [116]-[166].

35. For present purposes, I set out the analysis of the authorities in *Galliford Try* by Akenhead J at [190] (an analysis which was accepted by Fraser J in *Multiplex* at [155]):

> "(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 mis-statement 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.
>
> (b) The Courts have traditionally observed some caution and conservatism in economic loss cases. Attempts to open the

floodgates, such as in *Anns v Merton LBC*, have ultimately been rejected. An incremental approach is favoured.

(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.

(d) It is necessary for the party seeking to establish a duty of care to establish that the duty relates to the kind of loss which it has suffered. One must determine the scope of any duty of care.

(e) In considering the first type of duty of care, it is relevant to determine if the statement giver is being asked to give and is giving advice to the recipient. It is then necessary to establish that the statement giver is fully aware of the nature of the particular transaction which the recipient has in contemplation and that its statement would be relied upon by the recipient and, finally, that the recipient has to rely upon the statement in entering into the transaction in question.

(f) In considering the second type of duty of care, it is material to consider whether the relationship between the parties is akin to contract or whether the party alleged to owe the duty was asked by the person to whom the duty is said to be owed to provide services to or for the benefit of that person. Reliance is important also in this type of negligence to link the damage suffered to the breach of duty.

(g) Although the voluntary assumption of responsibility test is not mandatory, it is a useful guide in determining if a duty of care of either sort arises. It is an objective test. The threefold test (of reasonable foreseeability of the economic loss, proximity and fairness, justice and reasonableness) provides no simple answer where, in a new situation, a duty of care is said to arise. These tests are all helpful but are not always determinative.

(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.

(i) The context of and the circumstances in which statements are made by one party to another need to be considered to determine not only if there is a duty but also the scope of any duty. The facts that a statement is made by A to B, that A knows that B will rely upon it and that B does rely upon it are not or at least not always enough to found a duty of care.

36. However, there were important differences of emphasis between the parties which go to the heart of the dispute on the application.

Assumption of Responsibility

The Law:

37. Mr Hale submits that in determining the objective question of whether a defendant has voluntarily assumed a responsibility to a claimant, the primary focus will be on exchanges, whether statements or conduct, which cross the line between them, not upon the state of mind of the defendant (see *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 per Lord Steyn at page 835). He says that the Claimants have relied upon no such statements or conduct in pleading their case against WSP.

38. However, Ms Padfield drew my attention to a passage from *Hedley Byrne* in which Lord Reid said this:

> "A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require."

39. Ms Padfield submits that the Particulars of Claim in this case positively assert that WSP "knew and intended" that the Claimants would be made aware of its advice and recommendations and would rely upon WSP's competent performance of its duties. If this allegation is proved at trial, Ms Padfield says that this would be sufficient to create an assumption of responsibility.

40. Having considered the authorities to which I was referred with care, it does seem to me that this point is at least arguable and that it is not a straightforward point of law that I should determine for the purposes of a summary judgment application.

41. In *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at page 190, Lord Bingham appeared to disagree with the proposition on which Ms Padfield relied in *Hedley Byrne* saying this:

> "it is clear that the assumption of responsibility test is to be applied objectively and is not answered by consideration of what the defendant thought or intended. Thus Lord Griffiths said in *Smith v Eric S Bush* [1990] 1 AC 831, 862 that: "The phrase assumption of responsibility can only have any real meaning if it is understood as referring to the circumstances in which the

> law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice"."

42. However, Lord Bingham himself pointed out that it is not always possible to reconcile statements made in the leading authorities. The knowledge and intentions of WSP may certainly be of relevance to the "contextual scene" identified by Lord Steyn in *Williams v Natural Life,* and may also be relevant to the application of the alternative threefold test (if appropriate – a point to which I shall return). Furthermore, I note that in the context of identifying that the majority of outcomes in the leading cases are sensible and just, irrespective of the test applied to achieve the outcome, Lord Bingham observed in *Custom and Excise* that this:

> "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".

43. In both *Arrowhead* and *Multiplex,* the first instance judges accepted that:

> "in some contexts the defendant's knowledge of and consent to the fact that his advice is being passed on by his client to a third party who will rely on it for a specific purpose may be sufficient to enable the third party to demonstrate sufficient foreseeability and proximity, and that the context may also show that it is fair just and reasonable in such circumstances to impose a duty of care owed by the defendant to that third party" (*Multiplex* at [159]).

44. With this in mind, I note also Ms Padfield's submission that the facts of this case evidence a novel situation and that, in the circumstances and consistent with the approach in *Begum v Maran,* it is therefore inherently unsuitable for summary determination in any event. The novelty is said to lie in the particular nature of the PFI arrangement entered into by the parties, together with WSP's knowledge of that arrangement, which Ms Padfield says is not an arrangement that has been considered before in the context of an alleged assumption of responsibility.

45. Ms Padfield relies upon paragraph 47(a)(i) and (ii) of the Particulars of Claim, together with paragraph 29 of Mr Allan's third statement to the effect that prior to its appointment, WSP:

> "was aware that this was a PFI arrangement between the Second Claimant, who was the ultimate employer, the First and Third Claimants, who were the scheme operators, each of whom would, therefore, rely on WSP's advice and expertise in setting the fire strategy for the scheme. WSP was also fully aware that the use of sprinklers was of a particular concern".

46. Ms Padfield contends that under such an arrangement, it was inevitable that funding would have to be raised and that there would then be a long-term contractual arrangement involving the operation of Beechmere, in respect of which fire safety, both in terms of design and operation of the buildings, was integral.

47. Whilst I have considerable sympathy with Mr Hale's submission that if the touchstone of a PFI arrangement is a long term financial commitment that probably applies to the vast majority of construction contracts, nevertheless, it does not appear to me that Ms Padfield's point is unarguable. The existence of the PFI agreement is obviously relevant background and I cannot determine that there is no prospect at trial of the Judge finding that, as Ms Padfield put it in her skeleton argument, "the upshot of the PFI structure was that [the Claimants] could rely on the FSS". This may simply be another way of putting the point that WSP knew and intended that the Claimants would rely on WSP's competent performance of its duties, but, either way, I do not consider the point to be fanciful. I was not shown any authority precisely on point and it seems to me that this is plainly a matter that is best determined by the Judge at trial. As O'Farrell J pointed out in *RSK Environment Ltd v Hexagon Housing Association Ltd* [2020] EWHC 2049 (TCC) at [43]:

> "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."

48. Furthermore, I accept Ms Padfield's submission that the issues of scope of duty and assumption of responsibility by professional people have, over the years, been bedevilled with difficulties of definition and boundaries. If this is not a novel case, then the test of whether there has been a voluntary assumption of responsibility (or whether, as the test was straightforwardly put in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20; 3 WLR 81 at [16], WSP has "taken on responsibility" for advising the Claimants on fire strategy) will ultimately determine the issue of duty, whereas, if this is a novel case, then the question of whether it is fair, just and reasonable to impose liability in negligence will be relevant (see *Meadows v Khan* [2021] 3 WLR 147 at [66]).

49. In all the circumstances, I cannot properly dismiss the Claimant's case on the law as bound to fail. What WSP "knew and intended" about the identity of the parties to whom its FSS (and later its OFSM and FRA) might be provided will be a question of fact for trial. For present purposes I note merely that WSP accepts that it knew of the existence of the PFI arrangement, in respect of which there would be an operator or operators. It also accepts that the precise identity of those operators is not a requisite for WSP to have assumed a responsibility to them (see *Banca Nazionale del Lavoro SPA v Playboy Club London Ltd* [2018] UKSC 43 at [7]), but that in any event it knew that Avantage would be made aware of its OFSM and FRA. It appears to me to be at least arguable that, against the background of the PFI arrangement, if the Claimants succeed in establishing that WSP knew and intended that, as operators of Beechmere, the Claimants would rely upon its recommendations and advice, then they will be able to establish the existence of a duty of care (whether or not there is evidence of communications between the parties "crossing the line" – although such evidence will no doubt assist). I shall return to this in due course.

50. The above analysis also appears to me to deal with Mr Hale's additional submission that there is generally no assumption of responsibility by a sub-contractor direct to a building owner where the parties have structured their relationship by way of a contractual chain – which structure is inconsistent with an assumption of responsibility. He relies for this proposition on *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, per Lord Goff at 195.

51. Ms Padfield drew my attention to *Riyad Bank v Ahli United Bank (UK) Plc* [2007] PNLR 1, in which the Court of Appeal examined the question of assumption of responsibility in the context of a specific contractual structure which it was argued by the defendant was inconsistent with the existence of a duty of care. Longmore LJ agreed with the judge at first instance that, on the facts as he had found them, a duty of care did exist, observing at [32] that "[t]here cannot be a general proposition that, just because a chain exists, no responsibility for advice is ever assumed to a non-contractual party. It all depends on the facts."

52. At [37]-[47], Neuberger LJ (as he then was) took a similar view concluding (at [47]) that the question in a case where A has contracted to give advice to B, which advice is then relied on by C, who is not a party to the contract (his "Point (ii) 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…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".

53. I agree with Ms Padfield that it is clear from *Riyad* that the existence of a contractual structure or chain will not, on its own, provide the answer to the question of whether a duty of care in tort is owed in any given situation; the individual factual circumstances of each case will be important. This proposition also appears to me to be borne out by *Multiplex* at [164] where Fraser J, having considered *Riyad* in some detail, went on to say this:

> "Although the existence of a contract is not entirely determinative, it is a highly relevant feature. In my judgment, the closer the situation under scrutiny is to a more conventional or habitual business-like relationship governed by contractual terms agreed by the parties, the less likely the law will be to answer the questions concerning assumption of responsibility and fairness, justice and reasonableness, in favour of a claimant such as Multiplex who has no contractual relationship with RNP".

54. The circumstances of the present case are obviously close to a conventional business-like relationship governed by contractual terms, but the additional dimension to which I have already referred arising in the context of WSP's alleged knowledge and intention

that the Claimants, as operators under a PFI arrangement, would rely upon the proper performance of its duties, together with other aspects of the background factual matrix to which I shall turn later in this judgment, appears to me to create an arguable case which I cannot properly determine on an application for summary judgment. The fact that this is not a case in which there is a "liability gap", as Mr Hale correctly points out, does not, to my mind, take matters further.

55. I add that, of course, in any case involving a contractual structure, that structure will have been constructed at a particular point in time, whereas the ongoing relationship between the parties may subsequently evolve. It was with this in mind that Purchas LJ observed in *Pacific Associates v Baxter* [1990] 1 QB 993 that:

> "…where obligations are founded in contract they depend on the agreement made and the objective intention demonstrated by that agreement whereas the existence of a duty in tort may not have such a definitive datum point. However, I believe that in order to determine whether a duty arises in tort it is necessary to consider the circumstances in which the parties came together in the initial stages at which time it should be considered what obligations, if any, were assumed by the one in favour of the other and what reliance was placed by the other on the first. The obligations do not, however, remain fixed subject only to specific variations as in the case of contract. I would not exclude a change in the relationship affecting the existence or nature of a duty of care in tort".

56. I respectfully agree, and consider that in a case such as the present, this means that not only must the court consider the facts surrounding entry into the contractual structure, but it must also examine the extent to which any conclusions it may reach by reference to that contractual structure need to be moderated to have regard to conduct of the parties which takes place at some later time. The contractual matrix is the starting point but, even assuming it to be determinative at the outset, it will not fix the tortious relationship between the parties for all time. This of course is another indicator that the trial judge will often be in the best position to determine whether a duty of care is owed in a case where reliance is placed on events which occurred after the original contractual structure was put in place.

57. In this case, it seems to me to be at least arguable that the facts as they are established at trial, including, in particular, facts as to WSP's knowledge and intention in providing its FSS, OFSM and FRA to Gleeson (the latter two documents being provided some time after the contractual structure was put in place and addressed to Avantage), will undermine any conclusions that might otherwise be reached by reference to the contractual structure. I shall return to this later.

58. Next, Mr Hale relies on the decision of Stephen Males QC sitting as a Deputy High Court Judge in *Arrowhead* at [49]-[51] to the effect that where a claimant ought reasonably to expect there to be limitations of liability within the written engagement on which the defendant provided services to its third party client, it would be inconceivable that a reasonable businessman would consider that the defendant was voluntarily assuming any responsibility other than that owed under the contract, let

alone unlimited responsibility towards the claimant, with whom the defendant did not contract.

59. Ms Padfield conceded during her submissions that this was indeed the effect of *Arrowhead*, but she made the point that *Arrowhead* must be viewed by reference to its own particular facts. I agree. The case concerned an attempt by Arrowhead, an investment fund, to establish a duty of care against KPMG in respect of investment advice given by KPMG to its client, Dragon Futures Limited, pursuant to an agreement. Arrowhead was making an investment at several removes and the Judge held that it was obvious that if a notional conversation had taken place between Arrowhead and KPMG, KPMG would not have been prepared to accept unlimited responsibility for its advice (just as it had not been prepared to accept unlimited responsibility in its agreement with Dragon).

60. The facts of the present case appear to me, however, to be rather different. WSP's Defence, at paragraph 37.3, pleads that insofar as the WSP Terms provided that the WSP Appointment was for the sole benefit of the parties to it and that no benefits, terms or conditions of that Appointment should be directly enforceable by any person other than the parties to it, those were terms which "the Claimants and/or their predecessors in title would reasonably have expected to be present". This was expressly denied by the Claimants in their Reply at paragraph 28 where they also made the point that "On the contrary, for the reasons set out in the Particulars of Claim…Avantage, Cheshire County Council and/or MDHAL would have been surprised at any attempt to disclaim any duty to them". This clearly gives rise to a dispute of fact which does not appear to me to be answered by Ms Turner's complaint that the Claimants did not serve any evidence to challenge WSP's contention in paragraph 37.3. The Claimants have joined issue with that contention in their Reply and there was no need for them to serve evidence addressing every factual issue raised in the Defence.

61. In this case, as I have already said, it is expressly pleaded that WSP knew of the existence of the PFI arrangement and also knew and intended that the Claimants would be made aware of its advice and recommendations and that they would rely upon the competent performance of its duties. If that pleading is found to be correct at trial then it does not seem to me to be at all obvious that if a notional conversation had taken place between WSP and the Claimants (or their predecessors), WSP would have refused to accept any responsibility to the Claimants. I note but do not deal with Mr Hale's additional arguments based on specific limitation clauses within the WSP Terms, which do not appear to me to be pleaded in the context of this argument.

The Evidence

62. The above analysis requires me to consider whether there is in fact any evidence that WSP's services, including the provision of the FSS, were obviously intended for the benefit of the Claimants and/or evidence of communications crossing the line which arguably provide objective support for an assumption of responsibility. Mr Hale contends that there is not.

63. The FSS was entitled "Cheshire County Council Extra Care PFI, Crewe", thereby expressly acknowledging its production in the context of a PFI arrangement.

64. Amongst other things, as the Claimants have pleaded in the Particulars of Claim at paragraph 44, the FSS itself (i) identifies its objectives as including assisting "operational management with their understanding of the building function with respect to fire safety" (paragraph 1.2.1); (ii) identifies that the operational fire safety management plan for the scheme had "yet to be developed" and that it would be done "by the building owner in conjunction with the operators and care staff provider" (paragraph 2.4.2); and (iii) expressly states that "Any operational fire safety plan will take into account the buildings fire safety features as outlined in this report. It is advised that WSP Fire Engineering are consulted during the development of the plan for consistency" (paragraph 2.4.3).

65. Under the heading "Operational Fire Plan", section 9.1 of the FSS says this:

> "9.1.1 Upon building occupation the operator will be required to have an operational fire strategy in place which takes into account the buildings the inherent passive fire safety provisions [e.g. compartmentation], and the active fire safety systems [e.g. fire alarm and detection, smoke curtains and hold open devices etc.].
>
> 9.1.2 It is advised that WSP are involved with the operator in producing such an operational fire plan to ensure continuity.
>
> 9.1.3 The operational fire plan will be developed as the scheme progresses. "

66. Pausing there, Ms Turner asserts in her third statement that the objective identified in paragraph 1.2.1 of the FSS "cannot feasibly be read as a statement by WSP to the Claimants that WSP would assume a duty to them to protect them from losses arising as a result of a failure to update the strategy captured in the FSS by reference to a change in the design scheme" and she rightly points out that the FSS also includes the Disclaimer at paragraph 10.1.2, which WSP contends is clear in expressly excluding the entitlement of anyone other than Gleeson from relying upon it.

67. This appears at first sight to be a strong argument. However, Ms Padfield responds that it is plain from the terms of the Fee Proposal and the content of the FSS itself that the production of the FSS is not "the key deliverable" (as WSP contends), but that instead the Fee Proposal envisages that the overarching fire strategy designed by WSP would have two iterations: the detailed FSS together with an operational report in the form of the OFSM which WSP knew would involve liaising with the Claimants as operators. In the circumstances, she says that the involvement of the Claimants and of Mascot in discussions and meetings during the Project provides objective evidence that WSP knew and intended that the Claimants would be relying upon that overarching strategy.

68. Ms Turner sought in her evidence to contend that there was no relationship between fire strategy and operational fire safety, because the fire safety-related advice provided by WSP which related to the fire safety within the design of Beechmere was "separate" from the services associated with operational fire safety. Thus in paragraph 29 of her first statement she said that "The Operational Fire Safety Management report is about the management of the building and has nothing to do with design". Ms Turner also contended in her first statement that the allegations of breach in paragraph 123(a) and

(b) of the Particulars of Claim all related to WSP's input into the fire safety or strategy elements of the design of Beechmere and not to its advice on the operational fire safety management procedures to be implemented during the occupation and operation of Beechmere. This was echoed by Mr Hale in his submissions to the effect that the provision of the OFSM and FRA were not services relevant to the design of fire compartmentation of Beechmere, or to the decision not to install sprinklers, i.e. the basis for the pleaded claim against WSP. Mr Hale emphasised that any assumption of responsibility by WSP to the Claimants must be in respect of its performance in relation to those factual matters.

69. On close analysis of the available evidence, it is not clear to me, however, that there is such a stark distinction in this case between design and operational advice and, although Mr Hale is right in his submission as to the necessary nature of any assumption of responsibility, I cannot find that the Claimants' position is fanciful.

70. I have already referred to the terms of the Fee Proposal and the FSS. In addition, I note that in revised Design Team Meeting No 19 minutes (attached to an email of 25 September 2007 from Gleeson to the Project team including WSP, Mascot and Harvest), item 9.4, an action point for WSP and Harvest, said this:

> "WSP Fire strategy report
>
> - Part of on going design
>
> - WSP need detailed operational fire strategy from Harvest"

71. There is a dispute between the parties as to the relevance of communications involving Harvest in circumstances where, by his late fourth witness statement, Mr Allan has changed his original evidence (that Harvest was YHL's predecessor) to say instead that Harvest was the parent company to YHL's predecessor but that "for practical purposes…there was no separation between the information held by Harvest and by the individual member companies".

72. In his oral submissions, Mr Hale contended that this late evidence was "desperately weak", that the relationship between Harvest and YHL's predecessor had not been pleaded and that, accordingly, there was no pleaded basis on which to treat any interaction with Harvest as evidencing communications "crossing the line" so as to provide objective evidence of an assumption of responsibility to YHL. In response, Ms Padfield pointed out that the relationship between Harvest and YHL's predecessor was complex and that at this stage in the proceedings, it was not surprising that the Claimants had not had access to all relevant information upon which they may ultimately seek to rely.

73. I have sympathy with Ms Padfield's submissions. The Claimants have not yet had full disclosure and although the evidence as to Harvest's role may be weak, there would appear to be an issue of fact as to the significance of communications between WSP and Harvest (albeit that it is an issue which will need to be pleaded by the Claimants). That issue is plainly not something that I can determine on this application. If any such communications are of significance in the context of establishing an assumption of responsibility then these minutes appear to show interaction between Harvest and WSP

in connection with the creation of an operational fire strategy taking place in conjunction with the ongoing design.

74. Whatever the position in relation to Harvest, WSP accepts in any event that it knew that Avantage would be made aware of the OFSM – indeed the title of the OFSM is "Operational Fire Safety Manual, Beechmere Extra Care, Rolls Avenue, Crewe, CW1 9HW, **AVANTAGE**" (**emphasis added**). The FRA also appears to be addressed specifically to Avantage and, according to paragraph 1.1 was carried out for Avantage.

75. Paragraph 1.1.7 of the OFSM expressly provides that:

> "This manual has been developed from information presented in architectural plans, **the detailed fire strategy** produced prior to construction by WSP Fire…and discussions with Avantage management" (**emphasis added**).

76. This appears to confirm that, as one might expect, the operational advice was developed having regard to, and informed by, amongst other things, the FSS, and further that this was expressly discussed between WSP and Avantage, i.e. there were communications crossing the line from which (it is at least arguable having regard to the full factual matrix) a reasonable person might assume an assumption of responsibility.

77. Appendix B to the OFSM has the following note:

> "**NOTE. For full details see the WSP Detailed Fire Safety Strategy (Issue 3) issued on 2nd October 2007**"

Furthermore, the table in paragraph 3.7 of the OFSM sets out the documentation that will be available on request, which includes the FSS. Additional evidence in support of Ms Padfield's submissions about the overarching nature of the fire strategy can be found in the Introduction to the OFSM, including the flow chart identifying the various steps forming part of the overall fire strategy, all of which (including the FSS) are to receive periodic risk assessment.

78. In light of the evidence to which I have referred, it appears to me to be at least arguable, that, as the Claimants contend, WSP knew and intended the operator of Beechmere to rely not just upon the OFSM, but also on the FSS itself (a document which appears to have shaped and informed the operational requirements in the OFSM) and that there was (objectively) an assumption of responsibility on the part of WSP to one or more of the Claimants. There is no disclaimer in the OFSM and so the Disclaimer in the FSS cannot on any view be said to cover the full scope of WSP's work. Indeed, as Ms Padfield pointed out, if the correct interpretation of the OFSM is that Avantage (to whom the OFSM was directed) was being invited to rely upon the FSS as an integral part of the OFSM, then it must be arguable for that reason alone that the Disclaimer in the FSS is not effective as against Avantage at that point in time (even if it would have precluded a duty of care being owed at an earlier time).

79. In addition, I note that Mr Allan refers to various documents in his third statement at paragraphs 59 and 60 which tend to suggest that Building Control was interested in both design issues and operational issues (i.e. the two issues were being considered together). At paragraphs 62-65, Mr Allan describes how the Fire Service wrote to Building

Control on 5 January 2009 strongly advising that provision for sprinklers should be made at Beechmere. A query was also raised as to the level of combustibles. PRP sent these observations on to WSP on 16 January 2009 asking for its comments and for an indication as to whether "any of the recommendations should be passed to the Client by GB Building Solutions…", the reference to the "Client" apparently being to the Claimants (with whom, certainly in the case of Avantage, WSP had been liaising over the production of the OFSM a month or so earlier). On 19 February 2009, WSP responded in the following terms at paragraphs 1.2 and 2.1:

> " "1.2 Please confirm managers/carers (minimum of 2 on duty 24/7) as detailed within fire strategy – [WSP Response]: This statement was included in the "Operational Safety Manual" following discussions with Avantage – [Proposed Action]: Confirm the policy – [Responsible Person/Organisation]: Avantage – [Comments]: Confirmation received from Linda Brookes (Avantage) 2/02/09".
>
> "2.1… It is also noted that the level of combustibles will need to be continually limited and managed as part of the engineered design. Whilst smoke modelling has been provided for the proposed system it is noted that no guidance has been provided in connection with the levels of combustibles within the atria base – [WSP Response]: Detailed guidance on permissible level of combustibles included at 7.2 in WSP Detailed Fire Strategy 2nd October 2007…" "

80. I agree with Mr Allan's evidence that WSP appears to discuss the FSS and the OFSM interchangeably in this document, which is consistent with the objective noted at paragraph 9.1 of the FSS to the effect that it would be appointed to undertake both exercises to ensure "continuity" of approach. I also note that WSP's response again evidences a direct discussion with Avantage about the OFSM in the context of the FSS.

81. In her second statement, Ms Turner says that (having discussed the matter with Jason Oldham and Mark O'Connor of WSP) the OFSM was not an operational version of the FSS, notwithstanding that it refers back to the FSS in some places. She goes on to assert that references in it "need properly to be understood" and in light of that understanding, she rejects the suggestion that WSP could have assumed responsibility in relation to the Claimants (as operators of Beechmere) in respect of its content.

82. However this appears to me to be essentially a question of fact which I cannot determine on a summary judgment application. In his skeleton argument, Mr Hale invited the court to find that the Claimants' argument about the relationship between the FSS and the OFSM is simply an attempt to "obfuscate the services provided by WSP" and that there is a clear distinction in the pleadings between the design and strategy decisions which were addressed by the FSS and operational issues which were addressed by the OFSM and FRA. Thus Mr Hale's primary submission was that "The OFSM and the work that went into preparing it has no connection at all to the allegations of breach of duty or the loss caused by those alleged breaches…pleaded by the Claimants". However, the trouble with this submission is that there appears to me to be scope on the documents to contend otherwise. There is also scope on the documents to consider that

there may be more information available to throw further light on the issue, a point to which I shall return.

83. In the circumstances I am simply not persuaded by Mr Hale's submissions that there is only one way in which I can view the FSS and the OFSM. He may very well be right, but this is not a question that I am prepared to determine on this Application. In my judgment, it is arguable that, as the Claimants contend, there was an ongoing provision of services by WSP in relation to fire safety, which involved the formulation of the OFSM having regard to the fire safety-related design for Beechmere. Discussions were taking place between WSP and Avantage (i.e. communications were in fact "crossing the line") and it is not fanciful that these facts gave rise to an awareness, and intention, that the operators of Beechmere would rely upon the non-negligent performance of WSP's services in relation to the FSS, any necessary updates to the FSS, together with the OFSM and FRA such that (viewed objectively) WSP assumed responsibility to the Claimants, or any of them. I am certainly not able to say that the Claimants' case is bound to fail.

84. As for the Disclaimer, in addition to the points identified above, Ms Padfield argues that while a disclaimer may be an important factor in determining whether a duty of care arises (see *Galliford Try* at [190(h)]), nevertheless its significance is to be determined having regard to its true construction in the context of the relevant factual matrix.

85. Ms Padfield submits, first, that it would be incompatible with the primary purpose of the FSS, which she says was to inform the construction of the Claimants' building and was (amongst other things) to "assist operational management with their understanding of the building function with respect to fire safety" if the Claimants were to be regarded as third parties for the purpose of the Disclaimer. In essence she therefore argues that the Disclaimer cannot be relied upon by WSP when it is at odds with the services being provided, which were plainly for the Claimants'/their predecessors' benefit. Second, Ms Padfield argues that, on the strength of the passage in *Galliford Try* referred to above, a disclaimer may only weigh against the imposition of a duty of care if "all concerned" are told that no such duty is accepted. She points out that WSP does not allege in its pleadings that it did tell any of the Claimants or their predecessors that no such duty was being accepted as regards WSP's work generally, including, for example, its advice provided at meetings or in the OFSM. She maintains that where WSP was plainly in direct contact with the Claimants, or some of them, then the Disclaimer would not, or might not, be considered a relevant factor by a reasonable businessperson. That is because a reasonable businessperson would expect WSP to tell the Claimants directly that it wished to exclude liability in circumstances where there was such direct contact.

86. I have considered these submissions in conjunction with the Claimants' pleaded case and the evidence to which I have already referred and I do not consider them to be fanciful or bound to fail. It does appear to me that the existence of the known PFI arrangement in conjunction with (i) the terms of the Fee Proposal, (ii) the terms of the FSS, (iii) the terms of the OFSM, (iv) the apparent inter-relationship between the services that were being provided by WSP and (v) the involvement of the Claimants/their predecessors or Mascot in relevant meetings and discussions (as is clearly evidenced in Mr Allan's statement) gives rise to an arguable case that must go

to trial. This factual matrix appears to me to be capable of undermining Mr Hale's submission that if the Claimants saw the FSS, then the Disclaimer was effective.

87. Finally on this subject, I should record that during argument it became clear that in her first statement (on which the Claimants relied in preparing for this hearing), Ms Turner referred to "the facts relied upon by the Claimants as giving rise to an alleged direct duty of care (at paragraphs 39 to 47 of the Particulars of Claim)". She went on to say that "I understand that for the purposes of this application **none of those facts are in dispute**…" (**emphasis added**). Taken at face value, this appeared to be an acknowledgment that for the purposes of this Application, WSP was not seeking to go behind factual averments in these paragraphs of the Particulars of Claim – in other words it was not going to suggest that there is no real substance in the factual assertions made such that the court would be entitled to decide not to take them at face value (see [15](iv) of *Easyair*).

88. This apparent concession applied, for example to the important allegation that WSP "knew and intended" that the Claimants would be made aware of its advice and recommendations and that they "would rely upon WSP's competent performance of its duties" and that the Claimants did in fact rely upon the performance by WSP of its duties under its appointment with Gleeson (denied by WSP in paragraph 37 of its Defence). This was an entirely standard way of approaching a focussed application for summary judgment, but here it plainly had the capacity to play into the hands of the Claimants in presenting their arguments on the Application.

89. It was no doubt for this reason that in her second statement, Ms Turner sought to explain that the apparent concession she had made in her first statement was "not well phrased". She went on to say that she had intended to convey first that "a lot of the facts asserted by the Claimants [in these paragraphs] alleging that WSP assumed a responsibility to it are admitted in WSP's Defence" but that "It is often the interpretation of those facts that divides the parties"; and second that "There are a few facts that are disputed as facts, or not admitted by WSP", but that she was intending to convey that "even if those disputed facts were to be resolved in the Claimants' favour, WSP would still contend that there is no real prospect of the Claimants establishing a duty of care at trial".

90. Ms Turner then went on in her second statement to (i) dispute that WSP knew and intended that the Claimants/their predecessors would be made aware of advice and recommendations and that they would rely on WSP's performance, pointing out that "Mr Allan had not produced any evidence in his witness statement to support it" and (ii) point out that the Claimants had adduced no evidence "to address what belief the Claimants/their predecessors had that they were legally entitled to rely on WSP's advice or services, or to attest to the allegation that the Claimants/their predecessors actually did so rely, and using contemporaneous documents to support that assertion of reliance".

91. In my judgment, as Ms Padfield pointed out during her submissions, this is an unfair criticism in light of the fact that Ms Turner's first statement (served in July 2021) had accepted that the facts pleaded in paragraphs 39-47 of the Particulars of Claim were not in dispute for the purposes of the Application. It can only be assumed that Mr Allan's evidence was served with this in mind and, whilst Mr Hale was correct to say in his reply that Mr Allan did appear to address facts in his statement which Ms Turner had

said were not in dispute, (including in particular, issues of knowledge and intention), nonetheless I do not consider that it would be fair in all the circumstances summarily to dismiss the Claimants' claim on the grounds of a lack of evidence as to factual issues raised in their Particulars of Claim which had been expressly said to be agreed by Ms Turner in her first statement. Equally, I do not consider it to be fair to consider the question of reliance on the part of the Claimants (as Mr Hale invited me to do) in circumstances where this application did not focus on reliance and Ms Turner's original witness statement did not suggest that the question of reliance was in dispute.

92. Furthermore, I do not accept that when Ms Turner served her second statement on 10 November 2021, some 3 working days before the hearing, Mr Allan could properly have been expected to deal with the considerably more wide-ranging disputes of fact then identified. Indeed, it seems to me that he might legitimately have taken the view that the extent of the factual dispute now identified by Ms Turner's second statement, itself illustrated the inappropriateness of this application for summary judgment.

93. In all the circumstances, I am not prepared to find on this application, as I am invited to do by Mr Hale, that there is no arguable case that (viewed objectively) WSP assumed responsibility to the Claimants (or any of them) for the advice and recommendations in the FSS and/or in their overarching fire strategy and no arguable case that the terms of the Disclaimer, when placed in context, were not intended to apply to the Claimants.

94. This disposes of the application, certainly in relation to the claim for economic loss, but I should deal briefly with a final evidential issue that arose in the context of the application, namely the question of whether various meeting minutes are themselves capable of amounting to evidence of communications "crossing the line" for the purposes of establishing an assumption of responsibility.

95. Aside from the evidence to which I have already referred (which does appear to involve communications crossing the line), and in addition to the general proposition that there were various Project meetings (although not all) attended by WSP following which minutes were circulated to Mascot as agent for Avantage and to Harvest, the Claimants point in particular to meeting minutes of 13 November 2006 and 17 May 2007.

96. Ms Turner says in her evidence that she has seen nothing in any meeting minutes to support the allegation that WSP gave advice in those meetings "that it would have been reasonable for any party to rely upon pending the issue of the FSS, let alone that WSP acted in such a way as to assume responsibility to the Claimants". However, I agree with the Claimants that it is implicit in Ms Turner's evidence that WSP did provide advice at such meetings and I also agree that whether or not it would have been reasonable for the Claimants to rely on any such advice and whether WSP acted so as to assume responsibility to the Claimants for its advice on fire strategy for Beechmere, whether before or after the issue of the FSS, is a matter for the court to determine having regard to the factual matrix; it is not a matter for Ms Turner. I am inclined to agree that, in this particular case and for reasons I have already given, it would be dangerous for the court to seek to determine those issues on a summary judgment application in advance of disclosure.

97. The minutes themselves (which I need not set out for present purposes) evidence little more than that WSP was aware of the roles of Avantage and the Authority within the

Project, that it was liaising with one or more of the Claimants/their predecessors and that it was providing advice at Project meetings which came to the attention of Mascot, as employer's agent. On their own, they appear unlikely clearly to establish an assumption of responsibility and I understood this to be accepted by Ms Padfield. The presence of an employer's agent at design meetings and/or the circulation of meeting minutes to that agent (or indeed to the employer) is an entirely routine part of the construction project and will not usually be indicative of an assumption of responsibility by individual sub-contractors to the ultimate employer, especially where there exist carefully structured contractual arrangements. WSP's actions at these meetings are entirely consistent with it simply performing duties owed to Gleeson (whether or not it knew that information and advice provided at the meetings would probably be relied upon by the Claimants). See *Galliford Try* at [318(d)].

98. However, against the background I have already outlined in this judgment, I accept Ms Padfield's submissions that the minutes will certainly be relevant to the overall factual picture and that they tend to support the proposition that WSP's services cannot be separated out into distinct phases but were all part of one overarching fire strategy, a proposition which to my mind supports the Claimants' defence of this Application.

99. Finally on this issue, I note that Mr Hale points out that insofar as Mascot's involvement in meetings and discussions might give rise to an assumption of responsibility, it can only do so in relation to Avantage and not the other Claimants. Whilst this point might have merit, I am not going to make isolated findings of fact by reference to individual Claimants in circumstances where it seems to me that the entire factual matrix (including the roles of Mascot and Harvest) must be properly investigated at trial. There is sufficient evidence on this Application on which I can determine that it is arguable that at least one of the Claimants will be able to establish that WSP owed a duty of care.

Additional Plea: Physical Damage

100. In preparing his skeleton argument for the hearing, Mr Hale plainly operated on the basis that the Claimants were seeking to advance a case of pure economic loss against WSP in respect of advice and recommendations it made, or failed to make, in the FSS, in respect of which it would be necessary to establish an assumption of responsibility if a duty of care was to be made out.

101. However, paragraph 47 of the Particulars of Claim suggests that the Claimants' case on the extent of the duty of care owed by WSP goes rather wider than this, pleading that the duty "…extended to **protecting [the Claimants] from physical damage to property** and from pure economic loss" (**emphasis added**). The significance of this, Ms Padfield now contends, is that in cases of physical damage to property (at least where there is a positive act of negligence), it is not generally necessary to establish an assumption of responsibility (see *Robinson v Chief Constable* [2018] AC 736, per Lord Mance at [83]) .

102. Ms Padfield emphasised the twofold nature of the Claimants' case in her skeleton argument, prompting Mr Hale to deal on his feet for the first time with the authorities on physical damage and the manner in which the point was pleaded. Essentially he submitted that the attempt by the Claimants to set up a case based on physical loss was misconceived and was not in any event supported by the plea of a duty in its Particulars

of Claim which was premised upon the overarching requirement to establish an assumption of responsibility by WSP. In her response, amongst other things, Ms Padfield raised for the first time arguments based on the complex structures theory.

103. Whilst I will deal with these submissions briefly in this judgment, I note the obvious dangers in the court granting summary judgment in such a situation, where time was already very short and oral submissions were being made by both parties apparently "on the hoof" without any real opportunity for detailed reflection or considered submissions on the law.

The Law: Duty of Care in respect of physical damage

104. In her skeleton argument, Ms Padfield submitted that it is arguable that a duty of care was owed by WSP in respect of physical damage (i.e. the physical damage to the property caused by the fire together, potentially, with business interruption losses consequent upon such physical damage – such losses also capable of being regarded as pure economic loss). Essentially she argued that:

i) For a claimant to have a right to claim in negligence for loss caused to it by reason of loss or damage to property, it has to have either the legal ownership in, or possessory title to, the property when the damage occurs. Contractual rights relating to the property are alone insufficient. However, a beneficial interest may be sufficient if the legal owner is also joined to the proceedings (see Keating on Construction Contracts 11th Edition at 7-014).

ii) Cases involving damage to property do not require an assumption of responsibility in order to found liability: see *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GMBH* [2008] EWHC 6 TCC per Ramsey J at [171] (reversed on appeal but not on this point). Reasonable foreseeability of harm is usually enough (see *Customs and Excise* per Lord Hoffman at [31]).

iii) In *Biffa*, the Judge found that a sub-contractor owed a duty in respect of physical damage caused by fire. In *John Innes Foundation v Vertiv Infrastructure Ltd (Formerly Emerson Network Power Ltd)* [2020] EWHC 19 (TCC), Roger Ter Haar QC sitting as a Deputy High Court Judge held at [53] that "where a negligent act of a person causes physical damage, that type of act will normally be actionable".

iv) A duty of care for physical damage to property can be owed by an adviser (as opposed to a contractor). Ms Padfield drew my attention in this context to Keating at 7-020 and 7-021 to the effect that "An architect or engineer who issues instructions which they know or ought to know are likely to cause injury to persons or property may be liable in negligence if injury results".

v) There is no clear distinction between physical damage and damage leading to economic loss (see *John Innes* at [53]: "…physical damage causes loss of an economic type and in some cases the loss may be an indirect loss to property interests").

105. In her oral submissions, but not in her skeleton argument, Ms Padfield acknowledged that, as is clear from *Robinson v Chief Constable* [2018] AC 786, per Lord Mance at

[83], the negligence that gives rise to a duty to hold harmless from physical damage to property will normally involve a positive act, rather than an omission ("…there is, absent an assumption of responsibility, no liability for negligently omitting to prevent damage occurring to a potential victim"). This is because, as Roger Ter Haar QC said in *John Innes* at [60], such a duty to act is more easily found in a case where the alleged tortfeasor "is found to have assumed responsibility to act".

106. However Ms Padfield observed that it is often possible to characterise negligence as either a positive act or an omission, an observation which finds support in the authorities. Lord Hughes made the point in *Robinson* at [117] that although a different approach may be taken in relation to omissions, "there is no firm line capable of determination between a case of omission and of commission. Some cases may fall clearly on one side of the line…but the great majority of cases can be analysed in terms of either". Similarly in *Rushbond*, Coulson LJ observed at [53] that:

> "All negligence claims involve acts (things done which should not have been done) and/or omissions (things which ought to have been done which have not been done). As Lord Hoffman made clear, that is unexceptionable. It does not mean that a claim like this one, where the failure to do something (locking the door) was part of the activity undertaken by the tortfeasor that gave rise to the loss, can be said to be a claim based on 'pure omissions'."

107. In her submissions on the impact of *Rushbond,* a case involving a failure by a professional to lock the door to a property during a visit, leading to the entry by an intruder and damage by fire, Ms Padfield submitted in essence that it is at least arguable that (i) whether or not WSP omitted to provide adequate services or actively provided inadequate services (the semantic debate), this is not a pure omissions case because WSP was undertaking a relevant activity and it was the negligent carrying out of that activity that gave rise to the claim (see paragraphs [23], [48], [49] and [53] of Coulson LJ's judgment); and (ii) the inadequate services increased the risk of fire spread (and did not merely provide the occasion for harm).

108. As to the first of those propositions, Mr Hale appears largely in agreement. In his written submissions on the impact of *Rushbond*, he makes clear that WSP has not asked the court to conclude that the claim against it falls within a bracket defined as 'pure omissions' and he says that "This follows necessarily from the fact that WSP did provide services in connection with Beechmere (albeit critically not to the Claimants). WSP could not realistically characterise itself as having done "nothing or certainly nothing of any legal relevance to the claim" (*Rushbond* at [48])".

109. However, Mr Hale contends that the analysis in *Rushbond* where the duty arises from a physical act imperilling property is not apposite to the instant case. Indeed he submits that the Claimants' reliance upon the principles applicable in cases involving physical damage to property is misconceived, pointing out that *Biffa* concerned sub-contractors executing works to buildings and not professionals providing services (see also *Henderson v Merrett* at 196B). In his submission, cases in which it is unnecessary to establish an assumption of responsibility are about the <u>direct</u> infliction of physical damage (which the law accepts will satisfy the requirements of foreseeability and

proximity) and not the indirect sustaining of physical damage by reason of a failure to prevent such damage. Thus in *Rushbond* there was a physical act by the defendant in leaving the door unlocked and imperilling the property which was, at least arguably, an actionable wrong (paragraph [54] of *Rushbond*), whereas there was no such act in this case. Furthermore, the law on physical damage is not engaged in professional negligence claims involving design defects which have traditionally been regarded as giving rise to pure economic loss.

110. On the arguments as presented to me, I preferred those of Mr Hale. I note in particular, Lord Oliver's observation in *Murphy v Brentwood District Council* [1991] 1 AC 398 at 486 that:

> "In his classical exposition in *Donoghue v. Stevenson* [1932] A.C. 562, 580-581, Lord Atkin was expressing himself in the context of the infliction of **direct physical injury** resulting from a carelessly created latent defect in a manufactured product. In his analysis of the duty in those circumstances he clearly equated "proximity" with the reasonable foresight of damage. In the straightforward case of the **direct infliction of physical injury** by the act of the plaintiff there is, indeed, no need to look beyond the foreseeability by the defendant of the result in order to establish that he is in a "proximate" relationship with the plaintiff" (**emphasis added**).

111. In *John Innes,* Roger Ter Haar QC said this at [56]:

> "In the important passage in *Marc Rich* where Lord Steyn said that "the law more readily attaches the consequence of actionable negligence to directly inflicted physical loss rather than to indirectly inflicted physical loss" (at [1996] 1 A.C. 237 D-E) he went on to give the example of a surveyor carelessly dropping a lighted cigarette into a cargo hold known to contain a combustible cargo, thus having in mind a negligent act."

112. I find it difficult to see how it can be said that WSP inflicted direct physical damage to Beechmere, whether or not its alleged inadequate services increased the risk of fire spread. The direct physical damage caused in this case by Mac Roofing in carrying out its hot works to the roof of Beechmere seems to me to be very different from the alleged failure by WSP to provide a recommendation in its FSS which, on the Claimants' case, would have ensured that the fire was contained, alternatively that its spread was restricted. Ms Padfield did not address the authorities on direct physical loss during her oral submissions.

113. Furthermore, I note that in *Galliford Try* at [142], Akenhead J observed that:

> "The damage which may be caused by the negligently spoken or written word will normally be confined to economic loss sustained by those who rely on the accuracy of the information or advice they receive as a basis for action".

114. Insofar as Ms Padfield relies on the passage in Keating at 7-020 and 7-021 to support the proposition that a designer may be liable for direct physical loss to property, it seems to me that the passage in Keating is expressly restricted to negligent instructions (and indeed the cases referred to there all appear to concern physical injury to persons rather than property). On any view, I am not concerned with negligent instructions on the facts of this case.

115. Finally, Ms Padfield's reliance upon the contention that WSP's involvement with Beechmere was confined to one particular element of that property (fire strategy in the form of compartmentalisation and sprinklers) such that the 'complex structures' theory comes into play in the Claimants' favour, does not strike me as credible. Ms Padfield relied in particular on various passages within the speeches in *Murphy v Brentwood,* but I fail to see that this takes her any further on the facts of this case (and she accepted during her submissions that the failure to provide compartmentalisation and sprinklers is not the same as a defective central heating boiler – the example given in *Murphy* by Lord Bridge at page 478). In any event, there is no pleaded case to this effect.

116. In all the circumstances and despite Ms Padfield's valiant efforts, I find it very difficult to see on the (relatively limited) arguments made before me that the Claimants will succeed in the contention that this is a case involving the infliction by WSP of direct physical damage to property such that it will be unnecessary for them to establish an assumption of responsibility at trial. For what it is worth, whilst I accept that the Claimants have pleaded a duty to protect against physical damage to property in paragraph 47 of the Particulars of Claim, nevertheless I agree with Mr Hale that integral to the alleged existence of a duty is a plea of assumption of responsibility; indeed Mr Allan's evidence focuses on establishing a case in relation to assumption of responsibility. The Claimants' case on physical damage (including its new case on complex structures) appears to have been fully articulated for the first time only in submissions for this hearing.

117. Given the views I have expressed above, I have considered whether I should grant summary judgment in WSP's favour on this discrete element of the claim. However, in circumstances where I am not prepared to grant summary judgment in WSP's favour in respect of the claim for economic loss and given that the arguments on direct physical damage have been raised and responded to in something of a piecemeal fashion, I do not consider that it would be appropriate for me to make any final decision on the point and nor do I need to do so. Much better that these complex legal arguments are left for final determination by the judge at trial following full and detailed argument and citation of all relevant authority. Accordingly, the views I have expressed here should not be regarded as anything other than preliminary views having regard to the authorities to which I was referred.

Additional Factors raised by the Claimants

118. Given the conclusion I have arrived at above, there is no real need for me to consider the remaining factors upon which the Claimants relied in any real detail. However, in circumstances where I have alluded to the lack of full disclosure at various stages in the judgment, I should at least touch on the arguments relating to disclosure.

119. An important element of the Claimants' opposition to this Application is their contention (raised before me at the Case Management Conference on 19 October 2021) that they have a realistic prospect of success not least because this Application is premature; WSP has decided to advance it prior to Extended Disclosure. In the circumstances, say the Claimants, there is scope for further documents to be identified both in the disclosure of WSP and in the disclosure of other parties to the proceedings which might shed more light on the circumstances surrounding WSP's involvement in the design of the fire strategy for Beechmere.

120. WSP has sought to address this concern in its evidence. Attached to Ms Turner's first statement is a schedule in which she responds to requests made by the Claimants for various categories of documents, stating in respect of each category (for the most part) (i) that WSP has no documents falling into the identified category, or (ii) that there is no real prospect of any material (if it exists) contributing to the Claimants' allegation that WSP assumed a responsibility/owed a duty of care in respect of fire safety in design; or (iii) identifying and disclosing documents which WSP has located following searches. In her second statement, Ms Turner explains that she has instructed "further extensive searches of email custodians" since preparation of her first statement and that she believes that "the further work WSP has done will show the Court that it is very unlikely that Extended Disclosure will change the position for the Claimants on the question of WSP's alleged duty". In respect of the mailbox of one custodian, Mr Johnson, she discloses 186 emails saying that this mailbox "represents a reasonably good guide to the likely documents that would be produced by WSP on Extended Disclosure in relation to the issues of duty and responsibility to the Claimants".

121. In his submissions, Mr Hale acknowledged that this was a very old case, that the witness evidence would likely be of little relevance and that whilst "the available stock of documents may not be complete" (and indeed not every possible custodian's documents had been located), nevertheless WSP had located a "decent amount of material" likely to represent "the substantial majority of the documents". He submitted that the focus would always be on documents "crossing the line" for the purposes of establishing an assumption of responsibility and that disclosure of further WSP internal emails is very unlikely to throw up any evidence of use to the Claimants. In his submission, it is fanciful to suppose that any further documents will turn up on Extended Disclosure which will make a material difference.

122. Paragraph 15(v) of the judgment in *Easyair* requires the court to take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial. Paragraph 15(vi) cautions the court against granting summary judgment where "reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case".

123. In paragraph 12 of his witness statement, Mr Allan said this: "The Claimants are reliant on disclosure from WSP and other Defendants to gain a full picture of the parties' arrangements and communications. This is particularly the case in circumstances where the First Claimant retained an employer's representative (Mascot). While WSP has provided Initial Disclosure and assert that they are unlikely to identify any other documents which are relevant to the matters in issue if they give Extended Disclosure,

the Claimants do not accept that this is the case. Indeed, the stage at which this application is brought is, on its own and/or in combination with other factors, a reason why the application should be refused".

124. I agree with Mr Allan for the following reasons:

i) I am mindful of the need for the court to allow for the possibility that further facts may emerge on disclosure or at trial. The Claimants are most certainly not entitled to embark on a fishing expedition, but in my judgment, their concerns as to the potential for relevant documents to be available extend beyond a mere fishing expedition in this case – evidence of communications crossing the line between the parties is capable of affecting the outcome of the case against WSP, and (given the references I have seen in the evidence to discussions involving WSP and Avantage and Harvest) it is not fanciful to think that such evidence will exist in WSP's as yet undisclosed documents and/or in the Extended Disclosure of other parties, including Mascot – Mr Allan has already identified various meetings and events in respect of which there has, as yet, been no disclosure.

ii) WSP accepts that it has not carried out a complete disclosure exercise to date and I cannot discount the possibility that, given the disclosure it has already provided, it may have other documents relevant to the issue of assumption of responsibility. Whilst Ms Turner's evidence certainly suggests that this is unlikely, it does not appear to me to be impossible that custodians whose emails have not yet been searched will have relevant information, at least as to background context, if not as to communications "crossing the line".

iii) Gleeson is subject to an order for disclosure. As things stand, it is unclear whether it will give disclosure and equally unclear whether, even if it does, it will have any documents evidencing an assumption of responsibility by WSP to the Claimants. However, the court cannot properly discount that possibility. It can reasonably be expected that disclosure from Gleeson will contain notes of meetings or discussions between Gleeson and WSP relevant to the Claimants' claim. Whilst I accept Mr Hale's submission that most of the documents disclosed to date by WSP are documents passing to and from Gleeson and that any disclosure from Gleeson will likely duplicate many of those documents, nevertheless, there seems to me to be reasonable grounds for believing that disclosure from Gleeson (if it is provided) will produce material evidence.

iv) Each of the other Defendants will be giving Extended Disclosure pursuant to the Order of 19 October 2021. Mascot acted as agent to Avantage from the outset of the Project and it was copied in to meeting minutes. It is reasonable to suppose that it will have had relevant conversations/meetings with WSP (certainly there is evidence in the documents that WSP was liaising directly with Avantage, which, given Mascot's role as agent, may very well have involved Mascot). Ms Padfield submitted that Avantage is in fact reliant upon Mascot for documents.

v) WSP appears to have had a significant amount of interaction with PRP, which might also have, for example, relevant emails to and from WSP which are no longer in WSP's control.

vi) The fact that WSP has not disclosed any evidence of the type identified above does not mean that it does not exist. I note in this regard that Ms Turner explains in her second statement that data from the Project has not always been preserved (Mr McCreadie's emails are an example), particularly where employees have left the business. Equally, Ms Turner has not been able to locate emails from one custodian (Mr Oldham) within the context of the task she undertook for this Application, albeit it is clear from her statement that there is more that could be done. It is always possible that another party has retained such data, even if it is no longer available to WSP.

vii) Throughout the course of his statement, Mr Allan identifies gaps in WSP's disclosure (as is of course to be expected where Extended Disclosure has not yet taken place), some of which remain outstanding, despite the content of Ms Turner's second statement. Whilst documents filling those gaps may not relate to evidence of communications "crossing the line", they are very likely to assist in building up a clearer understanding of the factual matrix in which WSP was operating.

viii) In the 186 emails disclosed by Ms Turner as a result of the exercise described in her second witness statement, there were some emails which indicated that when WSP made its proposal to Gleeson in 2008 to produce the OFSM, it sent an email dated 19 September 2008 stating that the WSP Terms were attached. However, in common with the Fee Proposal, the WSP Terms were <u>not</u> attached to that email. This is inconsistent with Ms Turner's evidence in her first statement to the effect that "Our project managers or project directors normally send a copy of our terms and conditions with any fee proposal" and that "WSP consistently ensures that its Appointments incorporate the WSP Terms". I agree with Ms Padfield that the Claimants' submissions on this point set out in her skeleton may well have contributed to the decision by Mr Hale and WSP not to advance a positive argument at this hearing that the WSP Terms were incorporated into the Agreement – an illustration of one document potentially making a significant difference to WSP's case.

ix) That the Claimants have not disclosed any documents on which they rely for the purposes of their case on assumption of responsibility entitles me to infer, as Ms Padfield accepted, that they do not have, or have not been able to find, any such documents. However, given that Avantage was represented by Mascot throughout the Project and given that the other two Claimants had predecessors from whom responsibility had been transferred, it is not difficult to see why the Claimants might have difficulties in obtaining documentary evidence, including as to the role of Harvest. That does not, however, mean that such evidence does not exist. This case is very different from *Sainsbury's Supermarkets Ltd v Condek Holdings Ltd* [2014] EWHC 2016 (TCC), a case in which it was argued by Sainsburys, defending a strike out/summary judgment application, that full disclosure had not yet been given, but the court held (at [27]) that "Sainsbury's would have copies of all documents crossing the line between the parties". I

agree with Ms Padfield, that the present case is not a situation in which it would be fair to shift the evidential burden to the Claimants in the manner envisaged in *Sainsburys* at [13].

x) Whilst I do not attach significant weight to the fact that Ms Turner's evidence as to the incorporation of the WSP Terms appears to have been over-confident, nevertheless, this does seem to me to be an additional factor which supports a cautious approach towards her evidence as to the likelihood of relevant documents coming to light on disclosure. Ms Turner said in her second statement that the position in relation to the incorporation of the WSP Terms into the WSP Appointment was "very clear" and yet that was not a contention that Mr Hale was able to sustain during the course of the hearing.

125. The Claimants contend that there is reason for suspicion as to WSP's motives in applying for summary judgment prior to Extended Disclosure. However, that is not a factor I take into account in rejecting the Application.

126. Finally, the Claimants argued that the existence of contribution claims brought by Prestoplan and Mascot was itself a reason why the court should not grant summary judgment, because (although contingent upon Prestoplan and Mascot being found liable) they are not contingent on the Claimants proving that WSP is liable to them. In circumstances where they are independent claims, there would be obvious commercial reasons for Prestoplan and Mascot wanting to keep WSP in the litigation, at least until disclosure.

127. I reject this submission. The Contribution Notices served by Prestoplan and Mascot are in fact wholly contingent upon the allegations pleaded by the Claimants against WSP. No separate allegations are pleaded. I agree with Mr Hale that, under section 1(1) of the Civil Liability (Contribution) Act 1978, for those claims to succeed it must be established that WSP is liable to the Claimants for the same damage for which Prestoplan and Mascot have been found liable. That would no longer be possible if the court had granted summary judgment in WSP's favour. During her oral submissions I detected an acknowledgment on the part of Ms Padfield that the Claimants' case on this issue might have been put too high when she expressly said that she "did not press this point too far" and was realistic about the approach that Prestoplan and Mascot would be likely to take in terms of "expenditure of costs".

Conclusion on the Summary Judgment Application

128. For the reasons set out above, I decline to grant summary judgment in WSP's favour on the claim. The application for summary judgment is dismissed.

The Separate Strike Out Application

129. This application becomes relevant in circumstances where the application for summary judgment has failed.

130. WSP applies to strike out the Claimants' allegation of inadequate escape route planning in paragraph 123(b)(i) of their Particulars of Claim, which I have already set out earlier in this judgment, on the grounds that this failure is not alleged to have caused the economic loss claimed. At paragraph 73.5, the Defence pleads that:

> "As to (b)(i), the allegation concerns escape routes, which are unconnected to any loss said to have been caused by the breaches alleged against WSP. In the premises, the allegation forms no part of any cause of action and stands to be struck out."

131. The Claimants' response at paragraph 54 of their Reply reads:

> "As to paragraph 73.5, the length of the escape routes increased the fire safety risk, which made it yet more important that sprinklers be considered as part of the fire strategy".

132. I agree with WSP that the risk associated with escape routes identified in the Reply is a risk to life and not a risk to property. Fortunately, as I have said, there was no loss of life in the fire, and there is no allegation made by the Claimants that the length of the escape routes caused or contributed to the damage to Beechmere during the fire. At its highest, this allegation appears to form part of the factual background to the allegation concerning sprinklers (a point acknowledged by Mr Allan in his statement), but it is not, in my judgment, an allegation of breach of duty that is causative of any loss.

133. The Claimants contend that in circumstances where paragraph 123(b)(i) is an allegation of negligence which is relevant to, and supports, the allegation at paragraph 123(b)(ii) of the Particulars of Claim concerning sprinklers, it should be left on the face of the pleading; but I disagree. It is not an allegation which is connected to any alleged loss. If and insofar as the Claimants wish to rely at trial upon the fact that the design of the escape routes increased the fire safety risk, thereby rendering the inclusion of sprinklers in the design all the more advisable, then they can seek to amend to plead that case elsewhere. It is not appropriate for it to be pleaded as a stand alone allegation of breach of duty.

134. In the circumstances, paragraph 123(b)(i) of the Particulars of Claim is struck out.