Case No: A1/2016/0721

Neutral Citation Number: [2017] EWCA Civ 254
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM QUEEN'S BENCH DIVISION**
**TECHNOLOGY AND CONSTRUCTION COURT**
**MR ALEXANDER NISSEN QC**
**(Sitting as a Judge of the High Court)**
**[2016] EWHC 40 (TCC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2017

**Before :**

**LADY JUSTICE GLOSTER**
**(Vice President of the Court of Appeal, Civil Division)**

**LORD JUSTICE HAMBLEN**
and
**LORD JUSTICE IRWIN**

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**Between :**

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| | **MRS BASIA LEJONVARN** | **Appellant** |
| | **- and -** | |
| | **(1) Mr Peter Burgess**<br>**(2) Mrs Lynn Burgess** | **Respondents** |

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**Fiona Parkin QC, David Sheard and Louis Flannery** (instructed by **Stephenson Harwood LLP**) for the **Appellant**
**David Sears QC and Seb Oram** (instructed by **Mayo Wynne Baxter**) for the **Respondents**

Hearing date : 8 March 2017

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# Judgment**LORD JUSTICE HAMBLEN:**

**Introduction**

1. The Claimant Respondents ("the Burgesses") own a residential property in North London called "Highfields". In 2012 they decided to carry out landscaping to their garden. A quotation of £155,837 plus a planting budget of £19,785 (both exclusive of VAT) was quoted by Mark Enright of the Landscape Garden Company Ltd. Although the Burgesses liked the plan produced by Mr Enright they regarded his quotation as being too expensive.

2. The Defendant Appellant ("Mrs Lejonvarn") was a friend and former neighbour of the Burgesses. She is an American qualified architect although she is not a registered architect in the UK. She worked for two architectural firms in the UK from 2007 to 2013 during which time projects were both discussed and performed for Mr Burgess's firm, Retail Human Resources plc ("RHR"). By spring 2013 she had decided to work on her own account and had adopted a trading name of Linia Studio.

3. The Burgesses decided to ask for Mrs Lejonvarn's assistance with their landscaping scheme ("the Garden Project"). She secured a contractor to carry out the earthworks and hard landscaping and a quotation was provided. She intended to provide subsequent design work in respect of the "soft" elements of the Garden Project such as lighting and planting for which she would charge a fee. The project never got that far. The Burgesses were unhappy with the quality and progress of the work and Mrs Lejonvarn's involvement came to an end in July 2013.

4. The Burgesses claim that much of the work done during the period of Mrs Lejonvarn's involvement was defective, that she is legally responsible for it and claim damages of about £265,000. Their claim was advanced in contract but also in tort on the basis that Mrs Lejonvarn assumed responsibility for the provision by her of professional services acting as an architect and project manager.

5. The trial of preliminary issues was ordered to determine whether the Burgesses could claim in contract and in tort and also whether a budget figure of £130,000 was discussed. After a 3 day trial the judge determined that there was no contract but that Mrs Lejonvarn did owe a duty of care in tort in relation to the provision of various services pleaded. It was also found that the £130,000 budget figure was discussed on two occasions.

6. Mrs Lejonvarn appeals against the judge's decision that she owed a duty of care in the terms found or at all.

**The preliminary issues**

7. The preliminary issues together with the judge's answers to them (in italics) are as

follows:

(i) Was a contract concluded between the Claimants and the Defendant, as pleaded in paragraphs 21 to 23 of the Particulars of Claim or otherwise? - *No.*

(ii) If so, what were its terms? – *Not applicable.*

(iii) On the assumption that the defects set out in Schedule 1 to the Particulars of Claim existed as at 9 July 2013, did the Defendant owe any duty of care in tort in light of the matters, and in the terms, pleaded in paragraphs 18 to 20 of the Particulars of Claim, or otherwise? - *Yes. Mrs Lejonvarn owed a duty of care to Mr and Mrs Burgess to exercise reasonable skill and care in the provision by her of professional services acting as an architect and project manager on the Garden Project.*

(iv) If so, what was the nature and extent of her duty? - *The duty was to provide those services pleaded in paragraphs 14 and 15 of the Particulars of Claim with the exception of paragraph 14.2 and subject to the additional limitations and qualifications identified in the body of this judgment.*

(v) Was a budget of £130,000 for the Garden Project discussed between the Defendant and either or both of the Claimants as pleaded in paragraphs 10(1)(e), 11, 16(3), 21(2)-(3) and 29(3)(a)(b) of the Defence at any time before 5 July 2013, and if so, when? – *Yes, on both 28 April and 17 May 2013.*

8. The nature and extent of the duty found accordingly reflected paragraphs 14 and 15 of the Particulars of Claim which provide as follows:

"14. Between 6 March 2013 and 9 July 2013 the Defendant performed the following professional services, as architect and project manager, in relation to the Garden Project:

14.1 The selection and procurement of contractors and professionals needed in order to implement the Enright Design, including agreeing the terms on which they were engaged;

14.2 the planning of site commencement, preliminaries and initial strip out;

14.3 preparing such designs as were necessary to enable the Garden Project to be

accurately priced and constructed;

14.4 attending site at regular intervals (approximately twice a week) to project manage the Garden Project, and to direct, inspect and supervise the contractors' work, its timing and progress;

14.5 receiving applications for payment from the contractor, and advising and directing the Claimants in relation to their payment; and

14.6 exercising cost control by preparing a budget for the works, and overseeing actual expenditure against it.

15. In particular, the Defendant undertook detail design of Enright Design, and made revisions to that design. The Claimants are aware of the following:

15.1 the Defendant produced a series of drawings dated 15 May 2013, under her professional trade name of Linia Studio, by way of detail design of the Enright Design ("the Drawings");

15.2 around May 2013 the Defendant made a revision to the structural design of the Garden. In an email dated 23 May, timed at 13:52, she told the First Claimant that:

> "We are not going to use double layers of sleepers on any other walls than the one at the very front, (the first one) from here onwards, we are using steel structural support and bolting vertical sleeper to that (from behind) to minimise the use of sleepers as they are so pricey."

15.3 the Defendant altered, in the circumstances pleaded in paragraph 16 and 17 below: (i) the shape of the curved lawn in the Enright Design, to make it straight sided; (ii) the levels and design of the terraces in the Enright Design; and (iii) the layout of the paths of the Garden…."

**The facts**

9. The primary findings of fact made by the judge are set out in detail at [14] to [136] of the judgment which is reported as [2016] EWHC 40 (TCC). No challenge is made to those findings. In those circumstances it is not necessary to set them all out. We adopt those findings for the purpose of the appeal and will merely summarise the more

important.

10. By way of background, the Burgesses and the Lejonvarns had been good friends for some years. The judge found at [14] that "there were occasions when the Burgesses showed a degree of commercial generosity to the Lejonvarns beyond what some might see as the normal bounds of friendship". He mentioned three instances: providing office space at no cost to Mrs Lejonvarn when she decided to set up her own architectural business; Mrs Burgess, who is a graphic designer, providing some gratuitous design services in respect of the logo for that business; and Mr Burgess lending the Lejonvarns £67,000 for a few weeks to assist them in the purchase of their new home. The judge found that these instances "provide some context to the subsequent decision by Mrs Lejonvarn to offer to provide gratuitous professional services to the Burgesses in respect of the Garden Project as part of her nascent architectural practice."

11. Some previous architectural services had been discussed or provided by Mrs Lejonvarn to Mr Burgess or his company before the Garden Project. These were what the judge described as the Bank Project, the Kitchen Project, the Little Venice Office Project and Archway Road.

12. The Bank Project concerned a former bank in Archway Road which was owned by RHR and which it wished to turn into a residential apartment. At that time Mrs Lejonvarn was working for a firm called Papa Architects ("Papa") under the supervision and control of Papa's director, Mr Socrates Miltiadou. RHR entered into a contractual relationship with Papa for the provision of project management and professional services in relation to the Bank Project for a 15% fee. Contrary to Mr Burgess' understanding the judge found that it was RHR rather than Papa who contracted with the contractors for the work itself.

13. Mrs Lejonvarn was the person most closely involved in the day to day running of the project although this was subject to the supervision and guidance of Mr Miltiadou, even if RHR were not aware of that at the time. Papa were engaged to project manage the project and controlled and supervised the project. The judge found at [33] that Mrs Lejonvarn, through Papa, "was involved in proper project management" and "personally played a considerable role in project managing the Bank Project, monitoring the budget for it, supervising the works (with the exception of specialist trades such as M&E works) and co-ordinating the contractors". He found that, as would have been apparent to Mr Burgess, her experience on the project was that of a project architect and project manager.

14. The Bank Project ended up costing considerably more than estimated but everyone agreed that the standard of workmanship was good. The judge found at [44] that "by the end of the Bank Project, Mr Burgess would reasonably have been left with the impression that Mrs Lejonvarn was professionally capable of carrying out design work,

of project managing a small construction project involving third party contractors, of supervising their work, of reviewing applications for payment and of providing a budget and monitoring costs against it".

15. The Kitchen Project concerned work to the kitchen at Highfields for which a firm named Roundhouse had quoted in early 2010. On 12 May 2010 Mrs Lejonvarn had emailed Mr Burgess saying that "as your architect, I feel I should tell you that I can get you the same kitchen for much less." She provided a quotation which was not sufficiently cheaper than that provided by Roundhouse and the matter went no further.

16. The Little Venice Office Project involved the refurbishment of RHR's offices to create a new reception and conference area for which Mrs Lejonvarn was asked to tender in April 2012 by which time she was working for Richard Mitzman Architects LLP ("Mitzman"). There was discussion of a brief and a budget but nothing of substance had been done in respect of the project by the time Mrs Lejonvarn left Mitzman in October 2012. In June 2013 Mrs Lejonvarn proposed that there be works in the reception area at a budget of about £16,000 for which she would be paid a flat fee of £2,300 for project managing the works. Mr Burgess agreed and works were due to commence on 8 July 2013. This never happened due to the breakdown in the parties' relationship over the Garden Project.

17. Archway Road was a residential flat above the former bank in relation to which work was contemplated by RHR. In April 2012 Mr Burgess sought to involve Mrs Lejonvarn. She said that she needed a budget to work with and proposed that Mitzman work on a time charge basis as the job was not big enough to warrant a fee proposal. A letter of appointment dated 18 June 2012 was sent to Mr Burgess by Mitzman but was never signed as the work was then put on hold.

18. The conclusions drawn by the judge from these prior dealings were stated at [62] to be as follows:

> "These various ventures demonstrate that there was a willingness on the part of Mrs Lejonvarn to provide a variety of architectural services, both on an informal and formal basis, to Mr Burgess or his company in the period before the commencement of the Garden Project. Mrs Lejonvarn gave every impression that she, personally, was capable of providing all the services described and Mr Burgess was reasonably left with that impression. However, the most significant model for the Garden Project was in respect of the services provided and the experience gained on the Bank Project."

19. In relation to the Garden Project Mr Enright produced his plan in July 2012. On 2 August 2012 the Burgesses hosted a party to celebrate the London Olympics at which

the Lejonvarns were present. The judge found at [66] that during that occasion Mrs Lejonvarn commented on Mr Enright's plan indicating that it was his name that pushed the price up and that it did not need to come at anywhere near that price. The judge concluded at [67] that this was a casual remark and did not reflect Mrs Lejonvarn pushing to be appointed for the project.

20. In the winter of 2012 the judge found that there was a casual conversation between Mr Burgess and Mrs Lejonvarn in which he specifically asked her if she and her team had experience of working on garden projects and she said that she did and that terracing was a construction job like any other. He further found at [70] that:

> "The exchange was unsurprising as Mrs Lejonvarn did have some professional experience of domestic landscaping projects although I do not believe it was on anything like the scale of what became the Garden Project. In my judgment, she would not have let that stand in the way of the opportunity to secure a prestigious project for her new venture. As their previous dealings show, Mrs Lejonvarn had always been enthusiastic about offering to provide architectural services either for the Burgesses or for RHR."

21. In March 2013 Mr Burgess asked Mrs Lejonvarn if her "guys could do our garden". She replied that she would have a look at the plans and "definitely our guys will be great" and that she would "meet with them to go over the job so that they can price it".

22. The "guys" were a construction workforce headed by a Polish man called Przemek Kordyl with whom Mrs Lejonvarn had a good working relationship (she speaks Polish) and who had worked on the Bank Project. By this time Mr Kordyl had formed a limited company known as Hardcore Builders Ltd ("Hardcore"). There followed various exchanges between her and Mr Kordyl about the proposed works.

23. On 18 March 2013 there were several email exchanges between Mrs Lejonvarn and Mr Burgess upon which both parties placed considerable reliance. It is therefore necessary to set them out in some detail.

24. At 13.27 Mrs Lejonvarn emailed Mr Burgess as follows:

> "We have done the leg work on what needs to be done in preparation for works and we can be ready very soon at minimum getting things lined up. Do you have a start date or thereabouts in mind…Ideally I would not want to be away the week they start, but actually, that week is a short week due to Easter Monday. Hardcore will prepare the first phase for costing which will relate to all the ground preparation, ground works, etc. to get the levelling done. I would also like to instruct a drains survey as quickly as possible. This is the opportune time to confirm that all the below ground drainage is sound and where exactly we can connect to etc, for

additional drainage…I use 2 companies who are both very good and very reasonable."

25. Mr Burgess replied at 15.54 saying that the works could start at any time once he knew what the cost would be.

26. Mrs Lejonvarn sent an email in response at 17.12 stating:

"We can cost out the first phase of works to achieve the necessary levels. We have unit costs for the railway ties but we really need to have a more detailed design developed in order to cost out how many ties are needed. What can be achieved is a conservative estimate at the very least. In order to determine full costs for the steps and decking, I will generate areas and number of steps from Mark Enright's design but I would actually like to make my own drawings to develop the design to a realistic quantifiable level. In the meantime, the first phase of the works would include protection and site preparation, initial removal of existing decking…then the initial ground works to achieve the new levels. That can be priced up now….we need to cost up as much as is known of the works"

27. Mr Burgess replied at 17.37 saying that he did not want to have to go to the cost of a complete re-design unless he had some sort of feel for what the cost would be.

28. At 18.15 Mrs Lejonvarn responded saying:

"By no means am I suggesting a re-design. Mark gave you a very good general concept and his design should work but he hasn't taken it to a level that is necessary both for costing and for building. He gave you a budget estimate but he didn't give you a breakdown of costs, and once you would have started costs might just have accumulated. I wouldn't be charging you to work through the initial costing anyway. The only design charges I anticipate are for the exact layout of the deck areas, the paving area (it has to be laid out even for ordering of the tiles) and any design features such as the screens to the hedge, the fencing above and how you want it to be. A drawing helps you visualise the final result and it helps work out how much of each item one needs to order. Effectively, you have a general design, but it is not something anyone (other than Mark Enright of course) can implement without working out some further details. For example the fencing, what type, ready made panels or not, will it need some support members etc. The railway ties all come in different sizes and we need to make sure we get ones that are adequate for the job and keep consistency throughout the garden. It is premature for some of these decisions, but those are the kinds of things I mean when I refer to design. I don't mean I want to re-design the general layout. Mark has done that and from there you can move forward, but it isn't quite ready for a meaningful pricing exercise. Remember that Mark Enright does this over and over again, so he will have a good idea of what he needs to charge. From my builder's perspective, they need to go through the job with a fine tooth comb in order to arrive at a price that is realistic."

29. At 18.51 Mrs Lejonvarn sent a further email ("the 18 March email") in the following terms:

> "So you would prefer for me to get Hardcore to give you another budget estimate for the whole job just like Mark Enright did? … I am not suggesting a re-design, I am suggesting the next step of the initial concept design for the purposes of pricing. I see the project team as follows:
>
> 1. Labour: Hardcore (Przemek and Adam)
>
> 2. Project Management and detail design (to include layout and procurement of hard materials such as paving, decking, possibly balustrades and design features (possibly a water feature), consideration of technical aspects such as drainage and building of raised beds and or supports, fences, barriers and or other built items such as storage cupboard and all related finishes.) ME.
>
> 3. Lighting: Mark DAVIS
>
> 4. Trees: Richard Wassels
>
> 5. Planting and any pots or decorative features: Matt
>
> 6. Misc. items: underground drainage and irrigation.
>
> My guys are prepared to do all of the "building work", the ground works, the raised beds and terraces, the deck areas and stairs, and storage and the paved areas at the ground level and they can have it all ready to receive planting."

30. Mr Burgess replied at 19.07 that he would love her guys to do it, but that he did not want to be in a position where it cost even more than Mr Enright, that he was thinking it would be substantially less expensive and that he would need a fairly firm price.

31. At 19.37 Mrs Lejonvarn replied:

> "Ok so we get a firm price from them. I doubt their price would come even close to Mark's but the only way to find out is to test it. So that is how I will proceed. I will do what is necessary for them to price it out accurately and I will ask Matt to come and have a look at the garden so that he can get us a price too. I will work on finding the tiles so I can get a price for that too. Mark's design is good and you

> can always still say it is a Mark Enright designed garden as I am assuming you paid for his design so I don't see how you would lose that value by using Hardcore to carry it out. …Agreed for Hardcore to price out with my input?"

32. Mr Burgess replied at 19.38 saying "that all sounds great".

33. Matters then proceeded as had been proposed. On 17 April 2013 Mrs Lejonvarn sent the cost estimate prepared by Hardcore to the Burgesses explaining that it was a cost estimate for the "Ground works and first phase works" with budget estimates for subsequent stages. At [86] the judge described the one page cost estimate as "rudimentary", stating that "Under the heading "First stage – demolishing and structural works" there were eight listed items with a global cost attached of £45,000. Below that were items for supplying and fitting railway sleepers (£12,000), an allowance for hardwood decking and steps (£9,000), an allowance for the irrigation system (£4,500) and an allowance for new fencing (£8,000). When added together, the total cost was £78,500. VAT was expressly excluded." The judge found at [87] that Mrs Lejonvarn was not merely acting as a conduit – "By this point in time, she had identified the proposed contractor, discussed the scope of work with that contractor and provided quantified estimates for the work as set out in the cost estimate. She had previously agreed to get Hardcore to price the work in phase 1 with her input and that is what she did."

34. There followed various email exchanges about the pricing. On Sunday 28 April 2013 Mrs Lejonvarn met Mr Burgess at Highfields. The judge found that Mrs Lejonvarn did identify a (VAT exclusive) budget figure of £130,000 at the meeting, contrary to the evidence of Mr Burgess.

35. Work on the Garden Project commenced on 15 May 2013. At [101] the judge found this to be "the start of the period during which Mrs Lejonvarn provided further professional services for the Burgesses". He noted at [102] that "Mrs Lejonvarn created some design drawings dated 15 May 2013 under the professional title of Linia Studio. Mr and Mrs Burgess are named as the client on the drawings".

36. Substantive work began on 16 May 2013. On 17 May 2013 there was a meeting in the kitchen at Highfields at which the judge found at [106] that the budget figure of £130,000 was mentioned in the presence of Mr Burgess.

37. The Garden Project got underway with Mrs Lejonvarn visiting the site from time to time. The judge noted at [110] that on 11 June 2013 Mrs Lejonvarn emailed Mr Burgess to tell him that it was a good thing she had been on site because the contractor had been about to put some walls in the wrong place but that it had been sorted out. He further noted at [112] that there was another visit by Mrs Lejonvarn on 18 June 2013 when Mr Burgess and the contractor were present. Mr Burgess had questioned whether an error in

setting out had been made and this was investigated on site.

38. Various instalment payments were made by the Burgesses. On 1 July 2013 Mr Burgess raised some concerns about the progress of the project and asked whether they were on budget. Mrs Lejonvarn replied the same day in the following terms:

> "I can only say that I have no reason to doubt the efficiency or effort of the guys at present. Given the nature of the work, they have actually made very good progress. The sheer volume of clay that needs to be removed from site in order to create the lawns is in of itself very time consuming. Especially as it is removed skip by skip. I am not concerned with the budget yet as we have a very close eye on where we are. The land works are the greatest proportion of the budget by far. Once Joe and his men leave, you are effectively left with light building work, decoration and gardening."

39. On 3 July 2013 Mr Burgess raised a concern about rubble being left in the ground. Mrs Lejonvarn replied:

> "All the lawn related stuff Peter will be done professionally and all rubbish will be removed with spoil. Any builder working with me and Hardcore as a subcontractor is held accountable and works to our standards or he doesn't get paid."

40. On 4 July 2013 Mr Burgess raised further concerns about going over budget. Mrs Lejonvarn promised to prepare a budget tracking list and provide it to Mrs Burgess.

41. Mr Burgess continued to raise concerns about the budget and explained that he understood that the cost of the groundworks was to be £78,000 rather than the £130,000 now being mentioned. Mrs Lejonvarn responded by email on 8 July 2013 as follows:

> "We have made all efforts to keep to the 130 we agreed for doing the project (Linia Design Studio (myself) and Hardcore) and given the adjustments that had to be made which I have described above, we are very close. Have a look at the spreadsheet attached and if you want to discuss it in further detail just let me know. I have discussed with Joe an estimated 2 weeks to finish up this groundworks phase….I hope this will help reassure you that we haven't gone far from our agreed price which is a very positive given the site constraints at Highfields."

42. The judge found at [123] that the attached spreadsheet contained a list of project stages, sums paid and estimates for future stages, including the Stages A, B and C groundworks, the boundary treatment and the surface finishes. Stage A included a £8,000 detailing and project management cost. The judge found that "they probably did

represent a belated expectation on her part that she might be paid for what she had done to date. But those fees were never discussed with Mr Burgess in any event so nothing turns on it." The total projected cost was identified as £132,995.80.

43. Mr Burgess replied the same day saying that this was a "disaster", that £130,000 had never been agreed and that it now looked as if it would cost more than proceeding with Mr Enright. Mrs Lejonvarn responded by saying:

> "I am shocked by your email. You and I agreed 130k at your house when you also told me Mark Enright had wanted 178k. You told me that not once but twice. I have written down as such and if you believed that the cost estimate of 78k is what you believe you should be paying then you are saying that you never had any intention to pay for my project management and development of Mark Enright's "design" which was hardly something anyone can build from. Are you saying you wanted it at cost and managed as a friendly favour on my part? Perhaps then it is I who has wholly misunderstood our Professional relationship….I am very upset by this."

44. Mr Burgess responded saying again that this was a disaster and commenting:

> "…As for your fee, I have never asked you for a friendly favour. I would have thought that your project management fee should have been included in the quote and I was assuming that this was included". He sent a further email later the same day stating that: "I am sorry to say that you have not managed the costs of this project at all and you have not actually supervised the work."

45. On 9 July 2013 Mr Burgess emailed Mrs Lejonvarn to say that he wanted to call her involvement to a halt, adding that: "I think the truth is here that you were not qualified to take on a job such as this and have just muddled through hoping we wouldn't notice or wouldn't mind."

46. Mrs Lejonvarn had meanwhile replied in the following terms ("the 9 July email"):

> "Unfortunately you were working to a budget of £78,000 pounds based on a budget estimate early April well before you and I agreed the weekend of the 26th of April to a budget of £130,000. I did not put it in an email because you wanted to pay in cash and for that reason I wrote it down in my notes and have been working to that budget since that agreement and not via email for obvious reasons….It is my responsibility to work in the best interests of my clients and as such I make great efforts to make clients aware of any potential problems, issues or shortcomings that may affect the success of a project. I am not a Quantity Surveyor and as such I do not price jobs. I have also assembled an experienced team and offered to you their services which I have managed. I promised to work to a budget price that we agreed,

and that is exactly what I have done. The budget was £130,000 and we have come in at 132,000 plus change….The work thus far is of a very high standard and the retaining walls are in place according to the design despite you thinking otherwise….Unfortunately I don't believe we will come to a mutually agreeable conclusion. I am sorry that this has ended our relationship but I cannot work under these circumstances….

I don't want to leave you with an unfinished project so I will ask my contractors if they would be willing to continue with you directly. There are risks associated with this. Problems may arise on site that require someone to manage them with a knowledge of technical, logistical and design solutions You will be exposed and vulnerable to cost increases, or unacceptable results in terms of how it is finished off or detailed. The fact that you do not have any technical design drawings for the stairs leaves them open to the interpretation of the builders."

47. The judge commented at [131] as follows on the warning thereby given:

"The caution expressed here was, in my judgment, intended to contrast the position which she believed had been applicable hitherto. In other words, so long as Mrs Lejonvarn had been involved, she considered there was someone to manage the works with a knowledge of technical, logistical and design solutions, namely herself. She was warning Mr Burgess that if he was to continue with the contractors directly, without having anyone performing the role she had been providing, he would not have that expertise available to him".

48. Further acrimonious emails were exchanged including one in which Mrs Lejonvarn commented that: "You have also overstepped the professional boundaries. Moreover, you have overstepped the boundaries between friends." The relationship came to an end at this time.

49. Thereafter the Burgesses attempted to source other contractors without success. In the meantime, they continued to directly employ one of the workmen on site, Mr Joe O'Sullivan, from July to September 2013 to complete the groundworks. Following some heavy rain, cracks appeared and some of the earthworks started to collapse. A surveyor visited site and made some recommendations. Mr O'Sullivan's services were dispensed with and ultimately Mr Enright completed the project for the Burgesses from January 2014.

50. The Burgesses contend that the works executed by Hardcore under Mrs Lejonvarn's supervision were defective in a number of pleaded respects. For the purposes of the trial of preliminary issues it was to be assumed that the defects already existed as at 9 July 2013.

**The grounds of appeal**

51. The grounds of appeal are:

*Ground 1:* The judge erred in holding a duty existed at common law in circumstances in which he had found that there was no concluded contract between the parties.

*Ground 2:* The judge erred in holding that Mrs Lejonvarn owed the Burgesses a duty at common law to inspect and supervise the works.

*Ground 3:* The judge erred in holding that Mrs Lejonvarn had an obligation at common law to undertake and/or owed the Burgesses a duty of care in respect of the design of the Garden Project.

*Ground 4:* The judge erred in holding that Mrs Lejonvarn owed the Burgesses a duty at common law to exercise cost control, prepare a budget for the works and oversee expenditure against that budget, and to review and advise in connection with applications for payment.

*Ground 5:* The judge was wrong to conclude that Mrs Lejonvarn agreed to provide all of the services to which a duty of care was said to attach.

*Ground 6:* The judge's findings that Mrs Lejonvarn was as a matter of fact providing services to which a duty of care was said to attach were inadequate and/or incomplete and/or wrong.

**The law**

52. In considering whether a tortious duty arose, the judge recognised that this was a case in which the losses claimed are pure economic losses. He considered a number of cases which consider the circumstances in which a duty of care may be owed in respect of such losses. These included *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 and *White v Jones* [1995] 2 AC 272.

53. The judge concluded that this was a case in which the issue of whether a duty of care arose was best addressed by considering whether there had been an assumption of responsibility as explained in the leading case of *Henderson v Merrett.*

54. In his judgment in that case Lord Goff placed particular reliance upon the following passages from the judgments in *Hedley Byrne:*

Lord Morris at pp. 502–503:

> "My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

Lord Devlin at pp. 528–529:

> "I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Nocton v. Lord Ashburton* [1914] A.C. 932, 972 are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form…."

55. From these and similar statements made by the House of Lords in *Hedley Byrne* and their application in that case Lord Goff drew the following conclusions at pp. 179-180:

> "…we can derive some understanding of the breadth of the principle underlying the case. We can see that it rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which may or may not be contractual in nature. All of their Lordships spoke in terms of one party having assumed or undertaken a responsibility towards the other. On this point, Lord Devlin spoke in particularly clear terms in both passages from his speech which I have

quoted above. Further, Lord Morris spoke of that party being possessed of a "special skill" which he undertakes to "apply for the assistance of another who relies upon such skill." But the facts of Hedley Byrne itself, which was concerned with the liability of a banker to the recipient for negligence in the provision of a reference gratuitously supplied, show that the concept of a "special skill" must be understood broadly, certainly broadly enough to include special knowledge. Again, though Hedley Byrne was concerned with the provision of information and advice, the example given by Lord Devlin of the relationship between solicitor and client, and his and Lord Morris's statements of principle, show that the principle extends beyond the provision of information and advice to include the performance of other services. It follows, of course, that although, in the case of the provision of information and advice, reliance upon it by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect), nevertheless there may be other circumstances in which there will be the necessary reliance to give rise to the application of the principle. In particular, as cases concerned with solicitor and client demonstrate, where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, he may be held to have relied on the defendant to exercise due skill and care in such conduct."

56. Following his review of the authorities the judge concluded at [173] and [175] as follows:

> "…it is clear from the authorities referred to above (particularly the passages from Lord Goff at pages 178/9 in Henderson ) that no distinction is drawn between the provision of advice and the provision of services where a special skill is exercised. In the provision of supervision services in respect of construction work, a professional usually deploys a special skill and, in circumstances where there is an assumption of responsibility, a duty of care arises. That is the case even though the contractor who creates the defective construction work in the first place owes no such tortious duty" [173].

> "….it is established that in law a duty of care extends to the protection against economic loss in respect of both advice and any service in which a special skill is exercised by a professional. The duty can extend to negligent omissions as well as the performance of negligent acts. For present purposes, the relevant ingredients giving rise to the duty are an assumption of responsibility by the provider of the service coupled with reliance by the recipient of the service, all in circumstances which make it appropriate for a remedy to apply in law. The passages above make specific reference to the fact that a duty of care may be found to arise even in circumstances where services are performed gratuitously and in the absence of a contract. However, as identified by Lord Goff, in the absence of a contract it is important to exercise greater care in distinguishing between social and professional relationships" [175].

57. Applying those principles to the facts of this case he concluded that a duty of care

was owed by Mrs Lejonvarn on the basis of an assumption of responsibility.

58. On appeal it is contended by Ms Parkin QC on behalf of Mrs Lejonvarn that the judge erred in applying the test of assumption of responsibility and that he should have applied, or applied additionally, the threefold test set out in *Caparo Industries Plc v Dickman* [1990] AC 605, namely: whether the loss was reasonably foreseeable; whether there was a sufficient relationship of proximity, and whether in all the circumstances it is fair, just and reasonable to impose a duty of care. The reason for so submitting is that this would have meant considering the last matter as a separate question and it is submitted that this is a test which is not met in this case. It is said that the threefold test is appropriate because this is not a case which can be said to be equivalent to contract given the judge's finding that there was no contract. Nor was there any other contract which could define the services to be provided and supply the necessary contractual framework for an assumption of responsibility.

59. It does not appear that it was suggested to the judge that assumption of responsibility was not the appropriate test to apply in the circumstances of this case. In my judgment he was entitled to apply that test. As the decision of the House of Lords in *Customs and Excise Commrs v Barclays Bank plc* [2007] AC makes clear, assumption of responsibility is an appropriate test in cases which involve a relationship akin to contract, as the judge found this case to be.

60. In the *Barclays Bank* case Lord Mance stated at [93] that the assumption of responsibility test is particularly useful in the "two core categories of case" identified by Lord Browne-Wilkinson in *White v Jones*, at p 274F-G. These were:

> "(1) where there was fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice. In both these categories the special relationship is created by the defendant voluntarily assuming to act in the matter by involving himself in the plaintiff's affairs or by choosing to speak."

61. This is a case which concerned Mrs Lejonvarn voluntarily tendering skilled professional services in circumstances where she knew the Burgesses would rely on the proper performance of those services.

62. As Lord Mance stated at [93] in these core categories of case assumption of responsibility "may effectively subsume all aspects of the threefold approach".

63. A similar point was made by Lord Hoffmann at [35] at p 199D-E:

> "In these cases in which the loss has been caused by the claimant's reliance on information provided by the defendant, it is critical to decide whether the defendant (rather than someone else) assumed responsibility for the accuracy of the information to the claimant (rather than to someone else) or for its use by the claimant for one purpose (rather than another). The answer does not depend upon what the defendant intended but, as in the case of contractual liability, upon what would reasonably be inferred from his conduct against the background of all the circumstances of the case. The purpose of the inquiry is to establish whether there was, in relation to the loss in question, the necessary relationship (or "proximity") between the parties and, as Lord Goff of Chieveley pointed out in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 181, the existence of that relationship and the foreseeability of economic loss will make it unnecessary to undertake any further inquiry into whether it would be fair, just and reasonable to impose liability. In truth, the case is one in which, but for the alleged absence of the necessary relationship, there would be no dispute that a duty to take care existed and the relationship is what makes it fair, just and reasonable to impose the duty."

64. Whilst there is no need to make a further inquiry into whether it would be fair, just and reasonable to impose liability, that is because such considerations will have been taken into account in determining whether there has been an assumption of responsibility.

65. As Lord Hoffmann stated at [36]:

> "It is equally true to say that a sufficient relationship will be held to exist when it is fair, just and reasonable to do so. Because the question of whether a defendant has assumed responsibility is a legal inference to be drawn from his conduct against the background of all the circumstances of the case, it is by no means a simple question of fact. Questions of fairness and policy will enter into the decision…"

66. In my judgment, in determining whether there had been an assumption of responsibility the judge was therefore correct to consider whether the circumstances "make it appropriate for a remedy to apply in law" – i.e. whether it would be fair, just and reasonable to impose liability.

67. The other aspect of the law emphasised by Ms Parkin QC is the distinction between duties in contract and in tort and between undertaking positive obligations (the realm of contract) and the imposition of a negative duty to avoid doing something or to avoid doing it badly (the realm of the tort of negligence). I agree that this is an important distinction and that it is of relevance in this case.

68. In this connection we were referred to the instructive comments of Mustill LJ in *The*

*Zephyr* [1985] 2 Lloyd's Rep. 529. In that case Hobhouse J had held at first instance that an insurance broker owed a duty of reasonable care to use best endeavours to achieve an indicated signing down. An appeal against that decision was allowed on the grounds that failing to perform a positive undertaking of this kind was not the proper subject matter of the law of negligence. Mustill LJ stated as follows at p 538:

> "The complaint is that he did not perform the acts necessary to transform his expectation into reality, with the result that the syndicates were held to the terms of their contracts with the reassured as written, rather than in the attenuated form which would have resulted from a signing-down. To make this actionable, one must find an enforceable promise to perform the acts. Let this be characterized, not as an absolute promise, but as a promise to use "best endeavours". Even so, it bears to my mind no resemblance to the kind of obligation to avoid doing something, or to avoid doing something badly, which is at present the subject-matter of the English law of negligence. I acknowledge that the general tenor of the modern authorities is to avoid cramping the cause of action into rigid categories. I grant that the demarcation between misfeasance and non-feasance appears old-fashioned, and indeed artificial to this extent, that doing something badly may often involve a neglect to carry out an act which would turn bad performance into adequate performance; so that allegations of misfeasance may be implicit in an allegation of non-feasance. But the present is not such a case. The complaint cannot without abuse of language be expressed by saying that the partially signed down slip was an injurious object, which causes the syndicates economic loss; or that allowing the risk to attach with the slip only partially signed down was an injurious act. In reality, the fault of the brokers lay in a continuing failure to perform a positive undertaking. Once any contractual background is subtracted, I do not see how such a right of action can be sustained without holding that if the relationship between the parties is of the right kind, the law of England recognizes the enforceability of a gratuitous promise. On the face of it, this would be inconsistent with fundamental principle."

69. Finally, as Lord Bingham emphasised in the *Barclays Bank* case at [8], much depends 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." Whether there has been an assumption or responsibility is a mixed question of fact and law but the importance of the detailed circumstances mean that the findings of the tribunal of fact as to those circumstances are likely to be of considerable significance.

*Ground 1: The judge erred in holding a duty existed at common law in circumstances in which he had found that there was no concluded contract between the parties.*

70. In relation to whether there was a contract, the judge found that it was impossible to identify any offer and acceptance from the written exchanges between the parties. He noted at [146] that: "Leaving aside the absence of discussion about remuneration, nothing was said about the duration of services, provision for their termination or any

other clauses of the type typically to be expected in a professional's terms of engagement. In addition, the parties never discussed, or even mentioned, the notion that they would be entering into a contract between themselves". He found at [147] that whilst the nature of the services which Mrs Lejonvarn intended to provide were described "it was never clear upon what terms (if any) those services would be provided".

71. The judge also found at [149] that "the parties did not intend to be bound by a contractual relationship" and at [152] that there was no consideration.

72. Although there was no contract the judge found that there had been an assumption of responsibility such as to give rise to a duty of care. In reaching that conclusion the judge emphasised the following matters in particular:

(1) Over a period of time Mrs Lejonvarn agreed to and did in fact provide a series of professional services for the Burgesses in respect of the Garden Project [179].

(2) Mrs Lejonvarn expressed a degree of confidence in her own ability to manage projects, control budgets and to select, organise and approve payments for contractors and the Burgesses had no reason to disbelieve that she had such expertise and experience [180].

(3) The project management services which Mrs Lejonvarn was providing on the Garden Project were akin to those which Papa provided on the Bank Project. The only difference was that, instead of charging a percentage fee on the whole of the construction cost, Mrs Lejonvarn intended to charge a fee for the later phase of the Garden Project beyond the earthworks phase should it ever have come to pass [180].

(4) The description of the project management and design services Mrs Lejonvarn intended to provide were set out in the 18 March email [181].

(5) In the 9 July email Mrs Lejonvarn admitted her responsibility was to work in her clients' best interests and described how she had both assembled an experienced team for this project and managed their services. This was "effectively, her own written confirmation that she had previously been managing the contractor with her knowledge of technical, logistical and design solutions" [181].

(6) The fact that the services were gratuitously provided did not mean that they were informal or social in context and the services were all provided in a

professional context and on a professional footing. The reality of the relationship on the Garden Project since May 2013 involved separate professional and personal boundaries and was akin to a contractual one. The Burgesses were Mrs Lejonvarn's clients and there was an obvious and sufficient relationship of proximity between them [182].

(7) Mrs Lejonvarn was the Burgesses' representative for the purposes of dealing with, instructing and approving payments to the contractor [183].

(8) Mrs Lejonvarn was or should have been well aware that the Burgesses were relying on her to properly perform her services in respect of the Garden Project. They placed trust in her. She had skills they did not possess. Mr Burgess had past experience of her professional services and the Burgesses relied on her to perform analogous services. Had she not been responsible for project managing and overseeing the project they would have entered into a contractual relationship with Mr Enright [184].

(9) In all the circumstances Mrs Lejonvarn assumed responsibility to the Burgesses for performing professional services in respect of the Garden Project and they specifically relied on her for that purpose[185].

(10) The circumstances are such that it is appropriate for a tortious remedy to apply in law [186].

73. Ms Parkin QC contends that it was wrong for the judge so to conclude. In particular:

(1) The findings which the judge made which led him to conclude that there was no contract (no offer, no acceptance, no intention to create legal relations, no consideration) should have led him conclude that this was not a relationship which was equivalent or akin to contract.

(2) In concluding that it was reasonable for the Burgesses to rely upon the services provided by Mrs Lejonvarn the judge failed to give sufficient weight to the fact that the services were being provided gratuitously and that no indirect economic value was being derived from the service performed nor was any value gained by society as a whole in encouraging the proper performance of a service.

(3) The judge's finding that it was impossible to identify any form of offer and acceptance should have led him to conclude that it was similarly impossible to identify precisely the matters for which Mrs Lejonvarn had assumed a

responsibility and the manner in which the Burgesses had reasonably relied upon such an assumption.

(4) It was not fair, just or reasonable to find that a tortious duty arose having regard in particular to the fact that:

(a) The judge found that the parties did not intend to create a contractual relationship.

(b) The factors relied upon by the judge to reach that conclusion.

(c) The builders who carried out the work would owe no such duty.

(d) The law of tort should not be used to impose obligations and duties on a person which the parties could voluntarily have agreed be undertaken by concluding a contract, but did not do so.

(e) No such duties would have arisen if Mr Enright had been employed to carry out the Garden Project.

74. As to (1), it is correct to observe that this is not a case where the case in contract has failed purely on the grounds of absence of consideration. The judge also found that it was not possible to identify an offer and acceptance and that there was no intention to create contractual relations. These are relevant considerations to whether there has been an assumption of responsibility, as the judge recognised, but in my judgment they are not determinative. In particular the judge found at [177] that the scope of the services for which responsibility was being assumed was reasonably clear. The obstacle facing the contract claim was not the scope of the services but the terms upon which they would be provided. He also found that Mrs Lejonvarn agreed to provide and did in fact provide a number of specific professional services acting as architect and project manager in relation to the Garden Project. There is accordingly no real difficulty in identifying the services for which responsibility was being assumed.

75. The fact that the judge found that there was no contract does not mean that the parties' relationship could not be akin to a contractual one. The judge found at [182] that it was so akin, observing that the services "were all provided in a professional context and on a professional footing" and that they "freely accepted by the Burgesses. The Burgesses were her clients (albeit not in a contractual sense) and they owned the land in respect of which the services were performed. There was an obvious and sufficient relationship of proximity between them as a result."

76. As to (2), the judge gave express regard to the fact that the services were being provided gratuitously. He found that they were nevertheless professional services being provided "in a professional context and on a professional footing". Further, they were being provided in the expectation that they would lead on to Mrs Lejonvarn being paid for her services in relation to the second phase of the work. Carrying out the Garden Project was also going to help in the establishment and growth of her business. There is no legal requirement that indirect economic value be derived from the service performed, but on the judge's findings there was some indirect value.

77. As to (3), this is addressed in paragraph 74 above by reference to the findings made by the judge at [177].

78. As to (4), the judge did consider at [186] whether the circumstances were such as to make it appropriate for there to be a duty of care to prevent economic loss. He found that it was so appropriate having regard in particular to the following:

(1) This was not a case of brief ad hoc advice but was a significant project which was being approached in a professional way.

(2) The services were provided over a relatively lengthy period of time and involved considerable input and commitment on both sides.

(3) The services involved significant commercial expenditure on the part of the Burgesses.

(4) Neither party saw this as akin to a favour given without legal responsibility.

(5) Although there was no consideration Mrs Lejonvarn did hope to receive payment for the soft design services that would later be provided and it was also important to the growth of her new business that she provided a good service.

(6) Mr and Mrs Lejonvarn had been the recipients of benefits provided by the Burgesses beyond the normal bounds of friendship and the provision of gratuitous services by her should be seen in that light.

(7) The losses allegedly sustained are of a type which would be expected to flow from a failure to competently perform the services which Mrs Lejonvarn was apparently providing.

79. In relation to the specific factors set out in paragraph 73(4) above which Ms Parkin

QC contends point the other way, factors (a) (b) and (d) all relate to the significance of the fact that there was found to be no contract. This has been addressed above. In particular, on the judge's findings, these were not services being provided in an informal or social context but rather on a professional footing and in a professional context.

80. Factor (d) relies on the fact that the generally accepted position is that a builder does not ordinarily owe a duty of care at law to protect against economic loss in relation to the execution of his work to third parties or to his direct client – see *Murphy v Brentwood DC* [1991] AC 398; *Robinson v PE Jones (Contractors) Ltd* [2012] QB 44.

81. It is submitted that it would be anomalous if Mrs Lejonvarn owed a duty of care in relation to the work undertaken on the Garden Project in circumstances where the builder who actually carried out the work does not. Reliance is placed by way of analogy on *Commissioners of Customs & Excise v Barclays Bank* [2007] 1 AC 181 in which one of the reasons given for finding that the bank owed no duty of care in connection with payments allowed to be made from an account subject to a freezing order was that it would be anomalous if a claim in negligence lay against the bank but not against the account holder.

82. I accept that this is a relevant consideration, as is the fact that the Burgesses would have a contractual claim against Hardcore for defects in the work carried out. There is, however, a distinction between a builder and a professional, as Mrs Lejonvarn held herself out to be. As stated by Jackson LJ in *Robinson v PE Jones (Contractors) Ltd* [2012] QB 44 at [75]:

> "75. It is perhaps understandable that professional persons are taken to assume responsibility for economic loss to their clients. Typically, they give advice, prepare reports, draw up accounts, produce plans and so forth. They expect their clients and possibly others to act in reliance upon their work product, often with financial or other economic consequences".

83. For the Garden Project to be successful it was recognised by both Mrs Lejonvarn and the Burgesses that her professional services would be required. They were not services that could be provided by the builders. Although the Burgesses were not Mrs Lejonvarn's clients in the contractual sense, on the judge's findings both parties regarded the Burgesses as being her professional clients, and that was how Mrs Lejonvarn herself described them.

84. Factor (e) was a point developed in oral argument which relied on the fact that had the Burgesses contracted with Mr Enright he would have been responsible if the work was carried out defectively but there would have been no separate duties in relation, for example, to supervision or detailed design. There is, however, no direct comparison. Mr

Enright was a "one stop shop". He was providing all the work and services required and would have been contractually responsible for their proper performance regardless of by whom they were in fact carried out. Mrs Lejonvarn's work on the Garden Project involved a division of labour with different parties responsible for different tasks, with her described and actual role being to provide professional services as an architect and project manager.

85. In my judgment the judge was entitled to conclude that there had been an assumption of responsibility in the light of the findings made by him, as summarised above. On the judge's findings this was a case in which Mrs Lejonvarn said that she would provide professional services acting as an architect and project manager on the Garden Project; in which she did in fact provide such services; in which she confirmed that she had provided such services and in which the Burgesses relied on her to properly perform those services, as she knew. In particular:

(1) In the 18 March email Mrs Lejonvarn had stated that she would be responsible for project management and detail design and gave specific examples of what that would involve. The judge rejected Mrs Lejonvarn's evidence that this was only intended to describe the services she would perform during the second phase of the Garden Project. It was submitted that the judge was wrong so to conclude but that was a finding of fact made by the judge after consideration of all the evidence, including Mrs Lejonvarn's oral evidence, and no sufficient basis for challenging such a finding has been made out.

(2) The judge found as a fact that Mrs Lejonvarn did then provide professional services acting as an architect and project manager, and in particular that: (1) she selected and procured the contractors and professionals needed to implement the Enright design including agreeing the terms on which they were engaged [190]; (2) she prepared such designs as were necessary to enable the Garden Project to be priced [193]; (3) she attended at site at regular intervals to project manage the Garden Project and to direct, inspect and supervise the contractors' work, its timing and its progress [194]; (4) she received applications for payment from the contractor and provided advice and direction to the Burgesses in relation to payment of such applications [198]; (5) she exercised cost control by preparing a budget for the works and overseeing expenditure against it [199] and she undertook detailed design work [200].

(3) In her emails of 8 and 9 July 2013 Mrs Lejonvarn confirmed that she had been providing such services for her "clients" in relation to which there were "professional boundaries". She referred to her project management and design development for which she made it clear she expected to be paid and which was not a "friendly favour". She said it was her "responsibility to work in the best interests" of her "clients" and that she had managed the services of her team and ensured they had worked to budget and to a high standard. She emphasised that

there would be clear risks in allowing the work to continue without someone, such as her, with "knowledge of technical, logistical and design solutions" to manage site problems and prevent cost increases and unacceptable results.

(4) As Mrs Lejonvarn knew, the Burgesses relied upon her to properly perform these services and had she not assumed responsibility for project managing and overseeing the Garden Project they would have employed Mr Enright.

86. In my judgment the judge was also entitled to conclude that it was appropriate or fair, just and reasonable to find that a duty of care arises in the circumstances of this case, as he found them to be. The factors identified and the findings made by him as summarised in paragraph 78 above all support that conclusion. In particular, the context was a professional one. It was not informal or social. There was an obvious relationship of proximity. Although she was not going to be paid initially the expectation was that she would be paid for later work. She held herself out as having professional skills. She said she would perform professional services and did so. She was aware that the Burgesses would be relying upon her to properly perform those services and it was foreseeable that economic loss would be caused to them if she did not.

87. I would therefore uphold the judge's decision that "Mrs Lejonvarn owed a duty of care to Mr and Mrs Burgess to exercise reasonable skill and care in the provision by her of professional services acting as an architect and project manager on the Garden Project".

88. It is important to stress that this is not a duty to provide such services. It is a duty to exercise reasonable skill and care in providing the professional services which Mrs Lejonvarn did in fact provide in relation to the Garden Project. She did not have to provide any such services, but to the extent that she did so she owed a duty to exercise reasonable skill and care in the provision of those services.

89. A duty expressed in these terms does not trespass on the realm of contract. In oral argument Ms Parkin QC submitted that the effect of the judgment was to impose a generalised duty to act as an architect or project manager in relation to the Garden Project, a duty which would be meaningless without a retainer. In my judgment that is not the duty found. As was accepted by Mr Sears QC in oral argument, the duty found is that Mrs Lejonvarn should exercise reasonable skill and care in the provision of professional services as architect and project manager when she performed those services.

90. The importance of what Mrs Lejonvarn did to the nature and extent of the duty of care which she owed means that caution is necessary in seeking to define that duty in advance of a full consideration of the facts. Although the judge found that Mrs

Lejonvarn did in fact perform the services identified in paragraph 14.1 and 14.3 to 14.6 of the Particulars of Claim he did not address the detail of what she did. That is no doubt because he was not concerned with the issue of or the evidence relating to breach. In my judgment no definitive statement of the nature and extent of the duty owed and of what that required can be made until the detailed facts have been considered and any description of the duty made at this stage needs to subject to that qualification.

*Ground 2: The judge erred in holding that Mrs Lejonvarn owed the Burgesses a duty at common law to inspect and supervise the works.*

91. This reflects paragraph 14.4 of the Particulars of Claim. The judge found that a duty of care was owed to exercise reasonable skill and care in the provision by Mrs Lejonvarn of the professional service of "attending site at regular intervals (approximately twice a week) to project manage the Garden Project, and to direct, inspect and supervise the contractors' work, its timing and progress".

92. The judge qualified this duty by finding that it required "periodic inspection" rather than continuous attendance.

93. On behalf of Mrs Lejonvarn it is contended that it was wrong for the judge so to conclude. In particular:

(1) There is no previous case in which a common law duty of care to avoid economic loss has been found to arise in connection with the supervision of another's work.

(2) It is particularly inappropriate for such a duty to arise in circumstances where, as here, no duty of care is owed by the person executing the work.

(3) The duty found by the judge involves a positive obligation to act in a specific manner in the future. That is the function of the law of contract, not of tort.

(4) There was no reasonable reliance through choosing not to utilise Mr Enright. He was not to be employed to act as a supervisor or indeed in any professional capacity.

94. As to (1), whilst there may be no such previous case, I can see no reason in principle why such a duty may not be owed where it is a professional service for which responsibility has been assumed and which is then performed negligently. If, for example, Mrs Lejonvarn had intervened during the course of her supervision of the work and negligently directed that a terrace be constructed in a particular manner with the

consequence that it fell down causing economic loss then there would be a clear case of liability in the light of the general duty found.

95. As to (2), this is essentially the same argument which was raised in relation to the finding of a general duty of care. As already observed, whilst a relevant consideration, it does not mean that in the circumstances as found in this case no duty of care can or should arise.

96. As to (4), the judge found that the Burgesses relied on the provision by Mrs Lejonvarn of her professional services in relation to the Garden Project. Reliance does not require it to be established that, but for the provision of services by the defendant, those very same services would have been performed by another. Reliance is generally sufficiently demonstrated by a claimant showing that he would have acted differently, and the judge so found in this case.

97. As to (3), I agree that it would not be appropriate for a duty of care to involve a positive obligation to act in a specific manner in the future. The duty found, however, is linked to paragraph 14 of the Particulars of Claim which avers that Mrs Lejonvarn performed the services there set out. It is accordingly alleged that she did provide the professional service of "attending site at regular intervals (approximately twice a week) to project manage the Garden Project, and to direct, inspect and supervise the contractors' work, its timing and progress". In doing so she owed a duty of care to act with reasonable skill and care.

98. It is correct that the judge speaks of a duty of periodic inspection and does so in generalised terms rather than linked to findings as to what Mrs Lejonvarn actually did. There was a dispute between the parties as to the regularity of her attendance on site and the judge only refers to three such visits. Without a more detailed consideration of the evidence I do not consider that any duty of inspection can at this stage be expressed in such specific terms.

99. Whilst accepting that the judge was entitled to find that a specific duty arose, given the importance of the detailed facts I would define the duty in the following terms:

> "In providing the professional service acting as an architect and project manager of project managing the Garden Project and directing, inspecting and supervising the contractors' work, its timing and progress Mrs Lejonvarn owed a duty to exercise reasonable skill and care."

*Ground 3: The judge erred in holding that Mrs Lejonvarn had an obligation at common law to undertake and/or owed the Burgesses a duty of care in respect of the design of the*

*Garden Project.*

100. This reflects paragraph 14.3 of the Particulars of Claim. The judge found that a duty of care was owed to exercise reasonable skill and care in the provision by Mrs Lejonvarn of the professional service of "preparing such designs as were necessary to enable the Garden project to be accurately priced and constructed".

101. The judge qualified this duty by finding that the duty meant that the designs be sufficient "to enable a fairly firm budget estimate to be prepared" rather than to enable them "to be costed with an absolute degree of precision".

102. On behalf of Mrs Lejonvarn it is contended that it was wrong for the judge so to conclude. In particular:

(1) As to the alleged duty to prepare designs to enable the Garden Project to be accurately priced, the Particulars of Claim do not allege that Mrs Lejonvarn failed to exercise reasonable skill and care in performing such a duty, nor is it alleged that any such failure caused the Burgesses to suffer loss. In those circumstances the judge should have declined to make any finding in relation to the question of whether a duty of care was owed in the provision of the service.

(2) The qualified duty found by the judge confuses and elides the content of any contractual duty which an architect (or project manager) might owe to his (or her) client with the question of what an architect's (or project manager's) duty might be to a third party at common law absent any contractual relationship.

(3) A duty of care is owed in order to prevent loss and damage but the nature of the loss which the duty found is aimed at preventing is not identified.

(4) The duty found involves a positive obligation to act in a specific manner in the future.

(5) As to the alleged duty to prepare designs to enable the Garden Project to be constructed, this would require Mrs Lejonvarn to go to considerable time and expense to perform services for the Burgesses free of charge until her involvement in the Garden Project was brought to an end. This is not the function of the law of tort, there is no previous case in which an analogous duty has been found to exist and to extend the law in this way is not justified as a matter of principle or authority.

103. In relation to the alleged duty to prepare designs to enable the Garden Project to be

accurately priced, the judge was asked to made findings by reference to the services set out in paragraphs 14 and 15 of the Particulars of Claim and cannot be criticised for so doing.

104. Mrs Lejonvarn said that she would do what was necessary for the project to be priced out accurately and prepared drawings to enable this to be done. Pricings were then provided which (based on the £130,000 budget figure) Mrs Lejonvarn claimed were accurate and were being adhered to.

105. This is not therefore a case in which Mrs Lejonvarn merely said she would produce designs to enable the work to be priced, but it is a case in which she did so. Further, as the email exchanges of 8 March 2013 make clear, Mrs Lejonvarn knew that costs and a reasonably accurate budget were crucial to Mr Burgess and the decision to use her rather than Mr Enright.

106. It is correct that there are some passages in the judgment at [193] which suggest that there was a positive obligation to produce designs. There was no obligation to do design work, but the design work which was done had to be done with reasonable skill and care so as "to enable a fairly firm budget estimate to be prepared".

107. I would accordingly define this duty as follows:

> "In so far as Mrs Lejonvarn provided designs to enable the Garden Project to be priced, thereby performing a professional service acting as an architect and project manager, she owed a duty to exercise reasonable skill and care to ensure that they were sufficient to enable a fairly firm budget estimate to be prepared".

108. In relation to the alleged duty to prepare designs to enable the Garden Project to be constructed, paragraph 15 of the Particulars of Claim avers that detail design work was done and revisions to the Enright design made. The judge found at [200] that she did in fact undertake detailed design work. In doing so she had to act with reasonable skill and care.

109. The judgment at [201] goes rather further than this and suggests that there was a duty in the following terms: "If an architect should have appreciated the need for appropriate designs to be prepared beyond those which had in fact been prepared then Mrs Lejonvarn ought to have used reasonable skill and care in ensuring that those further designs were prepared either by a professional or by the contractor provided that, in the latter case, she had reasonable grounds to be satisfied that the contractor had sufficient competence and experience to prepare the appropriate designs and was in fact doing so."

110. I consider that the judge has here been drawn into matters which depend upon a more detailed consideration of the evidence and of the facts. In my judgment for present purposes the judge should have confined himself to the terms of paragraphs 14 and 15 which were the tasks for which it was alleged that responsibility had been assumed.

111. I would accordingly define this duty as follows:

> "In so far as Mrs Lejonvarn provided designs to enable the Garden Project to be constructed, thereby performing a professional service acting as an architect and project manager, she owed a duty to exercise reasonable skill and care".

112. Paragraph 15 appears to be linked to the duty in relation to accurate construction rather than some separate duty and for present purposes I would not define the duty by reference to what is there alleged.

*Ground 4: The judge erred in holding that Mrs Lejonvarn owed the Burgesses a duty at common law to exercise cost control, prepare a budget for the works and oversee expenditure against that budget, and to review and advise in connection with applications for payment.*

113. This reflects paragraphs 14.5 and 14.6 of the Particulars of Claim. The judge found that a duty of care was owed to exercise reasonable skill and care in the provision by Mrs Lejonvarn of the professional service of "receiving applications for payment from the contractor, and advising and directing the Claimants in respect of their payment" (14.5) and of "exercising cost control by preparing a budget for the works, and overseeing actual expenditure against it" (14.6).

114. The alleged breaches of this duty are set out at paragraph 31 of the Particulars of Claim which provides that:

> "The Defendant was negligent in that she:
>
> 31.1 failed to produce an adequate budget for the works, in particular, breaking down the work elements necessary to complete the Garden Project, and attributing each element a reasonable proportion of the Cost;
>
> 31.2 failed to produce any other adequate budget for the works;
>
> 31.3 failed to appreciate that the Cost under-estimated the likely reasonable cost of carrying out the Garden Project, and to advise the Claimants of that fact before

the works commenced, or at all;

….

31.7 failed to properly assess, and to advise the Claimants in relation to, applications for payments made by the contractor, and directed the Claimants to make payments in excess of the proper value of the work undertaken."

115. On behalf of Mrs Lejonvarn it is submitted that the nature and extent of the breaches alleged highlight that the duty found is one which would need be agreed by contract rather than imposed by law.

116. It is further emphasised that the judge has not identified any specific act or advice which was relied upon by the Burgesses and to which the duty might attach.

117. In relation to applications for payment the judge found at [198] that "the receipt of applications for payment from the contractor and the provision of advice and direction to the Burgesses in relation to payment of such applications" was a service which Mrs Lejonvarn was providing. Having so found he was justified in finding that Mrs Lejonvarn owed a duty to exercise reasonable skill and care in so doing. Without a more detailed consideration of the facts it would not in my judgment be appropriate to be more specific as to what this duty required.

118. In relation to overseeing the budget the judge found at [199] that the pleaded service was one which Mrs Lejonvarn did in fact undertake. Again, having so found he was justified in finding that Mrs Lejonvarn owed a duty to exercise reasonable skill and care in so doing.

119. Consistently with the other specific duties I would define these duties as follows:

"In providing the professional service acting as an architect and project manager of receiving applications for payment from the contractor, and advising and directing the Claimants in respect of their payment Mrs Lejonvarn owed a duty to exercise reasonable skill and care."

"In providing the professional service acting as an architect and project manager of exercising cost control by preparing a budget for the works, and overseeing actual expenditure against it Mrs Lejonvarn owed a duty to exercise reasonable skill and care."

*Ground 5: The judge was wrong to conclude that Mrs Lejonvarn agreed to provide all of the services to which a duty of care was said to attach.*

120. On behalf of Mrs Lejonvarn it is submitted that such an agreement could only derive from her emails of 18 March 2013 and her involvement in the Bank Project.

121. As to the 18 March 2013 emails, it is submitted that they contain no promise or agreement to provide some or all of the services specified in paragraphs 14 and 15 of the Particulars of Claim. For example, there is no mention of periodic inspection for defects and it is clear that Mrs Lejonvarn was not promising to produce a detailed design for the Garden Project.

122. As to the Bank Project, there was no allegation of course of dealing and there is no basis for inferring a promise or agreement that an equivalent set of services would be provided to those provided by Papa some years previously, in the context of a professional engagement for which a substantial fee had been payable.

123. The agreement found by the judge is based, however, not just on what Mrs Lejonvarn said but also on what she did. In relation to each of the specific services identified in paragraph 14.1 and 14.3 to 14.6 of the Particulars of Claim the judge found that it was provided by Mrs Lejonvarn. The combination of what Mrs Lejonvarn said and did, against the background found by the judge, justifies his finding of a duty of care in relation to the provision of the services.

*Ground 6: The judge's findings that Mrs Lejonvarn was as a matter of fact providing services to which a duty of care was said to attach were inadequate and/or incomplete and/or wrong.*

124. On behalf of Mrs Lejonvarn it is submitted that in the absence of any contract, the judge ought to have but has not set out the specific occasions on which each service to which a duty of care is said to attach was actually being provided and identified the basis for a duty of care to arise on each such occasion. In fact, the judge wrongly assumed that if an example of the relevant 'service' having been carried out by Mrs Lejonvarn can be identified, there must have been a general obligation to perform that service, and to do so with reasonable skill and care, throughout the period up to 9 July 2013.

125. No proper basis has been made out for interfering with the judge's finding of fact that the specified services were provided. As already stated, the combination of what Mrs Lejonvarn said and did, against the background found by the judge, justifies the judge's finding of a duty of care in relation to the provision of the services.

126. It is correct that the judge has not addressed the detail of the services provided nor

sought to identify all relevant acts or advice. It was neither necessary nor appropriate for him to do so for the purpose of the preliminary issue hearing. What the duty of care required in relation to each of the identified services will involve further evidence and findings. This may mean that a more extended duty of care was owed, but that will depend on the evidence.

**Conclusion**

127. For the reasons outlined, I would uphold the judge's finding both of a general duty of care in relation to the provision of professional services and of a specific duty of care in relation to the services which he found were provided as identified in paragraph 14.1 and 14.2 to 14.6 of the Particulars of Claim.

128. I would, however, recast the answer to preliminary issue (iv). In relation to each specific duty alleged I would answer the question in the terms set out above, which may be summarised as follows:

> "In providing the professional service acting as an architect and project manager of:
>
> (1) project managing the Garden Project and directing, inspecting and supervising the contractors' work, its timing and progress;
>
> (2) preparing designs to enable the Garden Project to be priced sufficiently for a fairly firm budget estimate to be prepared;
>
> (3) preparing designs to enable the Garden Project to be constructed;
>
> (4) receiving applications for payment from the contractor, and advising and directing the Claimants in respect of their payment; and
>
> (5) exercising cost control by preparing a budget for the works, and overseeing actual expenditure against it;
>
> Mrs Lejonvarn owed a duty to exercise reasonable skill and care."

129. Subject to that revision I would dismiss the appeal.

**LORD JUSTICE IRWIN**

130. I agree.

**LADY JUSTICE GLOSTER**

131. I also agree.