Flanagan v Greenbanks Ltd (t/a Lazenby Insulation) and Cross
[2013] EWCA Civ 1702; CA; Rafferty, Maurice Kay and Macur LJJ

Mr Cross (Cross) ran a surveying business and, in 2005, entered into an arrangement with Lazenby Insulation (Lazenby) under which Cross could refer clients to Lazenby for the installation of cavity wall insulation (CWI). Lazenby informed Cross that they did not have the expertise to assess properties for suitability for CWI and would rely on Cross to do this. However, Lazenby was a member of industry bodies which required CWI installers to carry out suitability checks.

Later that year, Cross surveyed the properties of Mr Flanagan and Mrs Coles (the claimants). The properties were referred to Lazenby and were installed with CWI. Neither Cross nor Lazenby checked that the properties were suitable for CWI. It transpired that both properties were timber framed and therefore not suitable. Cross had previously referred properties to Lazenby which were unsuitable; however, Lazenby had identified the issue and not proceeded with the installation.

After the claimants had commenced proceedings against Lazenby, in which Cross was joined as a third party, the claimants and Lazenby entered into a settlement. Lazenby then brought a Part 20 claim against Cross for failing to ensure that the properties were suitable. Cross argued that Lazenby’s failure to check that the properties were suitable broke the chain of causation.

At first instance, HHJ Harris QC applied the test in Borealis AB v Geogas Trading SA [2010] EWHC 2789 (Comm), which requires that, in order to break the chain of causation, the intervening act must have such a significant impact that it obliterates the previous wrongdoing. Anything less than unreasonable or reckless conduct is unlikely to meet this test. The state of knowledge of the intervening actor is a relevant factor. Lazenby’s failure was not considered sufficient to break the chain and Cross was therefore liable to Lazenby for failing to ensure that the property was suitable.

Cross appealed on the basis that Lazenby knew of previous occasions where Cross had failed to carry out surveys properly; and Cross could not have foreseen Lazenby’s failure to ensure that the properties were suitable. Lazenby argued that they had made it clear to Cross that they were relying upon him to ensure that the properties were suitable.

Decision
The Court of Appeal dismissed the appeal. Rafferty and Maurice Kay LJJ found that HHJ Harris QC had applied the test in Borealis correctly. They agreed that Cross’ and Lazenby’s breaches combined to cause the loss. The latter did not obliterate the former. Whilst Lazenby’s conduct was negligent, it was not reckless.

Further, Lazenby’s knowledge that Cross had previously failed to carry out surveys properly in relation to other properties did not automatically mean that it should be on notice here. Cross’ previous failings were not specifically relevant to this instance as they did not concern failures to identify timber frames.

Macur LJ, in the dissenting judgment, also applied Borealis, but found that Cross’ breach was superseded by Lazenby’s gross negligence. Macur LJ also commented that HHJ Harris QC should have considered Lazenby’s knowledge of Cross’ previous incorrect assessments.

Significance
This decision confirms that the Borealis test remains good law and is a useful starting point for determining whether the chain of causation has been broken. However, the different conclusions reached by the
judges show that the application of the Borealis test is far from straightforward and remains fact sensitive. The intervening actor’s knowledge will only be relevant if it relates specifically to the instance in hand. Moreover, parties referring work need to ensure that the work is suitable for such a referral. Otherwise, the referrer could be held liable even though the referee was also required to make the necessary checks and failed to do so. Even where the referee’s knowledge of the referrer’s previous failings should have alerted the referee to the importance of undertaking the checks properly themselves, the referrer may not be absolved from liability.

**Royal Bank of Scotland plc v Halcrow Waterman Ltd**

[2013] CSOH 173; Lord Tyne

In 1998 Halcrow Waterman Ltd (Halcrow) was appointed as structural engineer on a project in Edinburgh. Lilley Construction Ltd (Lilley) was the design and build contractor. In 2001 the Royal Bank of Scotland Plc (RBS) became the tenant of the property and received the benefit of a collateral warranty from Halcrow. The collateral warranty contained a net contribution clause which provided that Halcrow’s liability would be limited to a just and equitable proportion of the loss, having regard to the responsibility of the ‘Other Consultants’. ‘Other Consultants’ was not defined. Defects later arose in the works. By this time, Lilley had become insolvent. In 2010, RBS commenced proceedings against Halcrow, alleging that the defects were caused by structural design.

During the proceedings, a dispute arose as to whether the reference to ‘Other Consultants’ included Lilley and its sub-contractors and therefore whether their responsibility for the loss should be taken into account in considering Halcrow’s liability. Halcrow submitted that Lilley’s responsibility should be considered as the parties intended that the clause would limit Halcrow’s liability to a just and equitable proportion of the loss. Halcrow argued for a ‘commercially sensible construction of the clause’, taking into account the fact that RBS was entitled to have a collateral warranty with Lilley assigned to it and therefore could have pursued Lilley directly had it not become insolvent. This construction could be achieved through a wide interpretation of ‘Other Consultants’ or by not limiting the parties whose responsibility should be considered when assessing Halcrow’s liability to ‘Other Consultants’. RBS argued that, on a literal interpretation, ‘Other Consultants’ did not include Lilley or its sub-contractors. This was consistent with the distinction drawn between the contractor and the consultants in the rest of the documentation. It was further submitted that clauses limiting liability should be ‘construed with a degree of strictness’.

RBS also argued that design and build contractors are omitted from net contribution clauses because they provide a single point of responsibility for the whole of the works, and so could be considered to be 100% responsible for any construction or design defect. Therefore, their inclusion in a net contribution clause in a consultant collateral warranty could render the warranty useless for beneficiaries, as the consultant’s proportion of any loss would be 0%.

**Decision**

Lord Tyne held that the reference to ‘Other Consultants’ did not include Lilley or its sub-contractors. RBS’ arguments were preferred as Halcrow’s approach was considered to involve effectively ‘rewriting the contract’. However, obiter, Lord Tyne rejected RBS’ argument regarding the inclusion of design and build contractors in net contribution clauses. The design and build contractor is 100% responsible for the design and construction of the works, but not necessarily the losses.

**Significance**

Although this is a Scottish judgment, it provides useful guidance for the English courts. It demonstrates the courts’ preference for adopting literal interpretations of clauses, particularly those which limit or exclude liability. Following West v Ian Finlay & Associates [2013] EWHC 868 (TCC), this case further demonstrates the importance of ensuring that a net contribution clause clearly sets out the parties whose responsibility for any loss is to be taken into account when assessing liability. Lord Tyne’s comments on the effect of including a design and build contractor in a net contribution clause will be useful for consultants trying to negotiate such an inclusion, as it does not appear that the effect would be to reduce the consultant’s proportion of the losses to 0%. They also suggest that, generally, a court would be willing to give effect to a net contribution clause.  

CL