Design Responsibility – Reasonable Skill and Care or Fitness for Purpose?

In AIS Fact File Information Sheet - Design Responsibility of Specialist Contractors we have considered the scope of responsibilities which might be undertaken by you if you are involved in design. We have also considered the different methods of procurement available to employers if they wish to engage contractors and specialist contractors to undertake design. In this Information Sheet we assess the standard of liability which might be imposed upon you in law if you act as a designer. In particular we look at the extent to which you can be liable for defects in your design.

General principles of design liability

Liability in law for your design can be imposed from a variety of different sources:

- **Express terms of your contract**
  This would include terms contained within any of the written documents that govern the contract. For example, conditions of contract, collateral warranties, parent company guarantees or bonds.

- **Implied Terms**
  Certain terms are implied into some contracts under statute and the courts will enforce these terms where they impose liability on a designer.

- **Common Law**
  At common law there is a duty of care imposed on designers, breach of which may lead to liability for negligence.

In order for you to appreciate the risk associated with a particular contract provision, you must first understand the extent to which you can be liable in law for that provision.

The general principle is that a designer may have a liability both in contract and tort (negligence).

**Contract**

Under the principle of freedom of contract the parties to a contract can agree whatever terms they wish, subject to certain statutory limitations. If a party fails to carry out his obligations then there is a breach of contract, which will entitle the other party to recover damages in respect of their proved losses. In awarding damages against the party in breach, the courts aim to place the injured party in the position in which he would have been if the breach had not occurred.

In law there are two types of damages for breach of contract that can be awarded:

- Damages which may fairly and reasonably arise naturally out of the breach.
- Damages which are the result of special circumstances known to the parties at the time of the breach.

In the latter case, the awarded damages will be far greater than in the former case. For example, there is usually a term within a design agreement that the designer must use reasonable skill and care in preparing the design. If the designer fails to do so and is therefore in breach, the injured party may be able to sue for damages arising from the breach ie, the cost of remedying the defective design in the works. If, however, there are special circumstances known to the parties, ie, that the designed building was required by the client by a particular date and that the design defect caused the client additional expense such as loss of profit, business, etc, then the client would recover not only the cost of remedy but also the additional loss foreseeable to both parties because of their special knowledge of the circumstances.

**Tort (Negligence)**
In addition to liability for breach of contract, a designer can also be liable in tort for professional negligence. In the past it was common for claims to be made both in contract and in negligence against designers. However, in the case of *Murphy v Brentwood District Council (1990)* the courts restricted this liability and claims in negligence for ‘pure economic loss’ are now unlikely to succeed. An injured party may only be able to claim in negligence for damages resulting from physical injury/death and physical damage to property other than the property which was defective as a result of the negligence of the builder or designer.

In order to claim successfully against such a party for the costs associated with the remedial works the injured party can generally now only sue in contract. This has led to an increase in the use of warranties where, for example, the employer engages a contractor who enters into a contract with a subcontractor for work. In order to establish the right to sue the subcontractor, the employer now requires a contract under which he can make the subcontractor directly liable to him for defects in the work or design.

The rise of such collateral warranties has increased the scope for placing greater responsibility for design on specialist contractors. A more detailed analysis of warranties will be considered in Fact File Information Sheet AIS 019/2000, Section 4. However, it is important to understand the extent to which certain provisions in the contract or warranties can increase your liability and thus the client’s ability to recover substantial damages against you if you are in breach in these liabilities.

**The use of reasonable skill and care**

Professional designers are required to exercise reasonable skill and care. If a designer fails to do so he may be professionally negligent. The test in law is whether he acted with the kind of skill of the average designer. This standard of reasonable skill and care is also imposed on designers by virtue of the Supply of Goods and Services Act 1982 in respect of any contract for supply of designed services. The courts will therefore imply such a term into a contract for such services.

A designer will therefore be liable if he failed to exercise the skill of an average designer. However, this duty can be displaced by express provisions within the contract that impose a stricter standard of duty.

**Fitness for purpose**

The duty of fitness for purpose can be expressly stated in the contract with words to that effect. The following phrases would be effective in imposing such a duty:

- Fit for the purpose
- Suitable for the purpose
- Entirely fit for the purpose
- Suitable for the purpose

The danger, from the specialist contractor’s point of view, is that the fitness for purpose requirement is an absolute duty. If, for example, you enter into a warranty with an employer for the design of an air conditioning system, the employer’s business at the time being an hotel and the warranty imposes a duty of fitness for purpose upon you, you will be bound by that stricter standard of duty. If, therefore, some three years after completion of the work the employer changes the use of the building to that of a block of flats, he may be able to sue you and recover damages if the air conditioning system is not fit for his purpose at that time.

The duty may also be imposed by law in circumstances where, for example, the employer relies on a contractor to provide an entire building and there is no independent designer involved.

The absolute nature of your duty can be mitigated to some degree by removing the strict terms of the fitness for purpose requirement. For example, the following phrases would lessen your duty but would not reduce it to that of the use of reasonable skill and care:

- Reasonably fit for the purpose
- Fit for the purposes expressly made known
- Reasonably fit for the purposes agreed by the parties and expressly set out within the contract

You should always examine the terms of any warranty or contract which seek to impose such duties upon you. It is important to bear in mind that the terms of any warranty of fitness for purpose will extend to all design work for which you are responsible under your contract, even if you sub-let part of the design. In such circumstances, and unless you are able to reduce your liability under the terms of the warranty or pass the same liability to your subcontractor, you may assume a greater liability for the design than your subcontractor has to you. Reducing the extent of your liability will obviously be in the interests of both you and your subcontractor.

It is worth bearing in mind that provisions within the standard forms of warranty, such as the less onerous employer/subcontractor agreement for nominated subcontractors, do not require the specialist contractor to warrant fitness for purpose but merely the exercise of reasonable skill and care. Note also that the subcontractor’s liability for design under DOM/2 is also limited to the exercise of reasonable skill and care.

Designers’ responsibilities in law can be significant and it is certainly in your interests to ensure that, when acting as
designer, you only accept terms which are reasonable and which do not impose significant liability upon you. Your company’s future success and survival depends upon it.

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