



DUTIES AND LIABILITIES OF CONSTRUCTION PROFESSIONALS

Victoria Russell

7 November 2006

CAPITAL PROJECTS IN THE EDUCATION SECTOR

1 Introduction

Architects

“An architect” was defined by the court in *R -v- Architects’ Registration Tribunal, ex p. Jagger*, as follows:-

“An Architect is one who possesses, with due regard to aesthetic as well as practical considerations, adequate skill and knowledge to enable him (i) to originate, (ii) to design and plan, (iii) to arrange for and supervise the erection of such buildings or other works calling for skill in design and planning as he might, in the course of his business, reasonably be asked to carry out or in respect of which he offers his services as a specialist.”

Such duties include preparing plans and specifications and supervising or inspecting the building works to ensure that the Contractor is complying with the building contract.

An Architect engaged by an Employer acts as his agent and owes him the contractual and often tortious duty to carry out his work with the reasonable skill and care to be expected of a competent Architect. He will also owe a duty when issuing certificates to act fairly as between the Employer and the Contractor. (*Sutcliffe -v- Thackrah and Others*)

An Architect does not merely design and supervise the erection of buildings, but also gives prospective building owners preliminary advice on the type of building to be erected and the cost of doing so. Since it is obvious that a design is wasted which will only produce a building costing considerably more than the owner’s resources, or the sums allocated by the owner to the project, the Architect must possess at least sufficient knowledge of the cost at current prices of buildings or other works which he may design, so that the cost of

carrying out his designs will come within a reasonable distance of the owner's requirements, insofar as these have been made known to him (*Money Penny -v- Hartland*).

For the same reason, an Architect will need to know enough about building techniques to avoid designing buildings which can only be constructed above the budget communicated to him by his client, or at unreasonable cost. See further below.

A person is prohibited from practising or carrying on the business of an architect under a name, style or title containing the word "architect" if he is not registered under the Architects Act 1997. However, whilst the term "architect" is protected, there is no prohibition against carrying out architectural work in the absence of registration.

Architects are expected to comply with the Code of Professional Conduct published by the RIBA. Matters of professional conduct and discipline are dealt with by the Professional Conduct Committee which will investigate "unacceptable professional conduct" or "serious professional incompetence".

Engineers

There is no exact definition of "an engineer", nor is there a statutory system of regulation.

The Institution of Civil Engineers has described the profession of Civil Engineer as "*the art of directing the great sources of power in nature for the use and convenience of man*".

The Engineer's function in relation to design and supervision is similar to that of the Architect; unlike the profession of Architect, however, there is no restriction upon people styling themselves "Engineers" or "Civil Engineers" and it is therefore important to check before employing an Engineer that they are a member of one of the professional bodies such as the Institution of Civil Engineers or the Institution of Mechanical Engineers, membership of which is only granted upon obtaining certain professional qualifications.

Quantity Surveyors

The role of a Quantity Surveyor was described in the 19th Century as being that of a person "*whose business consists in taking out in detail the measurements and quantities from plans prepared by an Architect for the purpose of enabling builders to calculate the amounts for which they would execute the plans*" (*Taylor -v- Hall*). This has of course now been considerably broadened, both at the preparatory stage of building contracts and throughout the life of a project, and includes assisting in the negotiating and obtaining of quotations for work to be carried out by specialists, the preparation of detailed valuations for the purposes of interim certificates, and the detailed preparation of the Contractor's Final Account including the valuation of variations and claims, largely as a result of which Quantity Surveyors now go by many different names, including "Cost Managers", "Cost Consultants", etc.

As in the case of Engineers, there is no prohibition against the use of the title of “Surveyor” or “Quantity Surveyor” and you therefore need to check whether or not somebody is a member of the Royal Institution of Chartered Surveyors in order to be confident that they have got the necessary academic qualifications and have acquired the necessary practical experience.

The Quantity Surveyor is normally engaged directly by the Employer, to whom he will owe a contractual and often tortious duty of care. See further below.

Project Managers

The services offered by Project Managers vary considerably, as do the qualifications and experience of the people putting themselves forward for this role. There is no defined group of services for them to undertake and only a limited number of contracts for their performance.

The qualifications and experience of people practising as Project Managers may stem from the professional side of the construction industry, as in Architects, Quantity Surveyors or Engineers, or may emanate from the contracting side, such as in the management teams of major main contractors.

The package of services offered may include providing, through others, all the design and consultancy services required for the project, with or without co-ordinating or chasing up the administration and supervision of any relevant construction main or sub-contract(s). In other cases, a Project Manager may simply exist as an additional tier of advice and administration between the Architect/Engineer on one hand and the Employer on the other, in other words act as the Employer’s agent in all contractual matters, sometimes including the engagement and briefing of the Architect, the Quantity Surveyor and other consultants.

Facilities Managers

Although the specific tasks and duties assigned to Facilities Managers vary significantly depending on the organisation for which they work, the duties fall into several categories, relating to operations and maintenance, real estate, project planning and management, communication, finance, quality assessment, facility function, technology integration and management of human and environmental factors. Tasks within these broad categories may include space and workplace planning, budgeting, purchase and sale of real-estate, lease management, renovations, or architectural planning and design. Facilities Managers may suggest and oversee renovation of projects for a variety of reasons, ranging from improving efficiency to ensuring that facilities meet current regulations and environmental, health and security standards. Additionally, Facilities Managers continually monitor the facilities to ensure that they remain safe, secure and well maintained.

Facilities Managers need to be able to determine the correct contract strategy, and how to drive down unnecessary costs. They need to be good at planning and control, and understand service contracts and the advantages/disadvantages of in-house versus outsourcing to external suppliers. The drafting of service specifications is vitally important, as is how to manage and control the tender process in order to get the best from the bidders. Setting KPIs, driving innovation and generally managing performance and costs are all part of the Facilities Manager's portfolio of responsibilities.

According to the British Institute of Facilities Management, facilities management is one of the fastest growing professions in the UK; it describes facilities management as *“the integration of multi-disciplinary activities within the built environment and the management of their impact upon people and the workplace. Effective facilities management, combining resources and activities, is vital to the success of the organisation. At a corporate level, it contributes to the delivery of strategic and operational objectives. On a day to day level effective facilities management provides a safe and efficient working environment, which is essential to the performance of any business - whatever its size and scope.”*

2 Duties and Liabilities to the Employer

2.1 Professional Appointments: Express and implied terms

The employment of a construction professional for services in relation to the design and execution of construction projects arises from his appointment by the Employer or by someone authorised on his behalf to make the appointment. The express and implied terms of the appointment govern the rights and obligations of the parties; the express terms are of course the starting point.

If an appointment is made in a relatively informal way, such as exchanging letters with or without incorporation by reference of a professional institution's conditions of engagement or other terms, it is important to stipulate whether the terms of the incorporated document are intended only to apply to the payment provisions or to the conditions of engagement as a whole, for example including the arbitration agreement, if there is one.

Since an external (i.e. not in-house) construction professional in private practice is in law an independent contractor, he is entitled to be left free, in the absence of express provision to the contrary, to carry out the incidental duties necessary to achieve the purpose for which he has been appointed in the way which seems best to him.

Whilst he is entitled to be left undisturbed in matters of the day to day discharge of his duties, however, he is not entitled to dictate to the Employer on matters which come

within the latter's legitimate sphere of interest and decision, and he is indeed in such matters bound to consult the Employer, at the risk of being liable in negligence for failing to do so.

In the case of *Bennet -v- Cape Town Foreshore Board*, an Architect sought an injunction against the Employer, arguing that there was an implied term that the Employer could not use only a part of the Architect's plans, or depart from them, without his approval, or, alternatively, that the Employer's action amounted to a breach of copyright. It was held that neither contention was valid, and that the Employer was entitled to make such use of the Architect's services as he saw fit, provided that proper remuneration was paid.

The Employer is entitled to a professional standard of skill in the discharge of all the duties necessary until the purpose of the appointment in question has been achieved. A mere request to act in relation to a project, without specifying at the outset the services required, will inevitably lead to doubt or dispute as to what are the respective rights and duties of the parties and it is therefore essential, particularly when more than one type of consultant is used on the same project, that the purpose and extent of the respective appointments should be made absolutely clear.

The Standard Implied Terms

The Supply of Goods and Services Act 1982 provides that a duty to serve the Employer with reasonable care and skill is implied in a contract for the supply of a service where the supplier is acting in the course of a business. Thus, even where the construction professional is engaged without reference to any standard form conditions, the duty to act with reasonable care and skill is implied by statute.

Section 13 provides as follows:-

"... in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill."

Further, Section 14 provides that:-

"(1) Where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time.

(2) What is a reasonable time is a question of fact."

It is common for Employers, in seeking to make claims of professional negligence, to bolster such claims by pleading other implied terms which seek to impose upon the Architect, Engineer or Quantity Surveyor a particular duty or obligation. The Employer must however meet the test for the implication of terms set out in the case of *Liverpool City Council -v- Irwin*, where it was held that a term will not be implied into a contract simply because it is reasonable to do so: “the touchstone must be necessity and not merely reasonableness”. There can be circumstances where the implied duty to exercise reasonable care and skill is replaced by a duty to ensure that the design of a product being supplied is fit for its intended purpose, for example if the Architect or Engineer is designing a product or item which will be incorporated into the building. See further at paragraph 2.9 below.

2.2 Nature of Duty

It used to be the case that a construction professional’s duty to their client, like that of other professionals such as solicitors, lay purely in contract, and not in tort.

One of the most important results of this was that, for the purposes of limitation, time began to run at the date of the breach of contract and not, as in the tort of negligence, from the often much later date when damage occurred or could reasonably have been discovered.

There is now universal judicial agreement that the liability of a professional person to their client arises both in tort and in contract.

As described in *Hudson*, generally, an owner under a building or engineering contract will have four main interests which he employs his professional adviser(s) to secure, namely:-

- “(i) *a design which is skilful and effective to meet his requirements, including those of amenity, durability and ease of maintenance, reasonable cost and any financial limitations he may impose or make known, and comprehensive, in the sense that no necessary and foreseeable work is omitted;*
- (ii) *obtaining a competitive price for the work from a competent contractor, and the placing of the contract accordingly on terms which afford reasonable protection to the owner’s interest both in regard to price and the quality of the work;*
- (iii) *efficient supervision to ensure that the works as carried out conform in detail to the design and the specification, and*
- (iv) *efficient administration of the contract so as to achieve speedy and economical completion of the project.”*

Insofar as any act or omission of the construction professional prejudices any of these interests, and is due to lack of skill or care on his part, he will be failing in his obligations and will, if a breach of duty is clear, be liable to the Employer for any damage which he may suffer (save, possibly, for pure economic loss, as to which see further, below).

2.3 Standard of Care

The precise degree of care owed by those holding themselves out as specially qualified in a particular trade or profession has been described in a number of different ways.

It is a question of fact which *“appears to us to rest upon this further enquiry, viz: whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant”* (per Tindal C J in *Chapman -v- Walton*).

In a medical case, it was said:-

“It is not enough, to make the defendant liable, that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question is whether there has been a want of competent care and skill to such an extent as to lead to the bad result.” (per Erle C J in *Rich -v- Pierpont*)

In another medical case, it was stated that:-

“There is ample scope for genuine difference of opinion, and one man clearly is not negligent because his conclusion differs from that of other professional men nor because he has displayed less skill and knowledge than the others would have shown.” (*Hunter -v- Hanley*)

In England, the House of Lords has adopted as definitive, in the case of professional people generally, the following direction to a jury by McNair J:-

“Where you get a situation which involves the use of some special skill or competence ... the test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess expert skill ... it is sufficient if he exercises the ordinary skill of the ordinary competent man exercising that particular art.” (*Bolam -v- Friern Hospital Management Committee*)

Of architects, it has been said in Canada:-

“As architect, he is in the same position as any other professional or skilled person, and whether it be in the preparation of plans and specifications, or the doing of any other professional work for reward, is responsible if he omits to do it with an ordinary and reasonable degree of care and skill.” (Badgley -v- Dickson)

The following has been said in American cases:-

“... We must bear in mind that the [architect] was not a contractor who had entered into an agreement to construct a house for the [owner], but was merely an agent of the [owner] to assist him in building one. The responsibility resting on an architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient, or which rests on anyone to another where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply in the given case his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result.” (Coombs -v- Beede)

“... in his contract of employment he implies that he [the architect] possesses the necessary competency and ability to enable him to furnish plans and specifications prepared with a reasonable degree of technical skill. He must possess and exercise the care of those ordinarily skilled in the business and, in the absence of a special agreement, he is not liable for fault in construction resulting from defects in the plans because he does not imply or guarantee a perfect plan or a satisfactory result.” (Surf Realty Corp -v- Standing)

“Architects, doctors, engineers, attorneys and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. Thus, doctors cannot promise that every operation will be successful; a lawyer can never be certain that a contract he drafts is without latent ambiguity; and an architect cannot be certain that his structural design will interact with natural forces as anticipated. Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather that exercise of that skill and judgment which can be reasonably expected from similarly situated professionals ... Until the random element is eliminated in the application of architectural sciences, we think it fairer that the

purchaser of the architect's services bear the risk of such unforeseeable difficulties.” (City of Mounds View -v- Walijarvi)

In a case concerning engineers, the Judge said:-

“...The professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances” (Eckersley -v- Binnie & Partners).

Of architects in their role as supervisors, it has been said in an English case that:-

“As regards matters in which the plaintiff (an architect) was employed merely as agent for the building owner, he was to protect his interests adversely to the builder, and the plaintiff would be liable to an action by his employer if he acted negligently in such matters.” (Chambers -v- Goldthorpe)

The architect:-

“Is bound to do his best for his Employer, and to look sharply after the builder whilst the work is going on, and it is his duty in that capacity to form an opinion as to what his Employer is entitled while the works are being executed.” (Cross -v- Leeds Corporation)

It is important to bear in mind a number of things when considering these various quotations.

Firstly, the language used should not be taken to justify a lower or “ordinary” standard of professional knowledge and skill in cases where a construction professional happens, whether by diligence or mere accident, actually to possess greater knowledge or skill than an ordinary similar situated professional.

For example, a construction professional may have had reason to study the geology of a particular area, or of a particular site, due to difficulties on another occasion, or have obtained specific information not normally available, or may have attended some special course which they have not put forward or professed as a special skill to their client.

In such a case, there will be liability if the skill or knowledge so obtained is not used with care.

“[Counsel submitted] that it is the duty of a professional man to exercise reasonable care in the light of his actual knowledge, and that the question of whether he exercised reasonable care cannot be answered by reference to a lesser degree of knowledge than he had, on the grounds that the ordinarily competent practitioner would only have had that lesser degree of knowledge. I accept [that]

submission; but I do not regard it as a gloss upon the test of negligence as applied to a professional man. As it seems to me, that test is only to be applied where the professional man causes damage because he lacks some knowledge or awareness. The test establishes the degree of knowledge or awareness which he ought to have in that context. Where, however, a professional man has knowledge, and acts or fails to act in a way which, having that knowledge, he ought reasonably to foresee would cause damage, then, if the other aspects of duty are present, he would be liable in negligence ...” (Wimpey Construction UK Ltd -v- Poole)

Under GC/Works/5, at Condition 10 (1.10 in the 1999 form) “*The Consultant shall perform the Services in accordance with all Statutory requirements and with the reasonable skill, care and diligence of a properly qualified and competent consultant experienced in performing such Services on projects of similar size, scope, timescale and complexity as the Project.*”

If a construction professional professes special qualifications, skills or experience to prospective clients, then the standard of care will obviously be raised to the new level which they profess.

In addition, it may be that where a client seeks the services of a professional person of pre-eminent standing in their field, and pays appropriately higher remuneration for their services, then a higher standard will be expected than that of the ordinary, everyday practitioner in that field (*Duchess of Argyll -v- Beuselinck*)

Against these possible factors raising the standard of skill required, you should remember that in areas of skill such as construction, to a greater extent than, for example, law or accountancy, a degree of experiment and innovation is clearly not only acceptable but, to quote *Hudson*, is “*to be encouraged if technical progress is not to be stultified*”:-

“If you employ an architect about a novel thing, about which he has had little experience, if it has not had the test of experience, failure may be consistent with skill. The history of all great improvements shows failure of those who embark in them.” (Turner -v- Garland)

As can be seen from the quotations from the judgments which I have set out above, an Architect or Engineer does not warrant the adequacy of his design to their client (unless their professional appointment expressly says so), but only due professional care in preparing it.

2.4 Continuing duty and limitation

The duty of design in a construction contract is essentially a continuing one where the construction professional’s employment continues during the supervision stage:-

“The architect is under a continuing duty to check that his design will work in practice and to correct any errors which may emerge. It savours of the ridiculous for the architect to be able to say, as it was here suggested that he could say: “True, my design was faulty but, of course, I saw to it that the contractors followed it faithfully” and to be enabled on that ground to succeed in the action.” (Brickfield Properties Ltd -v- Newton)

“I consider that the architect was responsible for the design and that that responsibility was a continuing one in the sense that, if he subsequently discovered that what he may initially have been justified in assuming was an adequate design was in fact a defective design, his responsibility remains.” (London Borough of Merton -v- Lowe)

“I am now satisfied that the architect’s duty of design is a continuing one, and it seems to me that the subsequent discovery of a defect in the design, initially and unjustifiably thought to have been suitable, reactivated or revived the architect’s duty in relation to design and imposed upon them the duty to take such steps as were necessary to correct the result of that initially defective design.” (London Borough of Merton -v- Lowe)

“In principle, it would seem that liability should continue until the time of the final certificate when the architect’s services usually cease. Thus, in a case of combined design and supervision failure, the breach of duty was said to occur at the time when the defendant advised the plaintiff that the builder’s contract had been satisfactorily performed, and that she should accept the house as the house that she had engaged him to design and arrange for.” (Edelman -v- Boehm)

2.5 Measure of Damage

If an error in the design is discovered at an early stage, the Employer should normally, as part of the duty to mitigate loss, give the professional an opportunity to correct it.

In *Columbus Co -v- Clowes*, the Judge said:-

“It seems to me that the most the plaintiffs can get is the reasonable cost of making the plans good. But then comes the difficulty. The defendant himself would have made the plans good without any charge. Indeed he would have been bound to do so. If, however, the plaintiffs had called in another architect, he would in all probability have insisted on commencing the plans de novo, and would have refused to make any use of the defendant’s plans, but would that have been a reasonable course to pursue? I do not think it would.”

These remarks would not apply if the design was quite useless, or the defects such as could reasonably be expected to destroy any further confidence in the professional adviser. In that event, the Employer would be entitled to treat the professional appointment as repudiated, and resist payment on the ground of a total failure of consideration (*Money Penny -v- Hartland*). The measure of damage for breach of the design obligation will thus differ widely according to the nature of the breach. It may be nominal, if the error can be rectified simply at an early stage, or it may be for loss of value or loss of commercial profitability in the case of a non-structural suitability breach, which cannot be rectified. Where the design failure relates to the structure itself, there will then be an argument as to whether the Claimant should recover the cost of repairs or the amount of diminution in value.

2.6 Design

An Architect or Engineer (“A/E”) will normally be given a relatively free hand in the design elements of their duties, but Employers of course sometimes press their own ideas upon them as to the materials to be used or the plans to be followed. Where the Employer’s suggestions or wishes are likely to lead to an unsatisfactory result, the A/E’s duty will be discharged if they give a sufficient warning to the Employer. Where an A/E is specifically instructed to use a new method of construction, its failure may still be consistent with a proper degree of care on the A/E’s part.

Where a project involves new techniques of construction, the A/E is under a special duty to take the best advice available upon the use of such new techniques, and to advise their Employer of any potential risks; and where the selection of the technique is down to the A/E, the onus of justifying their action will be correspondingly heavier.

In normal circumstances, an A/E will not be automatically relieved from liability for their plans or design by obtaining their Employer’s approval of them, if the design defect complained about is one of construction or of a technical character.

If, by reason of the known facts, there is only one really foolproof type of scheme, and another which is considerably more economical but involves an element of risk, it is the adviser’s duty to tell the Employer and leave the decision to them, in which case approval of the less safe course may often negative liability. (*City of Brantford -v- Kemp & Wallace-Carruthers Ltd*, a Canadian case)

Where there is a contract for both the design and supply of a product, there will usually be an implied term of the suitability of the design, but where a professional supplies a design service only, they will not normally warrant more than reasonable skill and care (*George Hawkins -v- Chrysler (UK) Ltd*)

There is a distinction between the position in law of contractors or subcontractors undertaking a design, compared with that of construction professionals.

The fundamental reason why the liability of an A/E for the design and suitability of their building is based on negligence, and so subject to “state of the art” defences even where the design fails, whereas a design and build contractor’s liability, in the absence of express provision, will be an unqualified obligation of suitability not subject to such defences, is that, in the case of a manufacturer or seller of goods or person carrying out work for a price on whom design reliance is placed, there are unavoidable competitive pressures to “design down”, as near as possible to the minimum acceptable standards of quality, durability and ease of maintenance compatible with maintaining their position as a supplier in the market. In such a situation the Employer must have, it is argued by Hudson, the protection of an unqualified suitability obligation, not open to “state of the art” defences, to counter balance this basic conflict of interest. On the other hand, a professional A/E is under far less, if any, pressure to “design down”; and indeed on the contrary will, if anything, be influenced, not least by their traditional means of remuneration, in the direction of conservative over-design. In such a situation building owners will regard themselves as sufficiently protected by a professional negligence obligation in the absence of this conflict of interest, and will see an advantage in the increased availability, flexibility and cheapness of professional services which the more limited liability permits. The reduced liability will also be less of an inhibition against innovation by professional designers, which an unqualified obligation might stultify, and which will be acceptable to building owners particularly where there are protective factors present, such as the professional’s more long term aim to enhance their reputation by successful designs, as opposed to the more short term profit considerations of manufacturers, sellers and design and build contractors.

An A/E will normally be failing in their duty if, without warning the Employer, they fail to provide for work, whether deliberately or negligently, which is necessary for a satisfactory final result, and which will have to be added by way of variation to the building contract. In the case of *Wilkes -v- Thingoe Rural District Council*, an Architect let contracts for a number of houses for a local authority, and, under pressure to effect economies and bring costs within a governmental “yardstick”, made provision for a smaller number of cookers than there were houses. There were other similar omissions in the bills. It was held that the Architect was liable to the Employer who, had they known of the true cost of completion, would have effected savings elsewhere.

2.7 Delegation

Professional firms in the construction industry frequently offer a wide range of services which may require delegation of administrative or day to day drafting or design work to employees, or the placing of specialist work with outside sub-contractors or sub-consultants.

Where what is being offered by the professional to the client includes the provision of such services, as distinguished from an exercise of the relevant partner's own professional judgment, simple errors or mistakes by subordinates and others may well be treated as a contractual responsibility of the professional, without proof of professional negligence in the normal sense. It would be sufficient if the service in question, if conscientiously performed, would have avoided the damage suffered - in other words, an implied warranty of at the very least due care, and even perhaps in some cases an unqualified one, may be given in regard to the carrying out of the service in question.

In the case of *Arbiter Group Plc -v- Gill Jennings* it was said that:-

“In every case where a duty is delegated there is an in-built risk that the person to whom the task is delegated will make a mistake. The question to be considered is the degree of risk and whether it is appropriate that the delegator should take it.”

The distinction between the act (which can be delegated) and the responsibility (which cannot) is illustrated by the duty of measurement, which need not normally be carried out personally by an Architect or Surveyor.

In the case of *Eaps -v- Williams*, there was a reference to two Surveyors to settle the terms of a mining lease. One of the Surveyors did not go down into the mine himself but based his valuation on the report of a competent agent whom he had sent to inspect it and upon his own knowledge of the neighbourhood. It was held that this fact did not render the award bad.

In the case of *Kirkwood -v- Morrison*, the judge said:-

“The measurement was made it seems, by sworn measurers or skilled persons in their employment. It is not understood that in every instance the sworn measurer, who may be the head of an extensive business, goes himself to the ground, in place of sending a skilled assistant to report to him the details, he adopting the result if it appears to him satisfactory and accepting the responsibility.”

Where a construction professional recommends to the Employer the appointment of another consultant to deal with a particular part of the work, and the Employer does employ such a consultant, the position is as follows:-

“... Where a particular part of the work involved in a building contract involves specialist knowledge or skill beyond that which an architect of ordinary competence may reasonably be expected to possess, the architect is at liberty to recommend to his client that a reputable independent consultant, who appears to have the relevant specialist knowledge or skill, shall be appointed by the client to perform this task. If following such recommendation a consultant with these qualifications is appointed, the architect will normally carry no legal responsibility for the work to be done by the expert which is beyond the capability of an architect of ordinary competence; in relation to the work allotted to the expert, the architect’s legal responsibility will normally be confined to directing and co-ordinating the expert’s work in the whole. However, this is subject to one important qualification. If any danger or problem occurs in connection with the work allotted to the expert, of which an architect of ordinary competence reasonably ought to be aware and reasonably could be expected to warn the client, despite the employment of the expert, and despite what the expert says or does about it, it is in our judgment the duty of the architect to warn the client. In such a contingency, he is not entitled to rely blindly on the expert, with no mind of his own, on matters which must or should have been apparent to him.” (Investors in Industry Commercial Properties Ltd -v- South Bedfordshire DC)

Hudson suggests that “where an A/E delegates design work to others in areas which A/Es either traditionally design and charge, or which is in any case comprehended within the design fees charged, then he will not escape liability if he chooses for his own purposes to delegate design services to another designer, and in particular to contractors or sub-contractors, if they are negligently carried out; that is, he will be warranting due care by that other designer. Where, however, the area of design is obviously outside the expertise of any A/E or of the consultants available in the construction industry, his duty may be limited to the exercise of reasonable care in the selection of such products or specialist services” (*Richard Roberts Holdings Limited -v- Douglas Smith Stimson Partnership*).

A/Es should wherever possible consult with, and obtain, the Employer’s instructions in all doubtful areas of design or selection and endeavour to obtain additional protection for the Employer through separate direct collateral warranties of suitability, etc, in the Employer’s favour, particularly in the case of suppliers or specialists whose products are relatively untried, or where the likely loss, should they prove to be unsuccessful, will be relatively heavy.

2.8 Examination of Site

Whilst not necessarily theoretically bound to visit the site personally in the preliminary stages of his engagement (although obviously that depends on what the appointment says), an A/E who does not do so, or carefully check any surveys or site installation provided by others against what can be seen and measured on site, will be at considerable risk. See further at paragraph 2.15 below.

2.9 Delivery of Drawings, Information and Instructions in Time

In the absence of any express term, the obligation to supply drawings and information is to do so within a reasonable time. Failure to meet this obligation is probably the most common cause of claims by contractors against employers.

There is a lack of legal authority on the exact nature of the professional's duty in this regard, no doubt because, in the vast majority of cases, if a Contractor can show that he has in fact been held up for lack of information, he would be awarded damages, and because, on the other hand, even if a point of time at which information should theoretically be available can be shown to have passed, it will not avail the Contractor if he has not suffered damage. In any particular case, the enquiry invariably becomes one of fact, and the precise identification of the point of time at which the Contractor needed the information, which is usually necessary to establish the quantum of his damages, is also a question of fact which cannot of course be of assistance in other cases on different facts.

It is submitted by *Hudson* that the duty needs to be assessed in the light of the following criteria, among others:-

- “(a) *By far the most important, the Contractor's actual progress, if slower than that shown by or to be inferred from any programme or the stipulated contract period (this will also go, of course, to questions of causation or damage);*
- (b) *The stipulated contract period or intermediate dates (dates to be inferred from these will normally take precedence over ‘optimistic’ earlier dates shown in any post-contract programme furnished by the Contractor, and over the wording of most contract provisions governing the submission and approval of such programmes ...)*
- (c) *The need of a Contractor for reasonable advance knowledge of the works for pre-planning purposes on his part, which obviously will vary considerably according to the subject matter of the information in question;*
- (d) *Whether or not the information relates to a variation;*

- (e) *Any agreed or indicated programmes showing the intended order of working or dates of completion of parts of the work;*
- (f) *Requests or notices by the Contractor indicating his need for the information in question.*

It is submitted that, unless an act or requirement of the owners or some circumstances quite outside the architect's control make it impossible, an architect must, as a matter of business efficacy, impliedly undertake to his client that he will give instructions in time so as to comply with the express or implied requirements of the building contract (which it should be remembered he will normally have recommended to the owner in the first place) and so avoid any claim whether for damages or under the provisions of that contract against the owner - in other words that, subject to the exceptions mentioned, the times for giving instructions to be implied in the building contract and in the architect's contract of employment are identical."

In an engineering contract, the Contractor alleged an implied term that all necessary instructions and details should be given to the Contractor "*in sufficient time to enable the contractors to execute and complete the works in an economic and expeditious manner and/or in sufficient time to prevent the contractors being delayed in such execution and completion*". It was held that it was clear from the terms of the contract that instructions would be given from time to time in the course of the contract, and that what was a reasonable time did not depend solely on the convenience and financial interest of the Contractor. Reasonableness had also to be regarded from the point of view of the Engineer and his staff and of the owners themselves. Other relevant matters affecting reasonableness would be the order in which the works were to be carried out as approved by the Engineer, whether requests for particular details have been made by the Contractor, whether the details related to variations or to the original works, and also the contract period. This list was not exhaustive, and what was a reasonable time was a question of fact having regard to all the circumstances of the case (*Neodox Limited -v- Swinton and Pendlebury Borough Council*). As far as the late instructing of variations is concerned, any liability of the A/E will depend on whether the reason for a later variation, and hence of any subsequent more detailed information, implies negligence or fault on the part of the A/E, either in failing properly to pre-plan the work or due to a defective design on his part requiring subsequent correction.

Hudson says as follows:-

“Difficult questions of fact can arise as to the time by which the Contractor is entitled to expect information from the Architect or Engineer to enable orders to be placed with ... sub-contractors and suppliers. It is clear that an owner will usually have discharged his obligation if the information is made available in time to permit the sub-contractor to quote delivery or completion dates consistent with the Contractor’s programme or progress. Shortages or lengthened delivery dates have a habit of occurring very suddenly in industry, and the first that the parties may know of any difficulty may be when the sub-contractor, on being asked to quote or receiving an order, announces that he cannot supply or do the work in the required time. It does not necessarily follow in such a case, it is submitted, that there has been any breach of duty by the Architect. Relevant facts in determining what was a reasonable time for such information to be given would include, it is suggested:-

- (a) Whether the goods and services concerned were well known in the industry to be in short supply or the subject of long delivery dates, so requiring very early nomination by the A/E or perhaps provisional orders being placed even before the appointment of the main contractor;*
- (b) Whether the availability of the goods, by their nature, ought to be expected to fall within the Contractor’s knowledge (for example, reinforcement steel, or bricks);*
- (c) Whether, in the light of both the above, he had made any request for the information or an early nomination;*
- (d) Whether, on the other hand, the matter was purely within the owner’s sphere (for example, complicated pipes and specials requiring to be specially made for the contract) and, if so, whether reasonable enquiries and assurances as to availability had been made and obtained by the Architect or Engineer in good time.”*

2.10 Instructions as to methods of working and temporary works

Unless the building contract expressly stipulates to the contrary, the Contractor is entitled to choose his own methods of working or temporary works; the corollary of this is that the Contractor is not entitled, when faced with difficulties, to demand or require instructions as to how to overcome them. The Architect’s duty is normally confined to stipulating the final permanent result required, and if this has already been done, he is under no further duty to assist, and if inclined or requested to do so, should normally be careful to adopt a facilitative attitude rather than give mandatory instructions.

If an Architect or Engineer sees the Contractor using, or proposing to use, a method of working which he considers potentially unsafe or likely to fail in its intention, his duty to the Employer will require him to balance the advantage to the Employer of the method he himself prefers against the fact that by intervening and giving an instruction, he may expose the Employer to a financial claim, if the Contractor can show that his own method would have been both safe and equally efficacious (unless, of course, the building contract expressly prescribes the method of working or provides that the Contractor's price is to include for any one of various methods to be chosen at the discretion of the Architect or Engineer.) The Employer's interest may require the Architect to intervene in the Contractor's method of working or temporary works if he has power to do so under the building contract, in the following situations.

- “(a) Where the contractor's methods of working are contrary to what is specified (almost always the basic reason for specifying a particular working method or practice expressly in the specification is its relevance to the satisfactory quality of the final permanent work). Here there will, of course, be little doubt as to the power to enforce the contract, since there is breach of an express term of the contract;*
- (b) Where, in the absence of express designation of the required working methods, those being used by the contractor are likely to imperil the quality of the permanent work (and usually will, therefore, constitute a breach of the implied term of good workmanship, it is submitted). Here an implied power to intervene may be less evident;*
- (c) Where the contractor's methods are unsafe, and an accident would delay the project to the serious prejudice of the owner, or might damage adjoining property, exposing the owner to claims whether for property damage or personal injuries, for example;*
- (d) To assist a contractor who has got into difficulties by relaxing the specification or varying the permanent work where the owner's interest in speedy completion is sufficiently important (though on terms that no additional payment will be due from the owner).”*

(Hudson's Building and Engineering Contracts - 11th Edition)

2.11 Knowledge of legislation, building regulations, rights of adjoining owners, etc

A construction professional needs to have a reasonable working knowledge of the law relating to relevant legislation, building regulations, rights of adjoining owners, etc, and

also of the requirements as to service of notices on local or other authorities or adjoining owners and deposit or submission of plans for planning approval, etc.

A professional should clearly enquire of the Employer whether there are any restrictions affecting the land to be built on, or its use for the purpose of the proposed building or work and should consider and advise the Employer as to any interference with right to light and air, and party wall matters. If they design or construct work without proper reference to the rights of adjoining owners, they will inevitably render themselves liable for negligence. However, the obligations of a construction professional as to legal knowledge will not be of the same standard as those of a legal adviser, and will be correspondingly diluted or removed if the Employer takes legal advice or has legal advisers available in relation to the contemplated project.

The general principle is that where a professional person such as an A/E agrees to act in an area where some knowledge and understanding of the principles of law applicable is required if the work is to be done properly, then they must have a sufficient working knowledge of those principles of law in order reasonably to protect their client's interests.

2.12 Excess of cost over estimates

In the earliest stages of the employment of the construction professional, the Employer will invariably indicate or impose limitations on the cost of the proposed project. Even if no mention of this is made, it has been suggested that an A/E owes a duty to design works capable of being carried out at reasonable cost, having regard to their scope and function. There will, therefore, in most cases be an express or implied condition of the professional's employment that the project should be capable of being completed within a stipulated or reasonable cost, and an A/E will be liable in negligence if, in fact, the excess of cost is sufficient to show lack of care or skill on their part.

In the case of *Moneypenny -v- Hartland*, the judge said:

“A man should not estimate a work at a price at which he would not contract for it; for if he does, he deceives his employer... If a surveyor delivers an estimate greatly below the sum at which a work can be done, and thereby induces a private person to undertake what he would not otherwise do, then I think he is not entitled to recover; and this doctrine is precisely applicable to public works. There are many in this metropolis which would never have been undertaken at all, had it not been for the absurd estimates of surveyors”.

One of the earliest cases to establish this principle was *Flannagan -v- Mate*, in 1876; the claimant was instructed to prepare designs for a building in Victoria, not to exceed £4,000

in cost. He prepared plans, and tenders were invited; the lowest tender was £6,000. It was held that he was not entitled to recover his remuneration for the work he had done.

The clearly established principle is now that if the estimating error is so serious that the services amount to a total failure of consideration, and so are of no value to the Employer, the A/E will not be entitled to his fees. So, too, if the Employer would not have proceeded with the project, had he known the true cost. However, should the Employer decide to sue for damages, he will normally be bound to give credit, on general principles, for the amount of fees payable, had the contract been properly performed (*Hutchinson -v- Harris*). The measure of damages for breach of this duty may often not be very great, since if discovered an Employer will have lost little, but just suffered a delay in the project coming to fruition. In cases where the excess of cost over estimate is not appreciated until the work has been completed, the measure of damage may be difficult to assess since against the price the Employer has had to pay, work done, to a corresponding value, has been carried out and there has therefore been no “loss”. The A/E may well lose their right to remuneration, however, under the principle in the *Money Penny* case (see above). See further at paragraph 2.19 below.

2.13 Recommending Contractors

A construction professional does not of course guarantee the solvency or capacity of a Contractor but it may be that it is their duty to make reasonable enquiries as to the solvency or competence/capacity of the Contractor if he, rather than the Employer, is responsible either directly or indirectly for the selection of the Contractor chosen to carry out the work, particularly in an area in which he is accustomed to practise and maybe expected to have local knowledge.

Apart from a possible affirmative duty of care such as this, a construction professional will be liable to the Employer if they carelessly give a positive recommendation in favour of a Contractor.

In the case of *Pratt -v- George Hill & Associates* in 1987, an Architect wrote to their client saying that two firms of tendering contractors were “very reliable”. The client chose one of them. In fact, the chosen Contractor was wholly unreliable, leaving the work in such a state that it needed to be effectively reinstated from slab level. The Client had paid some £2,000 on interim certificates and subsequently incurred costs of just under £4,000 in an arbitration against the Contractor before the Contractor became insolvent. The judge found that the Architect had been in breach of their duty of care to their client and that the disastrous state of the works was due to the unreliability and incompetence of the Contractor, but disallowed these two sums on the ground that they actually arose from the insolvency of the Contractor. The case then went to the Court of Appeal, which held that as a matter of causation, the losses concerned were caused by the Contractor’s lack of

competence and the state in which he had left the work, and the two sums were recoverable by the Claimant.

More recently, in *Partridge -v- Morris*, the Judge held that the Architect's duty of advising the Employer of the relative merits of tenders extended to the consideration of financial acceptability. He said:

"In my view the duty which the defendant undoubtedly undertook of advising the plaintiff on the relevant merits of the tenders extended to consideration of the financial acceptability of the tenderers. It was a matter upon which the plaintiff needed advice; there was no other member of the professional team, as there might be, more immediately concerned with that responsibility, and it therefore remained with the defendant as the plaintiff's general professional adviser in relation to the review of tenders and the choice of a contractor".

The Judge held that the Architect should have undertaken one or more of the following checks on the Contractor's financial standing:-

- Checking with Builders Merchants;
- Obtaining a bank reference;
- Obtaining trade credit references;
- Making enquiries of other Architects as to the Contractor's financial standing;
- Undertaking a Company Search or asking the Contractor themselves for their audited and latest management accounts.

He held that the failure to make the necessary enquiries was causative of damage because, but for the failure by the Architect to make one or more of these enquiries, the Contractor would not have been selected.

2.14 Recommending a form of contract

It is the duty of a construction professional, if more experienced advice is not available to the Employer, to advise and recommend a form of contract giving the Employer adequate protection of their reasonable interest as building owner.

A construction professional who recommends to their Employer which form of contract to use is under a heavy responsibility to see that everything possible is done both in the preliminary and later design and pre-contract stages to reduce the risks in that form of contract which lie on the Employer's shoulders. In the case of those contracts which are so drafted as to deprive the Employer prematurely of their remedies for defective work

against the Contractor, for example through the mechanism of a binding final or other certificate, this must, it is often argued, require a higher degree of frequency and thoroughness of inspection by the professional who has recommended such a contract to their client. However, as in the case of all professionals, the breach of duty must be clear and self evident. To show that better methods might have been used is not of necessity to show that the methods which were used were so unprofessional or so unskilled as to amount to negligence. In the case of the administration of building contracts, where the contract is susceptible to different meanings, it may be that if a professional acts honestly but erroneously upon one construction, they will not be liable for so doing. However, this must be a question of degree, particularly if the contract in question is a standard form recommended by the professional to their client, and the error relates to an everyday administrative matter under that form which is either basic or upon which adequate advice or information was available. Thus, where an Architect deliberately certified the full value of work done for interim payment without any deduction for defective work of which he was aware, on the ground that the contractual retention would be sufficient protection for the building owner, the Court of Appeal considered that as there was no specific mandate in the contract for the use of retentions for that purpose, the Architect was in breach of their duty to their client. (*Townsend -v- Stone Toms & Partners (a firm)*)

2.15 Supervision

There are 3 principal areas of a professional's responsibility to the Employer during the course of supervising a construction contract. These are:-

- 1) The prevention, detection and correction of defective work by the Contractor;
- 2) The more difficult role of intervention or non-intervention, particularly bearing in mind the Contractor's fundamental obligation to complete the works for the agreed price, including whatever contingent expenditure may be necessary to overcome difficulties, if the Contractor's working methods or temporary works prove unsuccessful or cause concern - involving a judgment as to whether or not, in the Employer's best interest, to intervene and give instructions (see paragraph 2.10 above);
- 3) Should there be any indications of potential failure of the permanent design, intervention to correct it.

Obviously a professional who undertakes to supervise the works must exercise due care during construction to ensure that the materials and workmanship conform to the contractual requirements.

In the task of supervision, the professional, though he may be assisted by others, cannot escape responsibility by delegation, unless his appointment expressly so provides. He may

make use of assistants, provided that he retains control of the work and does not cease to exercise his own supervision and judgment. See paragraph 2.7 above.

One factor calling for a higher degree of supervision would be where bad work by the Contractor had already been seen or reported:-

“I think that the degree of supervision required of an Architect must be governed to some extent by his confidence in the Contractor. If and when something occurs which should indicate to him a lack of competence in the Contractor, then, in the interest of his Employer, the standard of his supervision should be higher”. (Sutcliffe -v- Chippendale & Edmondson).

In this case, the Judge accepted evidence that the Quantity Surveyor owed no duty in respect of defective work and that it was the Architect’s function to instruct him whether or not to disallow the value of defective work from interim certificates, although it is recognised that generally speaking a Quantity Surveyor who sees, or should have seen, defective work when visiting site will owe a duty to the Employer at least to report it to the Architect for action or final decision by the latter.

In the case of *Jameson -v- Simon*, Lord Young drew an unfavourable comparison between the artistry inherent in the design process and the pedestrian nature of the supervision exercise, saying:-

“To some extent an Architect is an artist - that is, as regards the design and plan. But for the rest his work is just ordinary tradesman’s work, drawing specifications and supervising the work”.

Most claims against Architects and, to a lesser extent, Engineers, have arisen out of their failure to note and report on deficiencies in the Contractor’s works; the authorities make it graphically clear that the “tradesman’s work” of supervision is just as important as the apparent artistry involved in the design.

One of the best known observations about the nature, scope and extent of an Architect’s specific duty to supervise the works appears in the speech of Lord Upjohn in the case of *Eastham Corporation -v- Bernard Sunley & Sons Limited*; he said:-

“As is well known, the Architect is not permanently on the site but at... intervals it may be of a week or a fortnight, and he has, of course, to inspect the progress of the work. When he arrives on the site there may be very many important matters with which he has to deal. The work may be getting behindhand through labour troubles; some of the suppliers of materials or the sub-contractors may be lagging; there may be physical trouble on the site itself, such as finding an unexpected

amount of underground water. All these are matters which may call for important decisions by the Architect. He may in such circumstances think that he knows the builders sufficiently well and can rely upon them to carry out the job; but it is more important that he should deal with urgent matters on the site and that he should make a minute inspection of the site to see that the builder is complying with the specifications laid down by him... It by no means follows that, in failing to discover a defect which reasonable examination would have disclosed, in fact the Architect was necessarily thereby in breach of his duty to the building owner so as to be liable in an action for negligence. It may well be that the omission of the Architect to find the defect was due to no more than an error of judgement, or was a deliberately calculated risk which, in all the circumstances of the case, was reasonable and proper”.

In *Corefield -v- Grant & Others*, the Judge was not impressed by an argument that the Architect’s supervision was negligent simply because he had spent so few hours on the site. He said that what was adequate by way of supervision was not to be tested by the number of hours worked on site or elsewhere, but by asking whether it was enough to do all the tasks that an Architect had to perform. He said that at some stages of some projects exclusive attention may be required to the job in question: at other stages, it will be quite sufficient to give attention to the job only from time to time. On the facts, he found that the Architect was obliged to carry out a number of tasks, including supervision, requiring a skilled and experienced assistant which he did not have.

The mere fact that the Contractor’s work was defective will not necessarily lead to a finding that the A/E failed to supervise the work properly. That is particularly true of defects which are the result of deliberate actions on the part of the Contractor, as distinct from negligence or incompetence.

In *Kensington and Chelsea Area Health Authority -v- Wettern Composites* the judge found that the fact that the Architect had become aware during the works of poor workmanship and “a lack of frankness” on the part of the relevant subcontractors meant that the standard of supervision should have been higher. He also found that the degree of supervision should be greater where poor workmanship could result in physical danger.

“*Professional Negligence and Liability*” sets out the following analysis, derived from case law:-

- “(i) *They need to make periodic inspections of their design or satisfy themselves it is buildable, and to consider making alterations to improve its “buildability”;*

- (ii) *They should ensure that they inspect important elements of the construction work and, if necessary, require the contractor to give notice of when a particular element is going to be constructed....[especially if it] will thereafter be hidden from view. They should instruct the contractor not to cover up that element of work until they have a reasonable opportunity to inspect ...*
- (iii) *They are not entitled to assume that the contractor will tell them when an important element is going to be constructed simply because he has done so in the past ...*
- (iv) *If there is an important element of the construction which is to be repeated throughout the building or site, they should take particular steps to inspect and approve the construction of that element on the first occasion it is attempted by the contractor....*
- (v) *If the architect or engineer takes a design decision which means that a potentially risky element of design is included in the work to be carried out, it is incumbent upon [them] to exercise the closest and most rigorous inspection and supervision ...”*

2.16 Administration of Contract

The terms of the building contract require an Architect to take a number of actions in all of which he will owe a duty of care to the Employer.

It is argued that there is a duty to consult the Employer beforehand in all but trivial or emergency matters, for example to obtain the Employer’s prior approval of a variation and its likely cost. In addition, the Architect will need to check the Contractor’s final account on completion of the works, in association with any Quantity Surveyor dealing with quantum, but in self-determining any matters of contractual entitlement or liability.

As I have already stated above, an A/E will not be liable if, in the course of administering the contract vis a vis the Contractor, he honestly adopts one of two possible constructions in interpreting the contractual obligations of the Parties.

2.17 “Quasi-Judicial” Duties

Normally, as between the Employer and the Contractor, the Employer does not warrant that the certifier will be skilful or competent, but only that he will be honest and independent in exercising that function wherever, under the terms of the contract, he is required so to act. It will, accordingly, be a breach of contract, as against the Contractor, if the Employer applies pressure and seeks to influence the A/E in reaching his decisions when acting in that capacity (*Sutcliffe -v- Thackrah*). In that case the Judge said as follows:

“The building owner and the Contractor make their contract on the understanding that in all such matters [where a decision has to be made which will affect the amount of money which the contractor gets] the Architect will act in a fair and unbiased manner and it must therefore be implicit in the owner’s contract with the Architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the Contractor.”

In many cases, an A/E is not, when certifying, ruling upon any dispute formulated between the Employer and Contractor and referred to him for settlement and decision, but is merely concerned, without consciously resolving any dispute as such, to decide matters such as value, quality of work, or EOTs as part of an administrative function evidenced by his certificate. Cases have now confirmed that he is to be regarded as acting as agent of the Employer and not in any arbitral or “quasi-arbitral” or “quasi-judicial” capacity. Even where the certificate is to be final and conclusive, this remains the case. Subject only, therefore, to the case where an A/E is called upon to rule on a formulated dispute between the Employer and Contractor, the duties owed to the Employer by a Certifier will differ in no respect from his other duties, save that, in discharging them, he will not be obliged to obey the Employer’s instructions in regard to them, as will be the case with regard to some of his other duties.

The functions and duties of certifiers and others with decision-making roles under construction contracts was recently looked at in detail in the case of *Scheldebouw BV -v- St James Homes (Grosvenor Dock) Limited*, where judgment was given by Mr Justice Jackson, the judge in charge of the Technology & Construction Court, on 16 January 2006.

In that case, he was looking in particular at the functions and duties of the Construction Manager, but he took the opportunity to look at the duties of certifiers generally, reviewing the case law to date.

In particular, he quoted the following extracts from previous judgments:-

“It has often been said, I think rightly, that the architect has two different types of function to perform. In many matters he is bound to act on his client’s instructions whether he agrees with them or not, but in any other matters requiring professional skill he must form and act on his own opinion.

[The architect’s] duty is to act fairly when exercising his professional skill in considering whether work done satisfied the contract requirements as to work to be done..... his duty to act fairly does not conflict with, but rather is part of, his duty to safeguard and look after the interests of the building owner who has employed him.” (Sutcliffe -v- Thackrah)

“I would not be coy about saying that the engineer has to act “fairly”, so long as what is regarded as fair is flexible and tempered to the particular facts and occasion

Even, however, if the decision in question was of the more basic kind referred to in the earlier authorities, all of those authorities appear to consider that the engineer (or architect) must nevertheless act fairly, albeit that concept in the ordinary context where the engineer is employed by the building owner means less than it would do were the engineer acting in a judicial or quasi-judicial capacity. For the same reason “independence” and “impartiality” must necessarily be given a more restricted meaning than they regularly receive in other contexts. Even so, the engineer must “retain his independence in exercising his skilled professional judgment.”... He must “act in a fair and unbiased manner” and “reach his decisions fairly holding the balance”.... If he hears representations from one party, he must give a similar opportunity to the other party to answer what is alleged against him... he must “act fairly and impartially” where fairness is “a broad and even elastic concept” and impartiality “is not meant to be a narrow concept”

(Amec Civil Engineering Limited -v- Secretary of State for Transport)

Mr Justice Jackson in the Scheldebouw case said as follows:-

“33. Let me now draw the threads together. In many forms of building contract a professional person retained by the employer, and sometimes a professional person directly employed by the employer, has decision-making functions allocated to him. I will call that person “the decision-maker”. The decisions which he makes are often required to be in the form of certificates, but this is not always so. For example, there are many contracts (of which the present one is an instance) in which extensions of time do not take the form of certificates.

34. Three propositions emerge from the authorities concerning the position of the decision maker.

(1) The precise role and duties of the decision maker will be determined by the terms of the contract under which he is required to act.

(2) Generally the decision-maker is not, and cannot be regarded as, independent of the employer.

- (3) *When performing his decision making function, the decision-maker is required to act in a manner which has variously been described as independent, impartial, fair and honest. These concepts are overlapping but not synonymous. They connote that the decision-maker must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer”.*

2.18 Duties to the Employer independent of Contract

Section 1(1) of the Defective Premises Act 1972 provides:-

“(1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty

- (a) If the dwelling is provided to the order of any person, to that person;*
- (b) Without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling:*

to see that the work which he takes on is done in a workmanlike, or as the case may be, professional manner, with proper materials and so as regards that work the dwelling will be fit for habitation when completed.”

Other duties arise under the Construction (Design and Management) Regulations 1994 (“CDM”) which impose the following obligations upon a designer:-

“(a) Not to prepare a design for any project unless he has taken reasonable steps to ensure that an Employer is aware of the duties to which he is subject by reason of the Regulations.

(b) To ensure that any design that he prepares and which he is aware will be used for the purpose of construction work includes adequate regard to the need:

- (1) To avoid foreseeable risks to the health and safety of any person at work carrying out construction work or cleaning work in or on the structure at any time or of any person who may be affected by the work of such a person at work;*
- (2) To combat at source risks to the health and safety of any person at work carrying out construction work or cleaning work in or on the*

structure at any time or of any person who may be affected by the work of such a person at work;

- (3) To give priority to measures which will protect all persons at work who may carry out construction work or cleaning work at any time and all persons who may be affected by the work of such persons at work over measures which only protect each person carrying out such work.*
- (c) To ensure that the design includes adequate information about any aspect of the project or structural materials which might affect the health or safety of any person at work carrying out construction work or cleaning work in or on the structure at any time or of any person who may be affected by the work of such a person at work.*
- (d) To co-operate with the planning supervisor and with any other designer to enable each of them to comply with the requirements and prohibitions placed upon them in relation to the project.” (Professional Negligence and Liability).*

The obligations at (b) and (c) above are subject to a requirement of reasonable practicality.

2.19 Quantity Surveyors

In theory, the Quantity Surveyor (QS) should receive complete drawings and a specification from the Architect before he starts to prepare the Bills of Quantities.

An important aspect of the QS's work will be the drafting of the preambles to the various bills and of the individual items in the bills, which must embody the Architect's specification.

The bills will normally form the contractual basis of valuing variations of the work, as opposed to the discrepancies between billed and actual quantities, arising from errors or inaccurate estimates of the quantities, which it is the purpose of a measured contract, but not a lump sum contract, to correct.

There is a dearth of authority upon the standard(s) of skill or care owed by a QS to the Employer. Since, however, his task involves very large numbers of arithmetical calculations, it seems that an occasional slip or error may be insufficient to sustain an allegation of professional negligence against him.

In the case of *London School Board -v- Northcroft* in 1889 a school board employed a QS for measuring up buildings of a value of £12,000 which had been completed. They brought an action against him for negligence in making two clerical errors in the calculations, whereby the board had overpaid two sums, one of £118 and the other of £15. It was held that as the QS had employed a competent skilled clerk who had carried out hundreds of intricate calculations correctly, the QS was not liable for these two errors.

Given his professional status and skills, it is argued that a QS must employ them for the Employer's benefit, should he have an opportunity to do so, even though some other adviser, such as the A/E, must bear the prime responsibility. If he notices defective work while visiting for the purposes of making his valuations, for example, he should bring what he has seen to the A/E's attention, in case the latter has missed it. Considering the high degree of skill professed by QSs in the detail of construction methods, there would seem to be no reason why they should not also be joined as defendants by an Employer where, for example, the defects were so glaring that they should have been seen by them in the course of valuation inspections, as well as by the A/E.

The mere fact that the mistake in question may be a simple mathematical error will not be sufficient to rebut an allegation of negligence. In *Tyrer -v- District Auditor of Monmouthshire* there were a number of successful claims against the QS, including the allegation that the QS had approved excessive quantities of prices which led to irrecoverable overpayments to the Contractor. There was, in addition, a simple mathematical error in issuing an interim certificate. The Judge found that the error could have happened at any time, but "the obligation was on the appellant to ensure that adequate checks were made".

In the absence of any contract drawings or specifications, the bills must contain a full description of all the work necessary to achieve the desired result. In the case of *Keete -v- King*, the lack of provision of any shoring in the bills constituted "a grave omission". The Court held that a duty was owed to the Employer to prepare contract documents which were sufficient for the purpose of the erection of the building.

If there are drawings or specifications, the bills must be consistent with them so as to provide a comprehensive and clear summary of the building works required. Discrepancies between the contract documents are usually provided for in the standard forms of contract, and are normally resolved by the issue of an instruction which can entitle the Contractor to additional payment. In such circumstances, the Employer may be able to recover such monies from the negligent professional who failed to spot the discrepancy in the contract documents before they were signed.

If the QS is engaged by the Architect, the Employer will ordinarily be able to look to the Architect if there are any errors in the bills, and the Architect will then of course pass on any such claims to the QS. Depending on the facts, the QS may owe a duty of care to the Employer, whether or not there is a direct contractual link in the form of a collateral warranty.

It is only in extremely rare circumstances that the QS preparing bills or other contract documents will owe a duty of care to the Contractor.

The QS, like any construction professional, owes a duty to the person by whom he is employed to carry out his work. In general, the test is whether he has failed to take the care of an ordinary competent QS in those circumstances.

As in the case of an Architect or Engineer, a QS providing an estimate must assume, in the absence of any express instruction to the contrary, that the Employer is looking for a forecast of the likely final cost of the project, and not an estimate based on current prices. An estimate must make an allowance for, or give warning about, likely inflation and contingencies. The QS must clearly indicate the extent to which his estimate is subject to any variation or possible change.

The estimates of the building costs themselves must be reasonably accurate and capable of being justified in detail. In the case of *Savage -v- Board of School Trustees*, the estimate of \$110,000 was twice given in respect of proposed works. When tenders were received, the lowest was \$157,800, 43% over the estimated cost. The scope of the project was significantly reduced. The claimant again estimated that the project would cost no more than \$110,000, yet the lowest tender for even the scaled down project was \$132,900. The Judge commented “So on this one school, the plaintiff was three times gravely in error in his estimates. And three times are a lot”.

The finding that the plaintiff had been negligent was based largely upon the scale of the underestimation, and the frequency with which it was repeated. But on analysis, the Court’s conclusion was based in large part upon a careful consideration of the plaintiff’s workings, and the conclusion that “much of the plaintiff’s difficulty was caused by his methods of checking and re-checking his estimates”. The mere fact that an estimate is very significantly less than the final cost is not, on its own, enough to justify a finding of negligence. In *Copthorne Hotel (Newcastle) Limited -v- Arup Associates*, the claimant alleged negligence in respect of the defendant’s estimate for piling works. The estimate allowed £425,000 for this work; the successful tender was for £930,000. The Judge said of this discrepancy as follows:-

“I hope and believe that I am not over simplifying if I record the impression that the plaintiff’s main hope was that I would be persuaded to find in their favour

simply by the size of the gap, absolutely proportionately, between the cost estimate and the successful tender.

The gap was indeed enormous. It astonished and appalled the parties at the time and it astonishes me. I do not see, however, how that alone can carry the plaintiff home. ... Culpable underestimation is of course one obvious explanation of such discrepancy, but far from the only one. The Contractor may have over-specified from excessive caution, or to obtain a greater profit, or to suit the drilling equipment available, or for some other reason. Market conditions may have changed, or have been subject to some distortion outside the knowledge or foresight of a reasonably competent professional adviser. These possibilities are not mutually exclusive among themselves or as between them and Arup's negligence, but without evidence on which I can make a finding as to the sum which Arup, acting with due care and skill, should have advised... I am not in a position to find that negligence was even one of the causes."

As stated in paragraph 2.12 above, if the Employer specifies a cost limit, the QS must consider whether the limit is likely to be exceeded and give any relevant warning. In *Flanagan -v- Mate* the QS's fee claim failed because no warning had been given by them to the Employer that the Employer's cost limit could not be achieved.

Although a building project might have cost the Employer more than he reasonably anticipated, it will also be worth more than would otherwise have been expected, and the basis for the assessment of damages arising from a negligent estimate is far from clear cut. The overrun may be the starting point for any assessment of damages. Even if the claimant has ultimately obtained value for his unexpected expenditure, he may still have a claim for increased interest payments on the additional money borrowed to finance the more expensive project. Other possible heads of claim would include any additional maintenance or staff costs for the completed building arising due to the additional cost of the work.

2.20 Project Managers

According to the Code of Practice for Project Management for Construction and Development, published by Blackwell Publishing (3rd Edition):-

"The Project Manager, both acting on behalf of, and representing, the client, has the duty of providing a cost-effective and independent service, selecting, correlating, integrating and managing different disciplines and expertise, to satisfy the objectives and provisions of the project brief from inception to completion. The service provided must be to the client's satisfaction, safeguard his interests at all times, and, where possible, give consideration to the needs of the eventual user of the facility.

“The key role of the Project Manager is to motivate, manage, co-ordinate and maintain the morale of the whole project team. This leadership function is essentially about managing people and its importance cannot be overstated. A familiarity with all the other tools and techniques of project management will not compensate for shortcomings in this vital area. In dealing with the project team, the project manager has an obligation to recognise and respect the professional codes of the other disciplines and, in particular, the responsibilities of all disciplines to society, the environment and each other...”

It is essential that, in ensuring an effective and cost-conscious service, the project should be under the direction and control of a competent practitioner with a proven project management track record usually developed from a construction industry - related professional discipline. This person is designated the Project Manager and is to be appointed by the Client with full responsibility for the project. Having delegated powers at inception, the Project Manager will exercise, in the closest association with the project team, an executive role throughout the project...

The duties of a Project Manager will vary depending on the Client’s expertise and requirements, the nature of the project, the timing of the appointment and similar factors. If the Client is inexperienced in construction the Project Manager may be required to develop his or her own brief. Whatever the Project Manager’s specific duties in relation to the various stages of a project are, there is the continuous duty of exercising control of project time, cost and performance. Such control is achieved through forward thinking and the provision of good information as the basis for decisions for both the Project Manager and the Client.”

The Code of Practice includes a matrix correlating suggested project management duties and the client’s requirements, and goes on to say as follows:-

“The skills a Project Manager will use during the course of a project will include:-

- *Communication:- using all means, the foremost skill.*
- *Organising:- using systems and good management techniques.*
- *Planning:- via accurate forecasting and scheduling.*
- *Co-ordination:- by liaising, harmonising and understanding.*
- *Controlling:- via monitoring and response techniques.*
- *Leadership:- by example.*
- *Delegation:- through trust.*

- *Negotiation:- by reason.*
- *Motivation:- through appropriate incentives.*
- *Initiative:- by performance.*
- *Judgment:- through experience and intellect”*

The specific activities to be undertaken by the Project Manager will of course be set out in his/her appointment in each case. They may include reviewing, and in some cases developing, the detailed project brief with the Employer and any existing members of the project team to ensure that the Employer’s objectives will be met, and establishing, in consultation with the Employer and the other consultants, a project management structure and the participants’ roles and responsibilities, including communication routes.

In GC/Works/5, the duties of the PM are set out in Annex 1; if the PM is also the Lead Consultant, then the duties in Annex 8 will apply as well.

The PM’s role will inevitably focus in particular on monitoring the performance of the main contractor and the progress of the works, as well as monitoring the performance of the other consultants. The PM will need to anticipate and resolve potential problems before they develop, wherever possible, and, generally speaking, the “hard skills” required will include planning, scheduling, organisational ability, report writing, information assembly, cost control, innovation, decision making and prioritisation.

The PM will need to know how to manage change, ideally maintaining a register of changes and variations, cross-referenced to the Contractor’s requests for instructions, and possible contract claims. This register should include budget costs and final costs for reporting to the Employer on a regular basis.

The PM will need to ensure that accurately detailed daily diaries are kept by key personnel and that events are carefully recorded.

A fundamental aspect of the PM’s role is the regular reporting of the current status of the project to the Employer. The PM needs to ensure an adequate reporting structure is in place with the Consultants and the Contractor; reporting is required for a number of reasons, including:-

- To keep the Employer informed of the project status.
- To confirm that the necessary management controls are being operated by the project team.
- To provide a focused discipline and structure for the team.

- As a communication mechanism for keeping the whole team up to date, and
- To provide an auditable trail of actions and decisions.

Progress reporting should record the status of the project at a particular date against what the position should have been; it should cover all aspects of the project, identify problems and decisions taken or required, and predict the outcome of the project.

Annex 8 of GC/Works/5, setting out the duties of the Lead Consultant, provides, in paragraph 3, that

“The Lead Consultant’s primary duty will be to lead the team of other Consultants appointed by the Employer for the Project and to ensure satisfactory co-ordination of their designs, recommendations and reports and, where required in the following duties and at other times necessary to ensure the satisfactory outcome of the Project, communicate these matters to the Project Manager.”

The Lead Consultant and the PM will often be one and the same.

Such design “co-ordination” will include the consideration of all relevant issues, such as health and safety obligations, environmental requirements, loading considerations, space and special accommodation requirements, standards and schedule of finishes, site investigation information/data, availability of necessary surveys and reports, planning consents and statutory approvals and details of internal and external constraints. The PM will be acting as the interface between the design consultant and the Employer.

As with all construction professionals, the primary obligations owed will be found in the express and implied terms of the PM’s appointment. As there is, as yet, no formal recognition of a distinct profession of PM, it is likely that when ascertaining the relevant duty of skill and care, the court will look at the profession from which the PM comes. In other words, if the PM is an Architect, the standard will be the standard of skill and care to be expected of a reasonably competent architect holding himself out as carrying on project management work, etc.

A number of general observations regarding the role of PMs were made in the case of *Royal Brompton Hospital NHS Trust-v- Hammond* in 2003, when the Judge said that:-

- (a) Project management is still an emergent professional discipline, in which professional practices as such have not yet developed or become clearly discernable. The standard of care required of a PM is therefore likely to

depend upon his particular terms of engagement and of the demands of the particular project;

- (b) Nevertheless it was clear that a central part of the role of PM was to be “co-ordinator and guardian of the client’s interest”.
- (c) Moreover, the terms of engagement of other consultants will be material in defining the scope of the PM’s duties, since duplication of the function is not expected. For example, on the facts of that case, although the Architect was the contract administrator formally appointed under the contract, that function had been transferred de facto to the PM;
- (d) The PM is the Employer’s primary representative and should be regarded by other consultants as, in effect, an Employer (albeit a highly informed Employer) and should be kept fully advised by them. The expertise and knowledge of the PM will affect only the extent to which advice needs to be spelled out; the essential elements of the advice must always be clearly given although it may be thought to be pointing out the obvious;

Construction professionals acting as Contract Administrator or PM must have both a knowledge of the fundamental principles of construction law and an ability to apply those principles in the administration of building contracts and the management of construction projects. In many cases what is required is not so much knowledge of the general law but rather a good understanding of the operation of the standard forms of building contract. Given the above, care should be taken to ensure that an expert witness in a claim against a PM has appropriate qualifications. In the case of *Pride Valley Foods Limited -v- Hall & Partners (Contract Management) Limited* in 2001, the Judge said:-

“There is an initial difficulty in accepting expert opinion evidence in relation to the duties of Project Managers. There is neither a chartered or professional institution of Project Managers nor a recognisable profession of Project Managers. Insofar as it may be appropriate to accept expert evidence, the nature of the evidence that might be acceptable will depend on what the Project Manager has agreed to do.”

As the PM’s role is concerned largely with supervision and co-ordination, most professional negligence actions against PMs involve an allegation that the PM failed to control particular aspects of the costs, failed to ensure that other construction professionals had access to correct information, or failed to prevent another construction professional from making an important error. However, applying the theoretical to the practical is not always easy.

In the case of *Chesham Properties Limited -v- Bucknall Austin Project Management Services*, the claimant sued both the Architect and the PM in respect of what it alleged were excessive extensions of time together with loss and expense awarded to the Contractor. The Court found that where it would have been apparent to a reasonably competent PM that the Architect, Engineer and/or Quantity Surveyor were not performing their respective duties, he had an obligation to inform the Employer. The case illustrates the potential width of the duties owed by PMs managing the professional input of a variety of multi-disciplined contributors, particularly given that the conventional professional team had been engaged for some period of time before the PM came on board. The Judge was of the view that:-

“The Project Manager was plainly under a duty, on the true construction of the contract in such terms and made in such context, to report to the plaintiff on deficiencies in performance on the part of its co-defendants.”

However, where the claimant made the same complaint, in the case of *Royal Brompton Hospital NHS Trust -v- Hammond (No.7)*, the Judge found that it was not part of the PM’s duty to second-guess the decisions of the Architect.

Whilst a claim against the Architect succeeded in respect of their negligence in granting a 5 week extension of time, the claim against the PM was held to be based upon fundamental misconceptions as to the nature of the PM’s obligations under its retainer. The PM’s role in relation to the consideration by the Architect of applications for extensions of time was essentially found to be to ensure that the Architect dealt with such applications within a reasonable time.

There are relatively few reported cases concerning PMs alone; most claims are likely to be ancillary to claims against other professionals. For example, in both the above cases, the claims against the PMs were ancillary to the claims against the Architect for negligent over-certification. When considering how much of the loss should be borne by the PM, the court should have regard to the extent to which poor management was really the cause of the problem.

Further practical examples of claims involving PMs include the cases of *Pozzolanica Lytag Limited -v- Bryan Hobson Associates*, and *Palermo Nominees Pty Limited and Micro Bros Pty Limited -v- Broad Construction Service Pty Limited*.

In the *Pozzolanica* case, the defendant engineers were held to have been appointed as PM in relation to the design and construction of storage facilities for pulverised fuel ash. Part of

the works designed by the Contractor collapsed. It was held that the engineers, as PM, were responsible for ensuring that insurance was in place and were therefore liable to the claimant. The Judge held that the fact that the PM lacked the expertise necessary to assess the adequacy of the insurance arrangements which the Contractor did have in place did not relieve them of their responsibility. They could not simply act as “post-box”.

In the *Palermo* case, the PM was held to have fallen short of their contractual duties and undertakings by failing to recommend the appointment of an external consultant to report on internal acoustics in respect of a project involving the design and construction of a nightclub.

These cases confirm a growing trend towards establishing some degree of legal accountability in the performance of project managers, albeit that the precise parameters of the duties owed are still evolving.

3 Duties in Tort

The question of whether or not a professional person owes a duty of care in tort to their Employer, in addition to and concurrent with their contractual obligations, has exercised the courts for many years.

In the case of *Storey -v- Charles Church Developments plc* it was held that the designer of a building owes a duty to his employer to take care both in contract and in tort, subject to any restrictions necessitated by the terms of the contract itself.

It was also held that this duty extended to not causing economic loss, and that the position of a designer who also built was the same.

The question of whether or not there can be concurrent liability on the part of a defendant in contract and in tort was authoritatively answered in the affirmative by the decision of the House of Lords in *Henderson -v- Merrett Syndicates Ltd*. The principles were summarised by Lord Goff, who said:-

“... an assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, the plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous.”

In the *Storey* case, the Judge had to look at whether the designer’s duty extended to taking care not to cause economic loss, and said:-

“It may first be observed that it would be surprising if it did not. The field of concurrent liability, as so far developed, is largely concerned with relationships in which the only or predominant protected interest of the client is economic, examples being those involving solicitors, accountants, valuers and insurance brokers. That interest still looms large in the area of building design, and although protection against injury may also be a consideration there is no apparent reason why the one should exclude the other.”

He quoted Lord Goff in the *Henderson* case, when he said:-

“Attempts have been made to explain how doctors and dentists may be concurrently liable in tort while other professional men may not be so liable, on the basis that the former cause physical damage whereas the latter cause pure economic loss ... But this explanation is not acceptable, if only because some professional men, such as architects, may also be responsible for physical damage. As a matter of principle, it is difficult to see why concurrent remedies in tort and contract, if available against the medical profession, should not also be available against members of other professions, whatever form the relevant damage may take.”

The Judge in the *Storey* case observed:-

“I consider that where there are concurrent duties in contract and tort to use due care and skill the scope of the duty in tort is normally coterminous with that in contract. Whether or not I am right in believing that there is such a general principle I conclude in particular that a designer’s concurrent duty in tort to use due care and skill extends to taking care not to cause economic loss unless the contractual duty is more limited.”

The Judge then looked at *“whether in principle a distinction should be drawn between the duty of a designer who is an independent professional and that of one who also builds”* and said:-

“I can see no reason for such a distinction, which would introduce unnecessary and unacceptable anomalies between the position of employers who engaged architects and that of those who relied on builders who produced their own designs. It is true that a line must be drawn somewhere if builders are not to be concurrently liable in tort for all their contractual obligations, including workmanship as well as design, and including those which amount to warranties as well as those which can be expressed in terms of a duty of care. ... What is neither inherent nor justified is to create distinctions turning not on the content of the duty but of the trade or profession of the person undertaking it.

...

I conclude that the concurrent duty in tort of a contractual designer to use due care and skill not to cause economic loss is not displaced by the fact that the design is created by the builder.”

The next case which looked at whether or not there is a duty not to cause economic loss was the case of *Samuel Payne -v- John Setchell Ltd*. The conclusion in this case was different. The Judge held that the defendant did not owe a duty of care to the claimant where the loss suffered was pure economic loss. He held that as a matter of policy any person undertaking work or providing services in the course of a construction process was ordinarily liable only for physical injury or for property damage other than to the building itself and would not be liable for other losses. If any liability for economic loss was to arise, it must be for other reasons, such as a result of advice or statements made upon which reliance had been placed in circumstances which created a relationship where there was in law an assumption of responsibility for the loss. A designer was not liable in negligence to the client or to a subsequent purchaser for the cost of putting right a flaw in a design that the designer had produced which had not caused physical injury or damage.

The duty owed by the defendant was a duty at common law to exercise reasonable skill and care and judgment but these duties were to avoid causing physical injury or loss or damage to other property that might arise from the failure to carry out the duties properly.

The Judges in the *Storey* and *Payne* cases therefore adopted different approaches and reached different conclusions on the issues.

The next case which looked at duties owed in tort was *Tesco Stores Ltd -v- Costain Construction Ltd and Others*, in 2003.

Tesco brought a claim against Costain, alleging, amongst other things, that Costain had owed a duty of care to Tesco to exercise reasonable skill and care in the design and construction of a store, in particular to include appropriate fire stopping and inhibiting measures in the structure. Costain said that it did not itself make the relevant design decisions in relation to fire stopping and inhibiting measures, but that these were made by one of the other defendants. Tesco countered that by saying that Costain had assumed responsibility by contract for the adequacy of the design of the store and it therefore owed a duty of care to Tesco in respect of the design which mirrored its contractual obligations.

The alleged deficiencies in design did not themselves cause damage but meant that damage caused by a fire was more extensive than it would otherwise have been, had appropriate fire stopping and inhibiting measures been in place. Not only was the store itself damaged

severely but also its contents, in the form of stock and plant and machinery, together with an extension to the store which had been built subsequently.

The Judge said:-

“222. *It is plain, in my judgment, ... that the existence of a duty of care positively to act, rather than simply to take care while engaged in some action, depends upon the existence of circumstances which in some way justify the imposition of such a duty.*

...

It is difficult to see any circumstances other than where a party has specifically agreed to do something in which it would be appropriate to fix him with a duty to act positively, rather than simply to take care while doing something upon which he has decided to embark.

223. *... In relation to the performance of any obligation which does not require any act to be performed or any advice or information to be given the concept of negligence is not really meaningful. An obligation of such character is either performed or it is not. If it is not performed, there will be a cause of action for breach of contract. If it is proved that substantial, as opposed to nominal, damages have been suffered as a result of the breach of contract, they will be recoverable. Carelessness or not in the performance of the obligation just is not relevant to whether it has been performed.*

...

226. *The essential point in relation to the distinction between physical damage and economical loss is that physical damage is the immediate, and generally obvious, consequence of an act of negligence, while economic loss may not be. Thus if a duty of care is to be owed not to cause economic loss there needs to be some feature of the relationship between the parties which makes it fair, just and reasonable that the scope of the duty should extend to the avoidance of economic loss.”*

The Judge found that Costain had assumed a duty of care to Tesco to carry out the work which it itself, rather than any sub-contractor, did pursuant to that agreement with the care and skill to be expected of a reasonably competent building contractor. That work potentially included both physical work of construction and the making of decisions as to design. The Judge found that that duty did extend to not causing economic loss. There

was sufficient “special relationship” between the parties for that purpose, particularly as they were in a contractual relationship. He said:-

“If the position now is, if I consider that it is, that anyone who undertakes by contract to perform a service for another upon terms, express or implied, that the service will be performed with reasonable skill and care, owes a duty of care to like effect to the other contracting party or parties which extends to not causing economic loss, there seems to be no logical justification for making an exception in the case of a builder or the designer of a building.”

The duty of care owed by Costain to Tesco was thus to execute any building or design work which Costain in fact carried out itself with the care and skill to be expected of a reasonably competent building contractor so as not to cause damage to person or property or economic loss.

This decision was built on in the case of *Mirant Asia-Pacific Construction (Hong Kong) Ltd - v- Ove Arup & Partners International Ltd*, where it was held that the defendants owed the first claimant a duty of care both in contract and in tort as to the design of the foundations which they had carried out; the design of the foundations depended on assumptions about the ground conditions and it was held that the defendants were under a duty of care to verify the geological assumptions on which the design was based. The defendants had not taken reasonable care to verify those assumptions and were therefore liable both in contract and in tort. In the circumstances of the case, the defendants were liable for the economic loss which the first claimant had suffered.

The Judge applied the “special relationship” test, quoting Lord Goff in the *Henderson* case, where he said:-

“[The principle] rests upon the relationship between the parties, which may be general or specific to the particular transaction and which may or may not be contractual in nature...”

... The concept provides its own explanation why there is no problem in cases of this kind about liability for pure economic loss; for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages to that other in respect of economic loss which flows from the negligent performance of such services...”

The Judge applied an objective test and concluded that Arup had assumed a responsibility for economic loss; he did not agree with the judgment in the *Payne* case, where the Judge had placed a designer in the same position as a contractor and said that he considered that

“where the designer performs services of a professional or quasi professional nature it is in the same position as bankers, solicitors, surveyors, valuers and accountants.”

He said:-

“Arup assumed responsibility to [the claimant] for design services and there is no reason why it should not be liable in damages for any economic loss which flows from the negligent performance of such services.”

4 Duties owed to Third Parties

Collateral warranties may extend contractual liability beyond the immediate contractual relationship; rights may also be conferred by the Contracts (Rights of Third Parties) Act 1999, which enables a third party to enforce a contractual term where the parties to the contract itself intended such a term to be enforceable by the third party in question.

Contractual liability may also be extended by an assignment of rights to a third party; a purported assignment will be ineffective if prohibited by the original contract.

4.1 Duties owed by a construction professional to other parties on a project where there is no contractual relationship

This was looked at recently in two cases, the *Mirant Asia-Pacific* case to which I have already referred in section 3 above, and in *Architype Properties Ltd -v- Dewhurst Macfarlane & Partners*.

In the *Architype* case, it was held that there is generally no duty of care by a sub-contractor towards the employer.

The contracts in that case between the employer and the contractor, and between the contractor and the sub-contractor, were structured so that there was no assumption of direct responsibility between the sub-contractor and the employer. The Judge felt that it was not arguable that it was fair and reasonable to impose a duty of care in tort on the sub-contractor towards the employer.

The Judge in the *Architype* and *Mirant Asia* cases was the same person; the *Architype* case pre-dated the *Mirant Asia* case.

In the *Architype* case, he said:-

“There is no formula or touchstone to which recourse can be had in order to provide a ready answer in every case, and in each case the factual situation should be considered to see whether there exists between the

party alleged to owe the duty, and the party to whom it is alleged to be owed, a relationship characterised by the law as one of proximity or neighbourhood in a situation where it is fair and reasonable that the law should impose a duty of care upon one party for the benefit of the other.

...

The contracts between employer and main contractor and between main contractor and sub-contractor are structured so that there is no assumption of responsibility between sub-contractor direct to the building owner employer. In my view the parties have so structured their relationship in such a way that it is inconsistent with any such assumption of responsibility.

In these circumstances it is not arguable that it is fair and reasonable that the law should impose a duty in tort on [the sub-contractor] for the benefit of [the employer].

It is not essential to the argument, but it is an additional point in favour of this conclusion, that the question of the sub-contractor providing collateral warranties was raised specifically at the time of the formation of the contract and was, for whatever reason, not pursued to a concluded contract.”

In the *Mirant Asia* case, although the Judge found that the defendants owed the first claimant a duty of care both in contract and in tort, including a duty not to cause economic loss, he also held that they did not owe such a duty to another claimant, as there was an insufficient relationship of proximity between them. He found that there was no intention that there should be a direct, albeit non-contractual, relationship between them, but did say that had he found otherwise, he would have been unable in the circumstances “to see any reason why liability should not extend to ... economic loss”.

4.2 Duties owed to subsequent owners

In the case of *Baxall Securities Ltd -v- Sheard Walshaw Partnership*, the defendants (“SWP”) were a practice of architects engaged by a property development company in connection with the construction of light industrial units in Manchester. The claimants (“Baxall”) wanted to lease one of the units and instructed a firm of surveyors to inspect the premises prior to taking the lease. The inspection showed that there had been some water ingress. There was in fact a more fundamental

defect, unknown to Baxall. Baxall entered into the lease and there were then two serious floods, causing significant damage to Baxall's goods.

Baxall sued SWP, based upon a breach of a tortious duty of care owed to Baxall as subsequent occupiers by SWP. The breach alleged was negligent design of the roof gutter system and failing to ensure that the detailed design carried out by a sub-contractor had sufficient capacity to cope with the expected rainfall in the area.

The trial Judge held that SWP were liable for the damage caused by the second flood to Baxall's goods, as this was partly attributable to a latent shortfall in design capacity.

The case went to appeal, and succeeded. It was held that the defect could and would have been spotted by the surveyors acting for Baxall if they had exercised reasonable care prior to the lease and, particularly, after the first flood. The defect in question, namely the absence of overflows, was patent, not latent.

When reporting on the Court of Appeal's decision, the editors of the Building Law Reports said:-

"It is now clear that a construction professional ... owes a very circumscribed duty to subsequent owners. Firstly the duty must be to other property, i.e. property other than that which is the subject of the design ... Secondly a duty is only owed in relation to damage consequent upon an undiscoverable defect being a "latent" defect."

The editor of the Construction Industry Law Letter said:-

"Here, the Court of Appeal agreed with His Honour Judge Bowsher QC in extending the duty of care towards subsequent owners to avoid causing physical injury or damage to other property (and it is assumed other similar professionals).

The Court of Appeal also agreed with the trial judge's comment that actual knowledge of the defect, which caused the damage, or equally the existence of a reasonable opportunity for inspection, which would have discovered that defect, will usually be sufficient to breach the chain of causation. Thus a defect is not latent if it amounted to a defect in the design or workmanship, which was discoverable with the benefit of such third party advice as a party could be expected to take, whether or not the advice was either sought or taken.

Here the Court of Appeal held that the effective cause of both floods was the absence of overflows. This was something that could have been detected and should have been detected at the date of the survey carried out prior to purchase. Therefore although the architects had made an error over the provision of overflows, the chain of causation had been broken and they were not liable to the claimant.”

The question of duties owed to subsequent owners was also looked at by the Court of Appeal in *Bellefield Computer Services Ltd -v- E Turner & Sons Ltd*. The defendant had built a dairy building. A fire broke out after the building had been built, causing extensive damage. An action was brought against the builder in negligence, and two preliminary issues of law were addressed, namely:-

1. Did the defendant owe any duty of care to the claimant and, if so, what was the nature of that duty?
2. If the defendant owed a duty of care to the claimant and if the defendant had no other defence to the action, would the claimant be entitled to recover damages in respect of damage caused by the fire to the structure of the dairy which was remote from the seat of the fire or was this to be regarded as pure economic loss, for which no duty would be owed?

It was held that the builders did owe a duty of care but that damages could not be recovered for damage to the remote areas.

The Judges examined the distinction to be drawn in negligence claims between damage to the negligently constructed and designed building itself, and items which were within, but not part of, the building.

As the editors of the Building Law Reports point out:

“the basis for drawing a distinction between the physical damage to the thing itself and other property is essentially a matter of policy. [The Judge] described this as a “control device”. Loss of or damage to the negligently constructed building itself represents irrecoverable economic loss, which in the absence of some special relationship or specific assumption of responsibility is usually irrecoverable in tort.

The distinction is of course artificial. An owner of a new building negligently constructed will recover no damages in respect of damage to the building itself whilst he will recover compensation for damage to anything, not provided by the negligent builder, placed by him on or within the building.

The Judge at first instance permitted the subsequent owners of the building to recover all damage to machinery and plant, laboratory materials and equipment, office equipment, general contents and stock damaged by the fire.”

Another fire gave rise to the case of *Sahib Foods Ltd and Co-operative Insurance Society Ltd -v- Paskin Kyriakides Sands*. At the time of the fire, the Co-op had entered into a contract to buy the freehold of the property in question and were the beneficial owners of it. Sahib were the leaseholders. The defendants were architects and the claimants alleged that damage from the fire was caused at least in part by the defendants' negligence.

The Judge found that the fire had started as a result of Sahib's negligence and then had to look at whether the way in which the fire had spread through the factory was caused in full or in part by negligence on the part of the defendants.

The defendants said that they had no contract with Sahib; there was no written contract and no letter of retainer. The Judge found that even if there had not been a contractual retainer, they would nonetheless have owed a duty of care in tort to Sahib as the occupiers of the premises and the operators of the business for which the works were being designed and carried out. They also owed a duty of care to the Co-op as beneficial owners in respect of latent defects in the building of which there was no reasonable possibility of inspection. On the facts, the Co-op did not succeed in its claim. When the Judge looked at the duty of care owed by the defendants to Sahib, namely to carry out their duties with reasonable skill and care, he said:-

“I was not the slightest impressed by the submission that since the defendants had complied with their statutory requirements and as a result no-one was killed or injured they had fully performed their duties. Nor was I impressed by repeated submissions that warnings about this sort of fire were “insurance led”. That submission seems to me to be close to the frequent thief's submission that the only people to suffer from his activities are insurers.”

It was held that the defendants were negligent and in breach of their duty towards Sahib. Although Sahib's employee's negligence had started the fire, the Judge declined to make a finding of contributory negligence against Sahib and held the defendants wholly responsible, as their negligence had caused the fire to spread.

The editor of the Construction Industry Law Letter said:-

“The Judge was mindful of the gravity of the potential consequences of the architect’s breach of duty in this case. The architect had been put on notice generally about the risk of not using non-combustible panels, but had prepared his design under the wrong impression that in the particular room where the fire broke out, there was nothing so hazardous as to make such panels necessary. The Judge decided that in order to comply with his duty to exercise reasonable care in these circumstances, the architect needed to draw the risks specifically to the attention of a senior decision-maker in the client company, and have confirmation from that decision-maker that they understood the risk, and wanted to proceed with the cheaper option.

One could see this decision as the thin end of a wedge if it is taken to imply that designers must take into account all possible forms of negligence by their clients in finalising their design. The message seems to be, however, that if a designer is aware of a serious danger which his design has to guard against on a general level, he must scrutinise specific cases where the defences against this danger are weak, and ensure that his client is aware of the risk of cutting costs, and accepts that risk explicitly at an appropriately senior level.”

5 Duties and Liabilities of In House Construction Professionals

The common law recognises that there is implied into any contract of service a promise on the part of the employee (a) that he is reasonably competent to fulfil the role to which he is appointed and (b) that he will exercise reasonable skill, care and diligence in the performance of his duties.

For all practical purposes, it is immaterial whether the employee is engaged in skilled or unskilled labour but the observations of Willes J in *Harmer -v- Cornelius* are particularly relevant:-

“When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of the skill reasonably competent to the task he undertakes, spondeo peritiam artis. Thus, if an apothecary, a watchmaker or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts ... An express promise or express representation in this particular case is not necessary.”

Want of competence and/or a failure to act competently will expose an employee to liability for breach of his contract of employment. He will also incur liability in tort if negligence or deliberate failure to exercise reasonable skill in the performance of his duties results in loss or injury, whether to his employer or a third party. Even if such liability will usually be covered by an employer's insurance policy that, of itself, will not absolve the employee of liability.

The required level of competence is not to be judged by reference to some unreasonable abstract standard but in the light of the knowledge and expectation of the parties to the employment contract. In any given case, just what the required standard may be and whether the employee's performance has fallen short of this standard will depend entirely on the circumstances and the context in which these issues fall to be addressed. In civil actions for negligence or breach of contract of employment or in unfair dismissal proceedings, for example, it may be necessary to use in support a variety of sources ranging from express contractual provision to job descriptions, Codes of Practice, protocols, British or other industrial standards, legislative requirements and expert opinion to establish whether there has been a "want of due care" or that the employee is simply not up to the job.

In the context of internal disciplinary/capability proceedings or of assessing the fairness of dismissal for incompetence, the employer need only have an honest and reasonable belief in the employee's shortcomings. So long as there are reasonable grounds for that belief an employment tribunal is not going to challenge the employer's findings although questions may still be asked as to the reasonableness and propriety of any sanction imposed by the employer.

It is certainly the case that an employer's professional staff may be expected to possess and to exercise the skill and experience necessary to undertake to a reasonable standard the responsibilities they have agreed to discharge.

Condition 10 (1) of the General Conditions for the Appointment of Consultants - GC/WORKS/5 (1998) - offers a succinct exposition of an external Consultant's contractual duty of care in terms that would be implied into the service contracts of in-house professional staff:-

"The Consultant shall perform the Services in accordance with all Statutory requirements and with the reasonable skill, care and diligence of a properly qualified and competent consultant experienced in performing such Services on projects of similar size, scope, time scale and complexity as the Project."

The Codes of Professional Conduct of professional institutions such as the RICS and RIBA will also have a bearing on the quality and levels of service reasonably to be expected of employees. They set general standards of behaviour and are intended to regulate the relationship between members, their professional organisation and their clientele.

In discharging their duties in-house staff must demonstrate the same level of care and competence that is reasonably to be expected of all those practising in their chosen disciplines. In that respect their position is no different to that of the qualified external consultant. The standard of care is constant though its demands will vary according to the nature and circumstances of any given task in which they are involved.

Breach of this duty of care - falling below the requisite standard - may expose in-house construction professionals to:-

- tortious liability to third parties and both tortious and contractual liability to their employer for any damage attributable to their breach of duty.
- internal disciplinary and/or capability proceedings that could jeopardise their livelihoods
- disciplinary action by the relevant professional and/or regulatory bodies

Breach could also give rise in certain circumstances to criminal liability, e.g. under Health & Safety legislation.

In light of the case of *Harmer -v- Cornelius*, if someone applies for a position as an in-house construction professional, they are offered the job and then accept it, it is then the case that they have warranted to their employer that they have the necessary skills to carry out that job.

If an employee omits to do something which is patently necessary in order for the work properly to be done, the employer can rely by way of benchmark on the standard sets of duties which apply to the profession which the particular individual practises, e.g. architecture, engineering, etc. What the particular employee has done, or has omitted to do, will be judged by the standard of the “reasonably competent” architect, engineer, etc, as set out in section 2.3 above. Part of the test will be looking at whether or not there was a “norm” to be followed, in particular whether or not the work to be carried out was what one might expect as normal work, within the usual range of reasonable competence, or whether it was something exceptional. The employee will be measured by what is normally

expected of a reasonably skilled worker in the circumstances in which that employee operates. There should be conformity to the common stages within that expectation.

7 November 2006
Victoria Russell
Fenwick Elliott LLP

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