THE SOLICITOR'S RESPONSIBILITY

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As you have heard I am a Solicitor in private practice. While my paper is based on the professional negligence of a specialist contractor generally, I have, where possible, drawn particular reference to problems that may arise for acoustic consultants, a field in which I have recently been working.

My paper covers the headings mentioned in the meeting notice although I have altered the order.

Who is the Client?

It is important to establish from the outset for whom the consultant is providing his service? Specialist sub-contractors including acoustic consultants are often engaged to perform a number of roles which are comparatively small within the context of a contract. They may be approached by an architect, engineer or other contractor on the project or the mechanical service engineer. It is in the consultant's interest to contract with the party for whom the building is being constructed and who will ultimately benefit from the project and not with the architect, engineer, main contractor or sub-contractor.

If the consultant does not contract with the main party but with another professional or fails to clarify with whom he has contracted then this can give rise to difficulties to obtaining payment and if matters go wrong with the contract in deciding who the consultant should ultimately refer these problems to.

It is also possible that the other professionals may have been outside their terms of reference in appointment an acoustic consultant. If you are in any doubt as to who the client is you should make enquiries and write a letter to the main party to clarify and confirm your understanding of the position.

What constitutes a contract?

Once the client has been ascertained the consultant can then decide upon the appropriate form of contract. A contract contains four essential elements. An offer capable of acceptance, acceptance of that particular offer, an intention to create legal relations and consideration.

As I have mentioned the offer to provide a service may well come through an agent of the main party in the form of the architect, or mechanical engineer. It is important when the acoustic consultant accepts the offer to act as consultant that the acceptance is communicated to the main party. In business contracts such as the appointment of an engineer there is little doubt that there is an intention to create legal relations. No consulting engineer would agree to provide his services without also ensuring that he would receive proper remuneration.

Therefore, it should not pose any real problem to decide that there is a binding contract between the parties. The difficulty arises in knowing how far the acoustic consultant should go in setting out the services that he will provide under that contract and in ensuring that the client understands what services are provided or, perhaps more important, what services are not provided.

Very often the consultant will just agree to provide the necessary services as an acoustic engineer. The alternative is to have a contract which specifies which areas he is to cover and defines his role. As a Lawyer I favour the latter. If the consultants role is precisely specified by him from the outset and should problems with the contract arise it is far easier for all the parties to decide whether he performed his role. If a standard form of contract is used and requires parts to be deleted or completed then it is important to ensure that this is

done as if it is not the benefit of the written contract is lost. Again the consultant should ensure that a copy of the contract is sent to the main party to ensure that he is aware of the service that is being provided by the consultant and of course to the architect and mechanical engineer with whom he will have day to day contact. They may wish to comment on the service to be provided and suggest additions or deletions and thereby avoid doubt.

If a general form of contract is entered into where the consultant just specifies that he is providing his acoustic services and problems arise it is then necessary to define what the role of the consultant was and what service it was reasonable to provide on the particular project. In these circumstances it is not easy for the parties to resolve any problems between them and may necessitate the involvement of lawyers at an early stage.

Another reason for having a contract which specifies the acoustic consultants role is that there is often an overlap between the work of acoustic consultant and other consultants.

If modifications to the contract are made then it is important to ensure that these modification or variations are accepted and that there is a final agreed form of contract with which all parties are satisfied.

If the consultant has entered into a contract then clearly there is a duty for him to fulfil its terms. This seems an obvious statement but it is worth considering further. In the case of Chelmsford District Council -v- Evers, Judge Smout said that in the absence of a provision to the contrary there must be an obligation upon an engineer who can design and supervise the execution of his design to review his designs as necessary until the works are complete.

In a case in which I was involved although the matter was not finally decided on by the Court, being settled pre-Judgment, it appears that the Court would have decided that were a consultant had prepared an initial report and requested further information before he could finalise matters and that information had never been sent to him, because he had a contract which stated that he would attend meetings and deal with various aspects that contractual relationship remained even though the other parties made no attempt to contact him to provide the outstanding information or to involve him in the contract. There was a continuing obligation on the consultant to review matters and if necessary enforce its involvement. Of course, if it can be shown that he has written letters continuing to press for information and tried to re-involve himself but has not been allowed to do so, in those circumstances it would appear that he would have acted reasonably and done enough to fulfil his contractual obligations.

Consultant's Obligations

I have talked in some detail about the formation of the contract which hopefully will set out what the consultants obligations are. However, in conjunction with the contractual obligations he also has obligations in tort and in particular an obligation not to act negligently. The contract between the main party and the consultant will include an implied, if not an express term, that the consultant will exercise reasonable skill and care. The common law principle is now embodied in section 13 of the Supply of Goods and Services Act 1982.

This leads on to the consultant's obligations in tort not to act negligently but to act with the degree of skill and care that can reasonably be expected of an acoustic consultant.

Here there is some overlap between contract and tort. I have mentioned the implied term in a contract to exercise reasonable skill and care. It has also been held in the case of Midland Bank -v- Hett Stubs and Kemp that those implied terms can go wider. For example if a surveyor is instructed to produce a report on a certain property there is an express and implied obligation to inspect it. I consider an example in the acoustic field is that if a consultant was to advise on the provision of various plant it is implied that he would obtain necessary data to ensure that the plant was suitable and to it if necessary.

Specific terms are important as the consultant will be liable if he breaks them irrespective of the amount of skill and care which he has shown.

There are certain instances where the Courts have held that the implied contractual term that a professional man will carry out his role with reasonable skill and care is in fact more onerous than at first apparent and indeed what he is contracting to do is achieve his specified result and that there is no need for a contractual term either express or implied defining the skill and care he must use.

When considering the role of the professional, in particular, the acoustic consultant, the Court will consider whether or not the consultant has acted negligent and whether he has fulfilled his obligations. A claim in negligence is complete when the following conditions are satisfied.

1. The Defendant owes a duty of care to the Plaintiff.

2. The Defendant has breached that duty of care.

3. The Plaintiff has suffered damage as a consequence of the breach.

The most important breach on the duty of care in building related matters used to the be decision in Anns -v- Merton London Borough Council. However this case has now been overruled by Murphy -v- Brentwood District Council. This decision is so important to the consultant that it is necessary to spend a little time analysing it.

Donaghue -v- Stephens, the 1932 case established a type of liability in negligence to those who fell into a class of persons for whom it was reasonably foreseeable that they would suffer as a result of some defect in goods even if there was no contractual right. The right was to recover damages for physical injury and there was no right under the law flowing from that case to recover for pure economic loss, not flowing from a physical injury except where the loss had been sustained through reliance on negligent mis-statements.

In the Anns case it was said that the damage done was not solely economic loss. It was physical damage to the house. That case bridged the gap from liability under the Donaghue and Stephenson principle for damage to person or property caused by a defect in a carelessly manufactured article to liability for the cost of rectifying a defect that was manifest. Although the damage in Anns had been claimed as physical damage it had in fact been pure economic loss.

The first case that started to show that the law was changing

was that of D & F Estates -v- Church Commissioners 1989 where sub-contractors to the main contractors had applied plaster incorrectly resulting in the plaster coming loose. The owners of the flats and the lessee who occupied it brought an action against the main contractors, Waites Limited, for damage for negligence. The House of Lords introduced new rules for recoverability of damage in regard to property. Liability will only arise if all these conditions are fulfilled.

1. There must be personal injury or damage to property other than the defective structure itself.

2. The defect must remain hidden till the damage is done.

3. If the defect is discovered before any damage is done or loss sustained the cost of repairs of demolition works in order to avoid a potential source of danger to third parties is irrecoverable as pure economic loss.

4. The principles were expressed in relation to a hyperthetical case of a defectively constructed garden wall but more difficult questions may arise in relation to a more complex structure such as a dwellinghouse.

The doctrine in D & F Estates was extended in Murphy -v- Brentwood and in the case of the Department of the Environment - v- Thomas Bates and Sons Limited 1990 3WLR. As a result of these cases culminating in the Murphy case it is much more difficult to sue the builder or local authority in respect of their negligence. The role of the consulting engineer including an acoustic engineer is still a little uncertain. However some respects they will be assisted by the decision in Murphy if a claim was for pure economic loss. In the case of Smith -v-Eric S Bush and Harris -v- Wye Forest District Council 1989 appear to put a somewhat heavier burden on

surveyors, architects and the like where written reports have been prepared and reliance placed on those written reports. This is under the doctrine in Hedley Byrne & Co Ltd -v- Heller & Partners Limited 1964 where there is a right to recover pure economic loss where the loss has been sustained through reliance on a negligent mis-statement.

There are also a string of recent cases which seem to be chipping away at liability in this area as well.

In conclusion I think all I can say at present is that the law in this area is changing and the signs are that the changes are advantageous to the consultant but that there is considerable uncertainty over his role when written reports have been prepared.

One further aspect that I ought to cover is the protection of the Limitation Act 1980 which has been significantly eroded in recent times by the decision in Pirelli General Cable Works Limited -v- Oscar Faber and Partners 1982. Since Pirelli the law has been further modified by the Latent Damage Act 1986. The limitation of actions is a substantial topic in itself and outside the scope of this article, but it is something in the context of building litigation that may prove to be of very considerable importance, particularly where the damage does not manifest itself immediately.

Liabilities to Third Parties.

The consultant has a wider duty of care than merely to the parties to whom he has contracted. Conversely he cannot owe a duty of care to all those who are likely to be affected by his work. Some professional works such as detailed reports which are circulated widely have a far reaching effect and it would

not be right to hold the consultant liable for all the consequences. Although consultants do hold a special position of trust, in particular where you have a very specialised area such as acoustics, third parties are going to rely heavily on their reports and the conclusions given because they will believe that the consultant is in a position to make those conclusions and they are not in a position to question them themselves.

The position was accurately expressed in Bowen -v- Paramount Builders (Hamilton) Limited when the Court said :

> "quite clearly English law has now developed to the point where contractors, architects and engineers are all subject to use reasonable care to prevent damage to a person whom they should reasonably expect to be affected by their work."

Standard of skill and care

The relevant standard of care is that of a competent practitioner existing at the time when the particular professional service is performed as distinct from perhaps a higher standard that may exist at the date of trial. The standard does not remain static and will vary depending on circumstances. In particular the standard reflects the need of the building profession to keep pace with new skills and technology. It will also apply even if the consultant embarks on a novel design. In the case of IBA -v- EMI and BICC, BICC were sub-contracted to design and erect a cylindrical television mast which was at the limits of their professional competence. The House of Lords held that they were in breach of their duty to exercise reasonable skill and care in the design of the mast, Lord Edmund Davies said of the duty of care:

> "Judgment of hindsight has to be avoided. Justice requires that we seek to put ourselves in the position of BICC when first confronted by their daunting task, lacking all emperical knowledge and adequate expert advice in dealing with the many problems awaiting the solution. But those very handicaps created a clear duty to identify and think through such problems including those of static and dynamic stresses so that dimensions of venture into the unknown can be adequately assessed and for the ultimate decision as to its practicability is arrived at."

The standard of skill and care is usually established by other experts within the field. The practitioner does not have the particular knowledge or expertise required then he must so advise. The standard is not that of perfection, you are not guaranteeing that it will be done properly. An error of judgement or a wrong opinion is not necessarily negligent. In the case of acoustics it may not necessarily be negligent for an error to be made in calculations. In the case of London School Board -v- North Croft Son & Neighbours, as a result of two errors by a clerk employed by the Defendant quantity surveyors the builder overpriced some sums. The Judge rejected the Plaintiffs' view that the clerk was negligent in making these errors.

Obviously a lot of the work of an acoustic consultant involved figures and calculations. I consider that it is more likely that in this field an error in such calculations may amount to negligence as they are so fundamental to the work. The Court would have to look at the nature of the error, who had committed it and the effect of it in deciding whether or not the consultant had shown reasonable skill and care in the contract as a whole. For example, if complex calculations are delegated to a junior member of staff and not properly checked then this would no doubt amount to negligence.

Client's Obligations

In looking at these I have taken the client as the main contractor, although clearly it is necessary to consider the role of the architect and mechanical engineers as they may be acting as the agents for the clients and will be the channels through which information is received.

The clients obligations may be defined in the contract and ideally should be. They should include provision of all necessary information and drawings, proper access for inspection of the site and remuneration of consultants. It is important that the consultant ensures that the client is aware of his contractual obligations. If information is not passed on through the architect and mechanical engineers then as mentioned previously I consider the consultant has a duty to press for this information. If matters are going badly wrong on the contact then the consultant should communicate this to the architect and mechanical engineer and also to the client.

If the client provides wrong information which the consultant relies on, and it was reasonable for the consultant to rely on the information then the consultant will have a claim for negligence against the client. In practice this is only likely to arise if some other party sues the consultant and he then brings in the client as a third party as otherwise the consultant would not have suffered any damage. The clients obligations are more likely to be in contract rather than in negligence.

Sub-contracting of Consultancy work

I have taken this heading to mean, where the consultant himself subcontracts all or part of the work for which he has been

contracted. The necessity to do this may arise where he does not have the expertise to deal with the specific areas, in which case he would be under a duty in accordance with the BICC case to sub-contract the work.

Obviously, in entering into any sub-contract he should ensure that the contract terms with the sub-contractor are compatible with his own contract. In sub-contracting work the consultant becomes liable under the terms of the contract to the sub-contractor. In fulfilling his duty of care to the main party he has a duty to chose a competent sub-contractor and to provide the sub-contractor with all relevant information necessary to carry out the contract. He will also continue to owe a duty of care to the client irrespective of the employment of the sub-contractor. This is why building litigation often becomes such large multi-party litigation with the various parties involved getting drawn into the action.

It is also important to consider whether the sub-contractor is himself an independent contractor or in effect an employee over whom the consultant has control. If the latter then the consultant will have a duty to supervise the work of the sub-contractor and to ensure that it is carried out properly.

As to what the role of the sub-contractor is, that is obviously going to depend on the nature of the work and the degree of expertise in the sub-contractor.

If the main party sues both the consultant and the sub-contractor then the consultant will have to consider bringing contribution proceedings against the sub-contractor to ensure that liability can be apportioned between them as if the Court finds in favour of the Plaintiff against all the Defendants they will not be interested in apportioning liability and this will

have to be dealt with under the contribution proceedings. This type of contribution is usually covered by the Civil Liability (Contribution) Act 1978 which covers liability arising after 1st January 1979.

Where a party suffers loss as a result of the negligence of two or more of his professional advisers, the apportionment of liability between them is governed by the general principles that apply to any wrong doer. The Court has to have regard to the degree of blame, of any of the parties and to the extent to which each actions led to the damage. Under the 1978 Act there is no restriction to actions in negligence and contribution proceedings can be brought in respect of contract.

This brings me to the end of this paper. Perhaps it is appropriate if I leave you with the words of Lord Denning in the case of Greaves & Co -v- Baynham Michael - a claim against consulting engineers in 1975.

> "Apply this to the employment of a professional man. The law does not usually apply a warranty that he will achieve the desired result but only a term that he will use reasonable care and skill. A surgeon does not warrant that he will cure the patient nor the Solicitor warrant that he will win the case".