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The construction & energy law specialists

Identifying and managing your legal expectations to avoid pitfalls in an increasingly demanding project role

by Nicholas Gould, Partner

Introduction

This paper reviews professional liability with a particular emphasis on the modern project management practice. In reality, this means a traditional firm of forward thinking construction professionals (quantity surveyors, now commercial cost managers, or some other derivation, building surveyors, architects, engineers) that have expanded into the area of project management and acting as employer's agents (there are of course those who have qualified as project managers (PM) or taken a masters degrees in the subject).

In addition, this papers acts as a reminder of the role of insurance. Has the professional indemnity insurance market kept up with the new and expanding roe of the PM's practice? This leads to a consideration of whether appropriate insurance cover is in place, and finally reviews some of the risk management procedures that a POM might consider it respect of its liability.

The starting point is the general test for professional negligence, and a consideration of how this has been applied in the construction industry to the construction profession.

Professional liability

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. 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* (1984) 13 HLR 38 HL, 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.

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 according to Tindal C J in *Chapman –v- Walton* (1833) 10 Bing 57:

> "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"

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* (1862) 3 F and F35)

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." (per Lord President Clyde in *Hunter –v- Hanley* (1955) SLT 213)

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* [1957] 1 WLR 582)

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* (1886) 13 AR 494)

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* 36A 104 (1896) Supreme Court, Maine)

> "… 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* (1953) 78SE 901)

> "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* 263 NW 420 (1978) Supreme Court, Minnesota)

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* (1988) 18 Con LR 1*)*.

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- Goldthorpel* [1901] 1 KB 624)

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* (1902) Hudson on Building Contracts)

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

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* (1826) 2 C&P 378, 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* (1876) 2 Vict LR 157, 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* (1978) 10 BLR 19).

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 *Moneypenny* case (see above).

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* (1987) 38 BLR 25 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* [1995] CILL 1095, 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.

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)*(1984) 27 BLR 26).

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* (1870) IR 4 CL 467).

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.

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.

Clerical errors

In the case of *London School Board –v- Northcroft* ((1889) Hudson Building Contracts) 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* (1973) 230 EG 973 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".

Bills of Quantities

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* (1938) EJ 65, 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.

Forecasts and estimates

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* [1951 3 TLR 39, 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* 12 Const LJ 402, 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 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.

Duty to warn

In *Flanagan –v- Mate*(1876) 2 Vict LR 157, 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.

Project managers

The services offered by PMs 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 standard form contracts for their performance.

The qualifications and experience of people practising as PM 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 PM 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.

The Chartered Institute of Builders has produced a Code of Practice for Project Management for Construction and Development. The definition of project management in the 2002 third edition is worth comparing to the 2010 fourth edition. The third edition stated:

> "Project management is the professional discipline which separates the management function of a project from the design and execution functions".

The fourth edition states that project management is:

> "…an established discipline which executively manages the full development process, from the client's idea to funding, co-ordination and acquirement of planning and statutory controls, approvals, sustainability, design delivery, through to the selection of procurement of the project team, construction, commissioning, handover review, to facilities management co-ordination".

The project management role has, therefore, really evolved into a more complex and wide ranging professional role.

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 RICS schedule of project management services can be used with the RICS standard form of consultant's appointment and the RICS short form of consultant's appointment. This is basically a schedule of services with a series of tick boxes. 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 PM should 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."

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 legal 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* (2003) 88 Con LR 1 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* (2001) 76 Con LR 1 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* [1996] BLR 2, 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) 76 Con LR 18, 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 *Pozzolanic Lytag Limited –v- Bryan Hobson Associates*, and *Palermo Nominees Pty Limited and Micro Bros Pty Limited –v- Broad Construction Service Pty Limited* (Supreme Court of Western Australia, Parker J, CIV 2439 of 1996, 17 April 1998).

In *Palermo*, 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.

The case of *Pozzolanic Lytag Limited v Bryan Hobson Associates* [1999] 89 BLR 267 considered whether a project manager owed a duty of care to the client to ensure that the professional indemnity insurance of the consultants was adequate. The case concerned the construction of a concrete dome, which due to a design defect collapsed causing considerable financial loss to the employer. The main contractor was primarily liable under the JCT Design and Build Form of Contract, but did not maintain adequate insurances required by the contract.

The TCC Judge held that the defendant engineer was liable to the employer for not ensuring that the contractor had adequate professional indemnity insurance, and for not ensuring that professional indemnity insurance was in place. The defendant engineer pleaded contributory negligence on the part of the employer for not himself checking the insurance. This plea was rejected by the Judge.

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".

The "good working rule" in *Pozzolanic Lytag*

The key question in *Pozzolanic Lytag* was set out on page 3 of the judgment:

> "The case raises questions as to the scope of the duty owed by projects managers to their clients to ensure that suitable insurance arrangements are put in place by contractors."

In *Pozzolanic Lytag* reference was made to the Code of Practice for Project Management for Construction and Development. Although there was a misapplication of the 1996 edition the author listed duties and responsibilities undertaken during the management of a construction contract. The list included:

> "(l) Compile all contract documents … establish the client's requirements on such matters as … insurance requirements …
>
> (o) … Ensure the contractor has complied with insurance and bonding requirements".

Mr Justice Dyson accepted that this was "a good working rule" as to the scope of the duties to be undertaken by a project manager in relation to insurance. There were two caveats:

1. There should not be a "slavish" application of the list; and
2. The list is subject to any "special requirements" made between the client and the project manager.

Mr Justice Dyson came to the conclusion that the project manager in that case owed a duty to the employer to take reasonable care to "ensure" that there was in place insurance that would cover the contractor's liabilities in respect to the building contract. No insurance was in place. The real or effective cause of the loss was the project manager's failure to ensure that the contractor had taken out the relevant insurance.

What does a PM need to do in order to "advise"?

In *Pozzolanic Lytag* Mr Justice Dyson stated on page 8:

> "If a project manager does not have the expertise to advise his client as to the adequacy of the insurance arrangements proposed by the contractor, he has a choice. He may obtain expert advice from an insurance broker or lawyer. Questions may arise as to who has to pay for this. Alternatively, he may inform the client that expert advice is required, and seek to persuade the client to obtain it. What he cannot do is simply act as a "post box" and send the evidence of the proposed arrangements to the client without comment."

Mr Justice Dyson took the view that a project manager was to act in a proactive manner in respect of the insurances. Does this obligation relate only to the contractor's insurances, or does it extends to insurances that the Employer may need to obtain? Mr Justice Dyson was of the view that a project manager must inform the client and "seek to persuade the client to obtain" appropriate insurances. It is not adequate to simply act as a "post box" by sending evidence of the proposed arrangements to the client without comment.

The use of the word "persuade" suggests that a project manager should do more than just advise, but should make very clear to the client the importance of dealing properly with insurance. Also he is suggesting that even where the contractor is to take out the insurance, the client, meaning the employer, could be advised by the project manager to take out the insurance.

The case of *Six Continents Retail Limited v Carford Catering Limited* [2003] EWCA Civ 1790 concerned the construction of a restaurant which was damaged by fire during construction. Six Continents were the project managers and they engaged Carford to

design and install the kitchen equipment. Once the restaurant had reopened, there was a problem with the spit-roaster. Carford had failed to follow the spit-roaster's manufacturing installation guidelines. The project manager had a duty in his appointment to check the condition and nature of the spit-roaster.

At first instance, the project managers were not liable. However, the Court of Appeal decided that the project manager was responsible. The project managers had escaped liability because they sent their client a letter from the spit-roast manufacturer that set out the recommendations for installation, but these were ignored by the restaurant. The Court of Appeal decided that simply forwarding a letter was not adequate. The project manager needed to be more proactive and should have assessed the fire risk and warned the client in much clearer terms.

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.

Professional indemnity insurance

General Principles of Insurance Law

There is no statutory definition of insurance. This may be surprising given the volume of legislation regulating insurance companies and the manner in which they conduct their business. However, a widely recognised general description of the nature of insurance was provided by Channell J. in the case of *Prudential Insurance Co. v IRC* [1904] 2 KB 658:

> "It must be a contract whereby for some consideration, usually but not necessarily in periodical payments called premiums, you secure to yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event…the event should be one that involves some amount of uncertainty. There must be either uncertainty whether the event will happen or not, or if the event is one which must happen at some time there must be uncertainty as to the time at which it will happen. The remaining essential is…that the insurance must be against something."

The leading texts on insurance law refer to this case as offering a widely recognised or general description and so it appears that the case is widely recognised today. Levine and Wood consider that Channell J's description identifies five main requirements:

1 Contract (it is basically a contract);

3 Consideration (there must be an exchange of value);

4 Benefit on the happening of some event;

5 Uncertainty (there must be uncertainty as to the happening of the event); and

6 The insurance must be "against something" that can be identified.

Insurance Policies are founded on the Law of "Contract"

Hudson (page 1424) considers that insurers, much like Bondsmen:

> "expend considerable ingenuity in drafting and designing policies which on the surface appear to offer, but on informed and close analysis do not, the full protection expected and required by the assured, and also in implying any device of subrogation, or of settlement of claims in return for assignment of rights, in order to transfer, reduce or eliminate their own liability".

Care is needed when considering the wording of an insurance policy, the interpretation of which will turn upon the particular terms used. Particular attention must also be given to the notice mechanisms set out in the policy which must be followed when making a claim.

A recent case dealing with the interpretation of policies of insurance is *Pilkington United Kingdom Limited v CGU Insurance Plc* [2004] EWCA Civ 23. In that case the appellant, Pilkington, was the manufacturer of heat soaked toughened glass panels that had been installed in the roof and vertical panelling of the Eurostar terminal at Waterloo. Some of them proved to be defective. Pilkington were joined to proceedings commenced by Eurostar against the contractor and professional team. Pilkington made a contribution, recovered some money from their professional indemnity insurers and sought a further sum from CGU under the terms of a products liability insurance policy.

In order to make out the claim, Pilkington had to demonstrate that their loss arose from "physical damage to physical property not belonging to the insured". The panels manufactured by Pilkington had not caused any damage to the terminal but because of the fractures they presented a future risk of damage and possibly injury to persons. The court had to consider whether this potential future damage was damage covered by the policy. The Court of Appeal rejected Pilkington's argument that a potentially dangerous or defective product could constitute a "loss of or physical damage to the other property not belonging to the insured." Therefore, the defect was not covered by the policy.

Horbury Building Systems Limited v. Hampden Insurance NV [2004] EWCA Civ 418 is another case about the extent of cover offered by an insurance policy. Horbury Building Systems Limited had erected ceilings within in a cinema complex. The ceiling to one of the cinemas collapsed, and the whole complex closed for several weeks. Clause 4.1 of the insurance policy said that Hampden Insurance would indemnify Horbury Building Systems "in respect of … damage to the Property". Horbury Building System argued that the loss of profit caused by the closure of the entire cinema complex arose as a consequence of the damage to one of the cinemas. The insurance company did not agree, believing that the damage related only to a single cinema and not the whole complex. The judge agreed with the insurance company, and Horbury Building Systems appealed.

The Issue for the Court of Appeal was whether the closure of the complete cinema complex as a result of one ceiling collapsing and/or was the closure of the complex consequential damage caused by the collapsed ceiling? They decided that the Judge at first instance was correct. The insurers had not indemnified Horbury Building Systems for loss of profit to the whole cinema complex. The policy covered liability for the physical consequence of the collapse of the ceiling in the cinema and the economic or financial losses caused

by that physical damage. It did not extend to the closure of the entire cinema, especially given that the collapse of the ceiling in one cinema did not prevent the rest of the complex from operating.

This was a case, therefore, about the extent of cover offered by the insurance policy. The insurance company indemnified the builder in respect of the financial consequences of damage to the property. In this instance, the damage was caused to only one cinema, and so the building was covered for the financial losses arising from the loss of the use of that cinema. However, it did not cover the building for closure of the rest of the complex, even if the builder was held liable for the cinema operator's loss of profit for the whole development. The case demonstrates, as indeed do may insurance cases, that insurance cover is only as wide as the terms of the policy which may be more limited than the liability of the insured to others.

Utmost Good Faith

The principle of utmost good faith is frequently referred to by the Latin tag of "Uberrimae Fidei" which means the most perfect frankness. It requires each party to make full disclosure of all material facts which might influence the other party in deciding whether to enter into the contract. The principle operates to some extent in other areas of the law, for example; suretyship, guardian and award, solicitor and client etc, but it is a fundamental principle of insurance law.

The classic statement of the principle is set out in the case of *Carter v Boehm* (1766) 3 Burr 1905:

> "Insurances of contract upon speculation. The special facts, upon which the contingent chances to be computed, lie commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist. The keeping back of such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without fraudulent intention: still the underwriter is to cease and the policy is void, because the risque run is really different from the risque understood and intended to be run at the time of the agreement".

It appears that the only remedy for non disclosure is avoidance of the entire contract. The duty arises because it is generally only the insured that is in possession of all of the facts concerning the risk, and so the insurer must be entitled to rely and trust the representations made by the insured. The duty does, however, apply equally to the insurer as well as the insured.

Utmost good faith is therefore essentially about a duty of disclosure which requires each party to:

1. Disclose all material facts known to them; and

2. Not to misrepresent any of the material facts. This will include statements which are true but which are misleading because they are incomplete (*Aaron's Reefs v Twiss* [1986] AC 273).

A fact is material if it *might* but not would influence the judgment of a prudent insurer in deciding whether to take on the risk and in fixing the level of the premium. It is not necessary that a prudent insurer would refuse the risk or even charge a higher premium, but would have liked the opportunity merely to consider the position (*Container Transport International Limited v Oceanus Mutual Underwriting Association* [1982] 2 Lloyd's Rep 178 CA and *Saint Paul's Fire and Marine Insurance Co (UK) v McConnell Dowell Constructors* [1993] 2 Lloyd's Rep). However, the leading House of Lords case *Pan Atlantic Insurance Limited v Pinetop Limited* [1994] 3 WLR 677 clearly indicates that the insurer cannot merely rely on the non-disclosure, but must prove that they were induced by the non-disclosure.

The majority of the disputes in the area of good faith relate to the materiality. Material facts are facts which affect the risk and may be classified as;

1 Physical facts – concerning the likelihood of loss or the degree of loss; or

2 Moral hazards – concerning whether the insured is a fit person to insure, because for example, the insured has a criminal record for dishonesty.

The duty is a positive one and therefore omission can constitute a breach. Importantly it may not be sufficient simply to answer the question set out in the proposal form. Care needs to be taken and material facts not specifically requested in the proposal form must be disclosed.

This fundamental principle applies to formation of the insurance contract and also at each renewal. It is common practice for the policies to include a term requiring the insured to notify the insurer of any material fact arising during the term of the policy. If the policy contains such a term then the duty of utmost good faith will also apply to these communications (*Black King Shipping Corporation v Massie, "the Litsion Pride"* [1985] 1 Lloyd's Rep 437).

A breach of the duty of utmost good faith allows the innocent party to avoid the contract. Essentially, the contract is rendered voidable at the insurer's option. Any money paid over by the insurer must be repaid. A breach by the insurer would allow for return of the premium, but it does not give rise to a remedy in damages.

If all or part of a claim is made fraudulently the insured cannot recover any part of the claim (*Manifest Shipping Co Ltd v Uni-Polaris Co Ltd* (2001) UKHL 1). The same rule applies to a claim that was made honestly, but is later fraudulently exaggerated or supported by fraudulent evidence (*Agapitos v Agnew* (2002) EWCA Civ 247).

A fraudulent claim will not only be void, but will void another otherwise valid claims that have been made. In the case of *Axa General Insurance v (1) Clara Gottlieb (2) Joseph Meyer Gottlieb* [2005] EWCA Civ 112 the insured defendants made 4 claims in respect of property damage. Two were validly made, but the other 2 were found to be tainted by fraud. At first instance the judge held that the 2 fraudulent claims were void, but the other 2 were valid. The Court of Appeal did not agree. They held that the effect of a fraudulent claims was to retrospectively remove the insured's existing cause of action. This means that even the valid claims were void. Their reasoning was that those who are insured should not have the expectation that if the fraud fails they will still recover the valid claims and therefore loos nothing by making the fraudulent claim.

Contribution

An insured may have more than one insurance policy covering the same loss. An insured can recover the full amount of his loss from whichever insurer or insurers he chooses unless a term of the policy or policies in question provide for the contrary. In any event, an insured cannot recover more than his total loss regardless of the number of insurance policies because of the principle of indemnity.

The right of contribution allows an insurer who has discharged its obligations to an insured, to claim from the other insurers their proportion of the payment. The right of contribution is an equitable right between the insurers. In order for an insurer to exercise this right the insurance policy must:

1 Cover the particular event;

2 Cover the same subject matter; and

3 Contain no provision stating that the policy only applies after other insurances have been exhausted.

This final proviso is referred to as a "non-contribution clause" and is frequently encountered in policies.

Another frequently encountered clause provides that in the event of double insurance the insurer will only pay a rateable proportion of the loss. This means that the insurer will only be liable for a rateable proportion. The effect is that an insured may not recover the full loss if an insurer under one of the policies is entitled to avoid payment for any reason. On the other hand, where two policies both contain a provision stating that where another policy covers the same risk then indemnity cover will not be provided, the Court will not allow the policies to cancel each other out (*Steelclad Limited v Iron Trades Mutual Insurance Co Limited* [1984] SLT 304).

Warranties

A warranty is a term of the insurance policy which if broken entitles the insurer to terminate the contract from the time of the breach regardless of whether the breach is material. In the law of insurance the term "warranty" is therefore used in a similar sense to that more readily associated in general contract law with the term "condition". Breach of a warranty justifies the injured party's refusal to further performance. The policy will usually establish express contractual warranties which may or may not relate to the risk and loss. For example, the insured usually warrants that its statements in the proposal form (and therefore the contract of insurance) are true and "the basis of the contract" which has the effect of converting the insured's answers into warranties. Breach entitles the insurer to avoid the contract from the date of the breach.

The position is given a statutory footing in section 33(3) of the Marine Insurance Act 1906 which states that "a warranty is a condition which must be exactly complied with. If it is not so complied with, then … the insurer is discharged from liability as from the date of the breach of the warranty". These words were considered by the House of Lords in *Bank of Nova Scotia v Hellenic Mutual War Risks Associates (Bermuda) Limited "The Good Luck"* [1991] 2 WLR 1279 where a ship had been insured under a policy which entitled the insurers to

declare certain areas as prohibited. The policy was assigned to a bank and the insurers undertook to notify the bank promptly if they ceased to insure the ship.

The ship was struck by an Iraqi missile while trading in the Persian Gulf which had been declared by the insurers as a prohibited area. A claim on the policy was rejected by the insurers as the ship had been in a prohibited area. The House of Lords held that the insurers were liable on their undertaking to the bank. The insurers had "ceased to insure" the ship as soon as she had entered the prohibited area. This breach of "warranty" automatically released the insurers without any need for them to give notice.

For whose benefit is the insurance?

Section 3 of the Third Parties (Rights Against Insurers) Act 1930 allows the third party to avoid any agreement which restricts the insured's rights against the insurer after the insured has become insolvent. Unfortunately section 3 does not apply to pre-insolvency agreements limiting the insurer's liability. The case of *Normid Housing Association Limited v Ralph and Others* [1989] 1 Lloyd's Rep 265; 43 BLR 18 highlights problems in this area.

In that case the defendant was being sued for negligence by the plaintiff and decided to settle with his own insurers in respect of the total claim thereby releasing the insurers. The plaintiff sought an injunction to prevent the settlement as the defendant would be unable to meet even a small proportion of the damages.

The Court refused the injunction on the basis that the defendant was not obliged to effect professional indemnity insurance or deal with the policy in any particular way. Had the defendant become bankrupt before the agreement then the plaintiff would have been able to use the 1930 Act to step into the shoes of the bankrupt defendant and bring a claim directly against the insurers.

Insurance Mediation Directive

The Insurance Mediation Directive (2002/92/EC) came into force by an amendment to SI 2003/1476 to the Financial Service s and Markets Act 2000 (regulated activities) Order 2001 (SI 2001/544). It came into force on 14 January 2005 and introduces EU regulation dealing with insurance brokers and others that provide insurance services. These are referred to as "Insurance Mediation Services".

An insurance mediation activity basically includes advising on dealing in or arranging contracts of insurance. It covers an agent or person assisting in the administration of an insurance contract. It only applies to those who act in this capacity as a part of their business, which requires them to receive some form of payment by virtue of their activities. The payment can be made to them indirectly. The main aim therefore of the legislation is to regulate insurance providers and insurance brokers.

However, the frequently encountered standard forms, and even bespoke forms, used in the construction industry establish joint insurance policies and include a waiver of subrogation rights. So, for example, a contractor constructing a new build development under a Standard JCT 1998 Form or a JCT 2005 Form will take out insurance in the joint names of himself and also the employer. The contractor will be paid by the employer. As a result, it seems that the directive will apply to the contractor who is carrying out an insurance mediation service. Further, the contractor may be in a similar role when arranging insurance for a project which effectively covers the sub-contractors.

The effect of the Insurance Mediation Directive is that any person carrying out insurance mediation services must be authorised by the Financial Services Authority, be an appointed representative or agent of an authorised person or fall within one of the exceptions. A breach of the regulations is a criminal offence and may result in an unenforceable contract of insurance. The consequences are therefore extremely important.

One reading of the legislation is that the person arranging the insurance must receive remuneration from "third parties" (Recital 11). If, as is the usual case, the contractor is arranging insurance for himself and others, then it seems unlikely that the contractor will be caught by the directive. Nonetheless, there is currently no court ruling on this point. Further, other forms of procurement could lead to a position where a contractor, or someone else in the procurement chain is effectively arranging insurance for others. Under those circumstances, it seems highly unlikely that the person in question would be caught by the directive and would need to be authorised.

Claims Procedure

There is probably an implied duty to give insurers notification of any loss which occurs and that the duty of utmost good faith will also apply to that notification (*The Litsion Pride*). A method of notification is usually dealt with in some detail in an insurance policy, and indeed absence of such a provision in a policy would be exceptionally unusual. Most policies require notification to be given of any circumstances which *might* give rise to a claim. This means that the insured must give notice of any event which could give rise to a claim and it is not sufficient to wait until a claim is made.

Policies usually require notification to be made "immediately", "forthwith" or "as soon as possible". These terms have been held to imply prompt and vigorous actions without any delay. In such circumstances it will be vital that an insured notifies the insurer of the circumstances or claims as failure may allow the insurer to avoid the policy. In the absence of any express term the notification should be made within a reasonable time.

The manner in which notification is made is once again usually expressed in the policy. This must be strictly followed. It may be sufficient to notify the agent or broker, although it is preferable to notify the insurer direct.

The notice must include "such as will enable the party to whom it is given to take steps to meet the claim by preparing and obtaining appropriate evidence for that purpose" (*A/S Rendal v Arcos Limited* [1937] 3 AER 577). It is perhaps best to keep the notification fairly general as a specific notice may amount to non-disclosure at a later date.

PI Policies

The insured is indemnified against legal liability arising from its professional activities. The activities may vary tremendously, and so the activities covered by a policy are usually expressly defined. Once the nature of the insured's business has been defined, then the indemnity insurance covers liability at law subject to specific exclusions. For example, the insurance may be expressed to cover "failure to exercise reasonable skill and care required by the law" or "negligence, errors or omissions". As a general rule, professional indemnity insurance excludes cover for fitness for purpose and at the other end of the spectrum does not cover "error or omissions" which are non-negligent.

In the case of *Wimpey Construction UK Limited v Poole* [1984] 2 Lloyd's Rep 499 it was held that the word "omission, error or negligent act" should be read literally and that an "error or omission" need not be caused by negligence. The case demonstrates that a consultant can be liable for an error or omission without being negligent, but the insurer may not necessarily cover the consultant for that type of liability.

Most professional indemnity policies contain four main parts. First, the indemnity in respect of any claim made against the insured during the period of insurance which are a direct result of negligent acts. This usual cover, for an additional fee, be extended to cover liability for fraud, wrongful trading, deformation, and costs. Second, the limit of liability may include the insured's costs and expenses.

Third, the policy conditions will contain a range of commonly found terms. For example, a "QC" clause which states that the insured should not be required to contest the claim unless a QC has advised that the claim is worth contesting. An exclusion of liability for public liability or property damage is usual. The insurer will frequently agree to waive its right of subrogation in relation to the insured's employees, except in the case of fraud or dishonesty. The policy is usually confidential between the insured and the insurer and disclosure of the policy by the insured may make the policy void.

Finally, the policy will contain a list of exceptions. These will of course vary from policy to policy, but may include the excess, claims for fraud etc, debts, and claims for consequential loss.

Professional indemnity insurance is issued on a "claims made" basis. This means that the policy covers the insured for claims first notified to the insurer during the period of cover. There will often be a corresponding clause requiring the insured to notify the insurer as soon as the possibility of a claim exists. The "claims made" approach should be contrast with "claims occurring". This second approach is usually found in employer's liability insurance and covers the hazards prevailing during the period of insurance, and so covers claims made many years after the plaintiff's exposure.

Policies were, until recently, most frequently made on an annual basis, although now biannual policies with a separate limit of indemnity for each year are becoming more frequent.

There are three important points to note in relation to the "claims made" approach:

1. The policy covers claims made during that year even if the activity leading to the claim occurred years before;

2. There is no protection for claims notified after the policy has expired; and

3. The insured has a duty of utmost good faith when applying for cover to notify the insurer of any circumstances which might lead to a claim. The insurer is therefore entitled to refuse insurance or avoid the policy for non-disclosure. This leaves the insured in a somewhat dubious position as the insurer on receiving information at the time of the renewal date which indicates the possibility of a major claim may actually withdraw cover altogether. Hudson points out the irony of this situation by noting that the insurer will be retrospectively depriving the insured of cover despite the insured having made payment of the premiums for the years in which the liability had accrued (15.036, page 1442).

The limit of indemnity is usually expressed in one of three ways:

1 "Each and every claim" – the insured may make an endless number of claims, but each distinct claim cannot exceed the limit of indemnity. The liability of the insurer is therefore potentially inexhaustible, subject to the limit for a distinct claim.

2 "Any one claim and in all" or "in the aggregate" – the insurer will not be liable for a level greater than that of the indemnity. This limit may be absorbed by a single claim or a series of claims which cumulatively use up the limit of indemnity. At the renewal date the level will be topped up or renewed depending on the value of claims made.

3 "Aggregate cover subject to one or more reinstatements or unlimited reinstatements" – Once the insurer has met the limit of indemnity for a claim or claims, the indemnity is reinstated in full for any claims remaining or further claims. However, the insurer will not be liable for any single claim in excess of the original indemnity amount, nor for a greater level than the total number of reinstatements. Unlimited reinstatements operates in much the same way as "each and every claim" but the insurance is provided in layers.

Finally, the limit of indemnity usually includes damages, claimant's costs and expenses, and the cost of defending the claim. The excess may operate in respect of each and every claim, or in the aggregate, or even a combination.

Contribution and Contractual Insurance Premium

The Civil Liability (Contribution) Act 1978 states, at section 1(1):

> "…any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)…"

In addition, section 6(1) states:

> "A person is liable in respect of any damage for the purposes of this Act if the person who suffered it… is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability whether tort, breach of contract, breach of trust or otherwise)."

It was thought that the Act would cure the defects in the previous legislation where no contribution could be claimed by two wrongdoers who were not joint tortfeasors or two equitable wrongdoers. The purpose of the Act was only to deal with damage, and was not to affect the existing rules in respect of contribution between debtors.

The case of *Co-operative Retail Services v Taylor Young Partnership* [2000] BLR 461 considered whether an architect and structural engineer who were being sued by the employer could seek a contribution from the contractor and a sub-contractor for work carried out under a JCT 1980 Contract when the contractor was co-insured with the employer. The Court of Appeal held that the architect and engineer could not seek a contribution from the contractors because the contractors were jointly insured with the employer and the insurer bringing the claim could not exercise rights of subrogation against the joint insured. In the absence of the contractors' liability to the employer, the contractors were not liable to

make any contribution under the Civil Liability (Contribution) Act 1978. An appeal to the House of Lords confirmed the approach of the Court of Appeal [2002] 1 WLR 1419.

The House of Lords has also recently considered the meaning of "same damage". In the case of *Royal Brompton Hospital National Health Service Trust v Frederick Hammond & Ors & Taylor Woodrow Construction (Holdings) Limited,* (2002) 1 WLR 1397 HL the hospital had entered into a building contract with Taylor Woodrow. The contract overran and the architect granted extensions of time. Taylor Woodrow claimed loss and expense, and the hospital counterclaimed for liquidated and ascertained damages. The hospital also sued the architect for negligence in issuing the certificates, alleging that the architect should not have issued extensions of time. The architect then commenced a third party action against Taylor Woodrow (as a Part 20 Defendant).

The House of Lords held that the architect was not entitled to a contribution from Taylor Woodrow. This was on the basis that the architect and Taylor Woodrow were not liable in respect of the same damage. Taylor Woodrow was essentially liable for delay, while the architect was liable for negligent certification, which in itself did not lead to the delay. Lord Bingham said:

> "It would seem to me clear that any liability the employer might prove against the contractor and the architect would be independent and not common. The employer's claim against the contractor would be based on the contractor's delay in performing the contract and the disruption caused by the delay, and the employer's damage would be the increased cost incurred, the sums it overpaid and the liquidated damages to which it was entitled. Its claim against the architect, based on negligent advice and certification, would not lead to the same damage because it could not be suggested that the architect's negligence had led to any delay in performing the contract".

The Impact of Adjudication

> The swiftness of adjudication and speed with which an Adjudicator's decision can be enforced has curtailed the ability of defendants to delay payment. As a result many insurers are called upon not only to fund the defence, but also to fund the payment of adjudication claims. In some respects this new pressure on the insurance industry has been increased by fears of enforcement of erroneous decisions as a result of *Bouygues (UK) Limited v Dahl Jenson (UK) Limited* [2000] 13 July 2000 Court of Appeal. In that case the Adjudicator made a mistake in calculating the retention due in the decision. As a result Bouygues had to pay Dahl Jenson £207,000.00, rather than receive £141,000.00 from Dahl Jenson. At first instance Sir John Dyson upheld the decision, and the Court of Appeal reinforced that approach.

As a result insurers have introduced special provisions in relation to adjudication. This includes strict notification provisions, limited cover, requirements as to the adjudicator, and a requirement that the decision is not finally binding. The notification procedures are extremely strict, often requiring that the insured notify the insurer within 2 days regardless of bank holidays and weekends. In addition, notification is required to be given once the insured has received as much as an informal threat. The Act requires adjudicators to be impartial but not independent. Many insurance provisions insert that additional

requirement. Settlement of a claim will usually require the insurer's consent, and there must be no restriction on the insurer's ability to make the disputes to arbitration or court proceedings.

Risk Management

PMs can do a number of things in order to reduce their risk of receiving a claim. The following is a simple, albeit not complete, checklist. Further and more specific details can be obtained from an organisation's particular PI insurer.

1. Remember to recommend further specialist investigation if it may be appropriate. Do not rely upon your own limited knowledge of a specialist area.

2. Ensure that senior management or a partner always reviews and checks reports, and other relatively important items of work.

3. If a claim is made then always refer it immediately to your PI insurer. Never attempt to try to deal with it yourself. You may void your organisation's insurance or simply make matters worse. A specialist will be at hand in order to deal with the claim in an appropriate and expert manner.

4. Consider having a system or procedures in place and also standard format documents in order to ensure that key items are always dealt with.

5. Consider a quality assurance ISO 9000 system.

6. Maintain a diary system, in particular identifying critical dates that could lead to liability.

7. Communicate fully and regularly with your client. Monitor their file and notify your client of any changes in the market or legislation or practices that might affect your client's project.

8. Keep up to date with any legal changes.

9. Senior management should appraise staff in order to consider their level of expertise. Is a particular individual becoming more competent, remaining about the same (and perhaps therefore needing further encouragement or training) or are they, to be truthful, a liability. If they are a liability, then further training and a close working relationship must be considered.

10. Quality of files. A properly maintained chronological file is critical when it comes to defending a PI claim. The more badly maintained the file, the greater are the chances of success for the claimant. Keep file notes, records of conversations, attendance notes, minutes of meetings, notes of telephone conversations, site visits, letters, faxes and of course emails.

11. When exercising professional judgment, keep a record of the objective information upon which that judgement was based.

12. In respect of valuations, maintain back-up information and comparable evidence if this is used.

13. Checklists. Set up checklists for repeat items of work, update them and use them.

14 Refer to the up to date PM's Code regularly for best practice, and useful ideas on who to deal with particular situations.

15 Ensure that formal agreements with clients are completed. Pay particular attention to the scope of the services and liabilities.

16 Never step outside of your area of expertise. Refer your client to someone else or make it clear that you are unable to do the work. A major area of PI claims relates to consultants trying to "help their client out".

17 Ensure a project has an adequate level of staff working on it. Excessive workloads lead to mistakes and claims.

Conclusion

A PM's liability for general project management services is relatively extensive. The liability for a project manager or employer's agent can be onerous. That is because they are in the position of advising in respect of the entirety of the project and their advice assists the client in taking the project forward. A failure to exercise reasonable skill and care can lead to considerable losses.

Professional indemnity insurance is only as good as the scope of the contractual insurance policy. Obtaining the cheapest policy or simply selecting the lowest value of cover may well mean that an organisation is exposed. The benefit of a PI cover policy is for the firm, and not third parties. A firm which offers services beyond the cover of its PI policy "may find that" the entire PI policy is void. One substantial claim could lead to the destruction of a firm which may have been in existence for many years. Simply considering that "we are doing things this way because we have always done them that way" may give some superficial comfort, but may not in fact provide any actual cover, and can hardly be said to be a rational risk management approach.

An organised forward thinking and well document approach to project management is the best way forward. Understanding the scope and the limit of the PM's role, and then advising the client about steps that the client might take to resolve and deal with risks is fundamental.

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