Technical

# Back to Basics - Understanding Design

Date: 14 May 2021

This Article will consider some recent issues encountered by Ramskill Martin in relation to Design and Design Obligations.

## Establishing the Extent of Design Responsibility

When entering into a Contract, it is vital the Contract Documents are thoroughly vetted to ensure the extent of a Party's Design Liability is clearly set out and that it is consistent with the Design Liability tendered for.

This may seem obvious, however, we have encountered situations where the extent of the Design Responsibility in the presented Contract does not reflect that which was agreed during the Tender process. As with all other Contract Documents and Terms and Conditions, we recommend a thorough review of all presented documents prior to execution or starting on site.

A thorough review of a Contract prior to signing is advised to ensure that Parties can satisfy themselves that the Contract is reflective of what has been tendered for.

## Establishing the Extent of Design Duty – Reasonable Skill and Care v Fit for Purpose

An often overlooked element when entering into a Contract is the specified Design Duty. Regardless of whether the Works consist of full Design Responsibility or are limited to the Design of Minor Works/Elements, this can have a significant impact if not carefully considered.

## Reasonable Skill and Care

Under UK Law, where there are no Terms in the Contract which state otherwise, the default Design Duty is that the work carried out would achieve a standard described as being to a level of "*reasonable skill and care*". This is established via the *Supply of Goods and Services Act 1982* in combination with the negligence test under Common Law which requires that, in order to avoid an allegation of negligence, a professional person should carry out their work to the same standard as another reasonably competent professional of the same field.

Should a Party wish to bring a claim for breach of the reasonable skill and care obligation, they would have to pass the threshold test for negligence of a professional. This is commonly referred to as the *Bolam Test* which is stated as being *"…if he/she exercises the ordinary skill of an ordinary competent man exercising that particular art"*.

A professional Designer is not expected to have exceptional skill, but must be competent and have acted in accordance with usual practice and current professional standards.

The effect of this standard is that a specific result (in terms of the standard of the design or the outcome) is not required to be achieved, and provided that the Contractor/Consultant can demonstrate that it applied the expected level of skill and care, no action would be possible.

## Fit for Purpose

Often, however, an Employer (Developer/Main Contractor/Sub-Contractor) requires its Designers to accept a Design Duty described as a "*Fit for Purpose*" obligation.

Fit for Purpose is a requirement to achieve a specific result which is set out in the *Sale of Goods Act* 1976, where supplied goods will be of a satisfactory quality. This does not require any proof of negligence and is far more onerous than a "*reasonable skill and care*" obligation.

Such an obligation should be of particular concern to any Designer required to provide Professional Indemnity ("*PI*") Insurance as most Policies of this nature only provide coverage to the standard of reasonable skill and care. As such, the Insured Party could discover that its PI Insurance does not provide cover in the event that it has entered into an agreement that sets the Design Duty at this greater, fit for purpose, level.

Design and Build Contractors and Sub-Contractors ("*the Contractors*"), required to provide or seeking to rely on their PI Insurance, should be especially wary of the above obligation.

It is settled Law that, if the Contract does not state the applicable Design Duty, then the Design Duty is one described as being "*fit for purpose*" when assessing the Design Duties of a Design and Build Contractor/Sub-Contractor.

The reason for this is that the Contractors, whilst providing the design, are also constructing the building and are therefore found to be supplying goods which fall under the *Supply of Goods Act 1976.* The Courts deemed this to be the case in their Decision in *Independent Broadcasting Authority v EMI Electronics* (1980) 14 Build LR 1.

Whilst the Employer may view this as being an issue for the Contractors (if a Collateral Warranty is executed, there may be a direct link), careful consideration should be given to the effect of the Contractors not having PI Insurance to cover it in the event of a Design error. In the absence of such coverage the practical reality would be that, in the event of such an error, the Contractor's solvency would be seriously under threat and any claim made would not have a favourable prospect of satisfactory resolution. Therefore, whilst at face value it may seem attractive to the Employer to have such an onerous Design Duty placed on the Contractor, the reality is usually that having the Design Duty at a standard covered by the Design Obligation under the PI Insurance ("*reasonable skill and care"*) offers more protection than the uninsured "*fit for purpose"* obligation.

In the case of *MT Højgaard A/S (Respondent) v E.On Climate & Renewables UK Robin Rigg East Limited and another (Appellants)* [2017] UKSC 59, it was decided that a Contract could contain two standards of Design Obligation. It was decided by the Supreme Court that the Contractor (*MTH*) had both an obligation for the Design to be fit for purpose and also for the Design to achieve a certain, lesser, Design criteria. The Supreme Court held that the *fit for purpose* obligation was over-arching and took precedence over the Design criteria which was viewed as being a minimum standard expected to be achieved.

## Standard Contracts

The unamended JCT Contracts refer to the Design Duty being *"as would an architect or other appropriate professional designer"* (Clause 2.17.1 - 2016 D&B and 2.19 2016 SBC). The NEC3 does not specifically state "*reasonable skill and care*" or "*fit for purpose*" in its core clauses, but it does state that the Works are to be in accordance with the Works Information. This type of wording should be avoided as this implies a "*fit for purpose*" duty. It is recommended that Clause X15 of the Secondary Optional Clauses is utilised, which limits Design Liability to "*reasonable skill and care*".

## Design Life

The Parties should closely examine the Contract Documents to ensure that they are aware of the obligation for the Works to achieve a specified design life.

Recently, this position has been considered in the case of *Blackpool Borough Council v Volkerfitzpatrick Limited* [2020] EWHC 1523 (TCC). The Contract contained an obligation to achieve a design life of 50 years for the *"building structure"* and 20 years for other building components.

The Court considered the term *"design life"* which it believed was somewhere between *"anticipated maintenance"* and not requiring *"major repair"* and noted that *"it cannot realistically be thought that a structure should be intended to be maintenance free for the whole of its design life".* It can nonetheless be reasonably assumed that *"it ought not to need major repairs over that period"*.

The important aspect of this case was that there were two issues considered by the Court. The first was removing the formation of rust on the steelwork which the Court found to be reasonably *"expected to undertake limited and localised works, not going beyond reasonable maintenance".* The second issue involved blistering of the cladding whereby Volkerfitzpatrick argued that the design life of 25 years could be achieved if the cladding was regularly cleaned, which it stated Blackpool Borough Council was failing to do. The cladding was being cleaned once a year, however, the Court found evidence to suggest that the cladding required cleaning four times a year. In contrast to the issue surrounding the build-up of rust the Court found that, whilst cleaning might sound routine, these arguments were "*actually deceptive when one considers what would be involved in terms of frequency and cost*". It was on this basis it was found that the cladding was in breach of its intended design life.

## Conclusion

Great care is to be taken when entering into a Contract to ensure the Parties are fully aware of their Design Obligations and that they are a true reflection of what has been tendered. The Parties must also ensure that "*fit for purpose*" Design Duties are incorporated into the Contract as this could leave them without any recourse in the event of a claim, as it would more than likely not be covered by their PI insurance.