Reasonable skill and care vs. fitness for purpose

“Reasonable skill and care”
Currently UK law provides that, in the absence of any written terms and conditions to the contrary, a professional designer will have a duty to act with reasonable skill and care. This duty is implied into all contracts for service by virtue of the Supply of Goods and Services Act 1982. There is a common law test for negligence which states that a professional person is not negligent if they carry out their work to the same standard as another reasonably competent member of their profession would have done.

The “Bolam Test” established that where special skill and competence are involved, it is not necessary for the professional consultant to possess the highest skill provided his views or actions accord with those of a responsible body of opinion of that profession. Therefore, if a consultant can show that they acted in accordance with the usual practice and professional standards for their particular business current at the time the design was carried out, they will escape liability.

What we tend to see is that within a contract these statutory and common law duties are usually enhanced by contract terms requiring the consultant to use the level of reasonable skill and care to be expected of an experienced member of his profession. A typical example of such a clause would read;

“In performing the Services the Consultant shall exercise all the reasonable skill, care and diligence to be expected of an appropriately qualified and competent consultant experienced in carrying out equivalent services for developments of a similar size, scope, complexity, value and purpose to the Development.”

“Fitness for purpose”
By contrast, a fitness for purpose obligation imposes a higher duty as it is an absolute obligation to achieve a specified result, a breach of which does not require proof of negligence. This duty stems from the Sale of Goods Act 1979, which imposes implied terms on any seller acting in the course of business that the goods supplied will be of satisfactory quality and, where the purchaser makes known any particular purpose, are reasonably fit for their intended purpose.

For example, in a construction context, this means that a contractor is effectively guaranteeing that the components and finished building will be fit for their intended purpose.

Why does it matter?
One of the reasons why the distinction between these two levels of responsibility is so contentious is because most professional indemnity insurance (“PII”) policies will cover the holder only in the event of a claim arising out of the holder’s professional negligence (i.e. a failure to exercise reasonable skill and care). This leaves the designer uninsured against a contractual claim for breach of a fitness for purpose obligation. Where a defect arises and no allegations of negligence are made (when the employer doesn’t need to prove negligence, why would he allege it?), the policy is unlikely to respond to the claim and insurers may refuse to pay costs associated with the defence of the claim. Further, not only do PII policies generally expressly exclude a fitness for purpose risk (since it is difficult to quantify this risk in respect of both probability of occurrence and magnitude of loss), some may even be completely invalidated if a consultant has agreed to any fitness for purpose obligations within an appointment.

Full-blown fitness for purpose “in disguise”
The very words “fitness for purpose” will understandably ring alarm bells in the ears of many consultants. However, without using this highly identifiable and word-searchable phrase, absolute obligations may still be imposed. A common way for this to be achieved is to slip in a requirement for the consultant to warrant that the completed works shall comply with the employer’s requirements and/or any performance specification. This type of wording commonly follows immediately after a reasonable skill and care obligation, which may lull the unsuspecting consultant into a false sense of security.

By way of example an amended clause may read “the skill, care and diligence to be expected of a properly qualified and competent architect or engineer”.
This can often be followed by a clause warranting that, “when completed, shall be suitable for the purpose stated in the Contract Documents and will, when complete, comply with any performance specification or requirement included or referred to in the Contract Documents. Regardless of a reasonable skill and care obligation, the effect of the mandatory wording is to add something different – an obligation of strict liability.

This type of amended wording has obvious advantages from an employer’s point of view, as it has the same power and effect of a fitness for purpose clause but without having to shout about it.

**Example**

In the Robin Rigg case¹, the defendant, MT Højgaard (MTH) was contracted to design, construct and install the foundations for sixty offshore wind turbines. Clause 8.1 of the contract provided that these functions “shall” be completed with: the due care and diligence expected of appropriately qualified designers, engineers and constructors; in accordance with Good Industry Practice; so that each item of plant and the Works as a whole “shall be fit for its purpose as determined in accordance with the Specification using Good Industry Practice”; and when completed comply with and “be wholly in accordance with this Agreement and any performance specifications or requirements of the Employer as set out in this Agreement.” The employer’s requirements referred to a minimum site-specific design life of 20 years and required that “The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement”.

Despite exercising reasonable skill and care and following best industry practice, the foundations were found to be defective. Unfortunately, at the time, the industry-wide, and universally accepted, independent, international standard applicable to the design of such foundations turned out to be incorrect. The claimant, E.ON alleged that MTH was in breach of “overriding fitness for purpose obligations” and MTH responded by saying that any fitness for purpose obligation was qualified by its duty to comply with the standard. The point of disagreement between the parties was whether the terms of the contract imposed a strict obligation to design the foundations on the basis of a 20-year design life in accordance with the standard.

In his judgment at first instance, Mr Justice Edwards-Stuart referred to two Canadian cases as authority for the proposition that “the existence of an express warranty of fitness for purpose by the contractor can trump the obligation to comply with the specification even though that specification may contain an error”. He went on to assert that, “It is not uncommon for construction and engineering contracts to contain obligations both to exercise reasonable skill and care and to achieve a particular result” and that “the two obligations are not mutually incompatible” and therefore can coexist side by side. He held that MTH did assume full design responsibility and warranted a service life of 20 years upon which E.ON was entitled to rely, notwithstanding that MTH was required to design in accordance with the standard. Since the foundations failed within two to three years, MTH was in breach of that strict obligation.

MTH was given leave to appeal, which they duly did. On consideration the Court of Appeal held that MTH was responsible for the cost of the remedial work, confirming that an express obligation to construct an asset that is able to perform a specific duty can, if it is clear, override the obligation to comply with the plans and specifications.

This case reinforces the need to clearly draft and understand contract conditions, and to be aware of the implications of accepting absolute warranty/fitness for purpose statements.


**Other points to look out for**

Even if an appointment expressly provides for a performance obligation of reasonable skill and care, or is silent on this matter, a consultant should be wary of entering into a collateral warranty with a fitness for purpose obligation as they will automatically be increasing their potential liabilities with similar repercussions for their PI cover. These issues also need to be considered in the, now fairly common, situation where the employer’s design team is novated to the consultant. Questions should be raised not only in relation to the extent of the consultant’s responsibility for that design, but also as to the potential for differing standards of design responsibility. If the consultant has a fitness for purpose obligation and the third party, with whom they are working alongside, are merely required to exercise reasonable skill and care, this potentially creates a “mismatch” and means that the design liabilities do not flow consistently down the contractual chain.

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