Strictly liable

2 December 2016

Laurence Cobb discusses potential pitfalls when drafting technical documents strategies

---

Whatever your position in the contract chain, the extent of your liability as advisor or project manager can vary ? as indeed it can when you are an individual putting together contract documents and appointments. Sometimes, this situation leads to unintended or even dangerous consequences.

One case with such unintended consequences was MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Limited [2015] EWCA 407 . In this instance, the Court of Appeal considered the interpretation of contract provisions that required the contractor to work in accordance with both the specification and industry standards, exercising reasonable skill and care.

The design of the foundations was based on an internationally recognised standard, J101, but as a result of a significant error in that standard ? and through no fault of either party ? the design failed. This resulted in a lengthy dispute while the court considered which party had to foot the bill for repairing the foundations, necessitating the application of the rules concerning contractual interpretation to the large number of documents involved.

Technical requirements

In particular the court had to consider the wording in the technical requirements, which required the foundations to have a design lifetime of 20 years. It also had to reflect on the interaction between this wording and the conditions in clause 8.1 of the contract, which provided for the design to be fit for purpose ? as determined by the specification and good industry practice ? as well as calling for the exercise of reasonable skill and care.

The Court of Appeal was satisfied that the contractor had not warranted that the foundations would have a service life of 20 years. Considering both J101 and the contract conditions, the contractor was found not to be in breach of the contract. Although the technical requirements were directed at ensuring a "design life" of 20 years, this did not mean that it would inevitably function for 20 years, and clause 8.1 did not require an absolute warranty of quality. Neither did the contract provisions contain a free-standing warranty or guarantee.

Design obligations

Another case in which the contract contained conflicting design obligations was Costain v Charles Haswell [2009] EWHC 3140 (TCC) , where the consultant's appointment stated that the services were to be performed with reasonable skill and care, but a separate provision stated that the design would meet the requirements set out in the specification. These conflicting statements were construed as imposing strict liability for design on the consultant, although not in the provision of the other services where the obligation remained simply one of reasonable skill and care.

There is nothing wrong with including express provisions that impose strict liability to ensure that a finished building is reasonably fit for a specified purpose, or that foundations must comply strictly with the specification ? the contract simply needs to be clear so that all parties are aware of the extent of their respective responsibilities

Sometimes the contract remains silent on the particular issue. In those circumstances, there is usually an implied term relating to design that is imposed by the court ? a consultant, such as an architect, will usually have a duty to act with reasonable skill and care, and a contractor has a strict obligation to achieve the desired result; see for example the case of *Independent Broadcasting Authority v EMI Electronics Ltd [1980] 14 BLR 1*. Nevertheless, the extent of design liability is sometimes difficult to ascertain.

The case of Trebor Bassett v ADT Fire and Security [2012] EWCA Civ 1158 provides further guidance. The Court of Appeal determined that the contractor, in the absence of clear contractual terms, owed a duty of reasonable skill and care, as opposed to the more onerous fitness-for-purpose obligation. The dispute arose out of a catastrophic fire that destroyed a confectionery factory in Pontefract, after ADT Fire and Security had been engaged to provide a fire protection system for the "oil pop" popcorn production lines.

The Court of Appeal considered that the system that was designed and installed by the contractor was not tantamount to goods, for the purposes of the Supply of Goods and Services Act 1982 , and consequently there was no implied term that the fire system would be reasonably fit for purpose. The design and installation of the fire system involved more than the provision of an off-the-shelf product; it would be necessary, therefore, to use clear words in the contract if a fitness-for-purpose obligation was desired.

These decisions serve as reminders that contract documents should set out what is intended by way of liability. For the purposes of compliance with statutory requirements, such as those in building control, the documents should set out clearly who is responsible and to what extent; but questions of design liability can be tricky.

There is nothing wrong with including express provisions that impose strict liability to ensure that a finished building is reasonably fit for a specified purpose, or that foundations must comply strictly with the specification ? the contract simply needs to be clear so that all parties are aware of the extent of their respective responsibilities.

Laurence Cobb is a partner at the law firm Taylor Wessing

Further information

Related competencies include: Contract administration

This feature was taken from the RICS *Building Control journal* (September/October 2016)