
Liability Briefing

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Liability to third parties for reports

A consultant prepares a report in connection with a property or a project for a client (A). The report is passed to another party (B), who relies on it in some way. In what circumstances could the consultant become liable to B for any deficiencies in the preparation of the report?

This *Liability Briefing* considers different ways in which this could happen, concentrating on three situations which could give rise to potential liability, namely:

- A assigns to B the benefit of A's contract with the consultant;
- the consultant incurs a liability to B in tort; or
- the consultant agrees to be liable to B.

This *Liability Briefing* includes example disclaimer wording and other guidance on some of the steps consultants can take to manage the risk of third party claims.

1. A assigns to B the benefit of A's contract with the consultant

Unless assignment is prohibited in the contract, normally A would be free at any time to assign to B the benefit of its contract with the consultant. Any such assignment would usually take place when A sells or transfers its interest in the project to B, but it could take place some time later. If the contract requires C's consent to the assignment, that must be sought and given for the assignment to be effective.

The assignment would give B any rights that A may have against the consultant under the contract. Provided that notice of the assignment has been given to C, B would be entitled to sue the consultant in its own name for any breach of the contract committed by the consultant.

The effect of the assignment is to give B the same rights under the contract as A would have had – no more and no less. Thus, the consultant should be in no worse position, by virtue of the assignment, if faced with a claim for breach of contract, than it would have been in without the assignment. The claim will simply be brought by B instead of A. The same defences will be available as if the claim had been brought by A. The statutory limitation period will run from the same date – ie the date of the alleged breach of contract.

The damages recoverable by B would probably be no more than those that would have been recoverable by A. This issue (ie the damages recoverable) may arise if B is in a different business to A or has a different interest in the project in question, and therefore might incur losses of a kind that would not have been suffered by A. Party B would probably not be entitled to recover for such losses against C, under the assignment.

However, assignment of a cause of action most commonly takes place when B is taking over (or has taken over) A's interest. As such any losses that B suffers as a result of C's breach of contract are likely to be of the same kind that would have been suffered by A and therefore recoverable from the consultant.

In July 2006, the Court of Appeal rejected the argument that an assignee in these circumstances cannot recover substantial damages at all, on the ground that the assignor will have suffered no loss (see below).

2. The consultant incurs a liability to B in tort

The consultant may incur a liability to B in tort, independently of its contract with A.

The circumstances in which a person giving professional advice may incur liability to a person with whom it does not have a contract have been considered by the courts on many occasions. Some of the leading cases were reviewed by the Court of Appeal in 2005 in the case of *Precis (521) plc v William M Mercer Ltd*.¹ This case concerned a report prepared for a company which was later sent to some prospective buyers of the company's shares. The court held that, in the particular circumstances of that case, the makers of the report did not owe a duty to the prospective buyers.

It is not possible to state definitively the circumstances in which the consultant would be held to have owed a duty in tort to B. Key considerations are likely to include:

- the relationship between the consultant and B;
- the precise circumstances in which the report was prepared and in which it was sent to B;
- the extent to which and the purposes for which B relied on the report;
- the extent to which the consultant knew of this reliance and had agreed to it or should have anticipated it; and
- whether, taking all such considerations into account, the consultant could be said to have assumed responsibility to B for any deficiencies in the report due to negligence on the part of the consultant.

A duty will not necessarily arise simply because the report is passed to B; however, if the consultant agrees to a request that the report be passed to B, it may, depending on all the circumstances, be difficult for the consultant to show that it did not know or anticipate that B would rely on it and this might indicate an assumption of responsibility by the consultant to B.

1 *Precis (521) plc v William M Mercer Ltd* [2005] EWCA Civ 114 (15 February 2005), Court of Appeal.

Disclaimer

It may be possible to prevent liability in tort arising by means of a disclaimer.

The following words in a valuation report on commercial properties prevented liability from arising, where the interest of the party to whom liability was alleged to be owed was unknown to the valuers:

This report is for the private and confidential use of the clients for whom the report is undertaken and should not be reproduced in whole or in part or relied upon by third parties for any use whatsoever without the express authority of the surveyors.²

The appropriate wording of a disclaimer may depend on the circumstances. In some situations, it may not be feasible to attempt to prevent the report being shown to other parties, but a disclaimer along the following lines may help to prevent liability to any such party arising:

This report has been prepared by [consultant] on behalf of [client] in connection with [project] at [site] and takes into account their particular instructions and requirements. It is not intended for and should not be relied on by any third party and no responsibility is undertaken to any third party.

Or –

[The consultant] accepts no duty or responsibility (including in negligence) to any party other than [original client] and disclaims all liability of any nature whatsoever to any such party in respect of this report.

A disclaimer should be reiterated to the client and if possible to the third party direct if the consultant is or becomes aware that the report is being passed to any other party. In the event of a claim, the consultant may be required to show that any disclaimer of liability was reasonable under the Unfair Contract Terms Act.

3. The consultant agrees to be liable to B

Often, in circumstances where the report includes such a disclaimer, or otherwise, the consultant may be asked directly to allow a third party to rely on its report. For example, prior to committing to the purchase of a site for development, the purchaser may wish to rely on the consultant's site investigation report, condition survey or such other report. In practice the most common scenarios are:

- A asks the consultant to 're-address' its report to B;
- A asks the consultant to 'assign the benefit of' a report to B;
- A asks the consultant to 'confirm that the consultant owes a duty of care to B in respect of the report'; and
- B asks the consultant to 'confirm that B can rely on a report prepared earlier for A'.

In these circumstances, the consultant may be asked to remove the disclaimer from its report and/or enter into a contract with B, usually by means of a collateral

² This wording comes from *Omega Trust Company Ltd v Wright Son & Pepper* [1996] EWCA Civ 1233, (17 December 1996), Court of Appeal.

warranty or 'letter of reliance'. The consultant may be asked to agree this in its contract with A or may be asked to do so later.

The consultant does not of course have to agree to such a request but may be willing to do so for commercial reasons. However, the consultant should bear in mind that it may incur liability to the third party for losses for which it would not have been liable to its client and that the liability may not be subject to any limitations contained in the contract with its client.

Therefore, if the consultant is willing in principle or under commercial pressure to accept liability to B, appropriate terms, including sensible limitations of liability, could be sought – for example, there could be a limit on the types/amount of losses recoverable and/or a limit on the period of time for which the consultant could be liable. The collateral warranty or 'letter of reliance' should also include a provision stating that the liability of the consultant to B shall not be greater or of any longer duration than C's liability to A under the relevant contract. Such provisions may also limit (or exclude) any liability to B arising by either of the other ways described above – ie by assignment of the benefit of the contract with A or in tort.

Note that if the operation of the Contracts (Rights of Third Parties) Act 1999 is not excluded in the contract and there is a term in the contract with A that purports to be for the benefit of B – for example, a term that allows the report to be shown to and relied on by B – B may be able to bring a claim against the consultant under the Act. See the guidance in the CIC's Liability Briefing on the Act.

***Technotrade Ltd v Larkstore Ltd*³**

Some of the issues explored in this *Liability Briefing* are usefully illustrated in the 2005 TCC case of *Technotrade Ltd v Larkstore Ltd*.

The case concerned a site investigation carried out by a company, Technotrade Ltd (Technotrade), on the stability of a site, prior to the site being developed. The company (A) that engaged Technotrade later decided not to carry out the development and sold the site to another developer (B), with the benefit of the planning permission that had been obtained with the assistance of Technotrade's report. B acquired the report, used it in connection with a further planning permission and proceeded with the development. During the development, a landslip occurred.

The landslip caused damage to various houses uphill from the area of the slip and led to stabilisation works having to be carried out.

B wanted to make a claim against Technotrade. A agreed to assign to B the benefit of its contract with Technotrade. It was now more than five years since Technotrade had prepared its report and completed its services for A, and nearly five years since A had sold its interest in the site to B. In return for the assignment, B agreed to pay A one half of any moneys it recovered from Technotrade, after deduction of costs.

3 *Technotrade Ltd v Larkstore Ltd* [2005] EWHC 2742 (2 December 2005), TCC and [2006] EWCA Civ 1079 (27 July 2006), Court of Appeal.

The Judge made the following findings on preliminary issues:

- (i) The assignment was valid, and so the benefit of any claim for breach of contract against Technotrade arising out of the latter's investigation and report was passed to and could be pursued by B.
- (ii) The argument that A had suffered no loss as a result of any such breach, having sold the site for full value, and that B therefore only had a claim for nominal damages was rejected by the judge, on the authority of *Linden Gardens v Lenesta Sludge Disposals Ltd*.

The Judge's ruling on this point was upheld by the Court of Appeal.

- (iii) The landslip did not give rise to a claim in tort against Technotrade in favour of A, because it occurred after A had sold the site to B. No such claim could therefore be assigned to B.
- (iv) Technotrade did not owe an independent duty of care in tort to B, in respect of economic loss (ie the cost of stabilising the site, save for any part of that cost for which the consultant may be liable under (vi) below). Technotrade did not know at the time of its report that the development would be carried out by another party, to whom its report would be passed, or that its report would be 'recycled' in connection with a further application for planning permission.
- (v) Technotrade owed a duty of care to the house owners in respect of the physical damage to the houses. This means that B could pursue a claim against the consultant under the Civil Liability (Contribution) Act for contribution towards its own liability to the house owners, as owner of the land from which the houses derived support.
- (vi) Technograde owed a duty of care to B in respect of the physical damage to the houses.

The findings on liability were findings in principle on preliminary issues and subject to actual liability – eg negligence and causation – being proved.

This *Liability Briefing* is for general guidance only and legal advice should be sought to cover any particular situation.

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