Risk Management Briefing

Fitness for purpose obligations in consultant appointments

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"Fitness for purpose" obligations are often included in building contracts but, in the case of consultants, historically this type of obligation has been unusual, as the normal obligation within the UK, both within standard terms, and implied by statute, has been to use 'reasonable skill and care'.

However, the position is changing, and it is increasingly important that consultants should be aware of the differences between these two types of obligation and understand their implications.

What does a fitness for purpose obligation entail?

At its heart, a fitness for purpose obligation does exactly what it says on the tin - it imposes on the relevant party an obligation to produce something which is fit for a particular purpose. It is, in effect, a strict liability (sometimes referred to an obligation of result), i.e. it does not require proof of negligence, so that the performing party can be liable even if blameless in regard to the level of care taken.

An example would be if a consultant promises to prepare a design that complies with Building Regulations. If the design falls short, the consultant would be in breach of its obligations. If the consultant, on the other hand, promises to use reasonable skill and care in undertaking the design, including checking its compliance with Building Regulations, a claimant would have to prove not only that the design did not comply, but also that the consultant had failed to use reasonable skill and care, i.e. that it was negligent.

The exact meaning and scope of any strict obligation will very much depend on the drafting of the relevant clauses in the consultant's appointment. It could be overarching and apply to all services undertaken, but it is more likely that it applies only to specific aspect or aspects

of the services. An example would be if the consultant promises to provide information by a particular date (a strict duty), but to use reasonable skill and care in relation to design. It is quite possible to have a dual obligation within a consultant appointment with some obligations being strict, and some negligence based. This occurred in the case of *Costain Ltd v Charles Haswell Partners Ltd* [2009] EWHC B25 (TCC), where the terms stated:

> The Consultant warrants that: 7.1 . . .
>
> 7.2 In the provision of the Services the Consultant shall exercise all reasonable professional skill, care and diligence.
>
> 7.3 . . .
>
> 7.4 Any part of the works designed pursuant to this Agreement if constructed in accordance with such design, shall meet the requirements described in the Specification or reasonably to be inferred from the Tender Documents or the Contract or the written requirements of Costain and designed in accordance with good up-to-date engineering practice and with
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> all applicable laws, by laws, codes or mandatory regulations and in all respects with the requirements of the Contract.

The court here determined that the liability for design services was strict (clause 7.4), but that for all other services the obligation was to use reasonable skill and care (clause 7.2).

Standard printed terms

In most standard form professional services contracts the level of liability is expressly stated to be 'reasonable skill and care'. Examples would be the standard terms published by the RIBA and RICS. The NEC PSC also limits liability in respect of defects to those caused by negligence (clauses 20.2 and 20.3). Some appointments also include an 'overriding' clause. For example, the RIBA Standard PSC clause 3.1 states:

"*… notwithstanding anything that may appear elsewhere to the contrary, whether under this Contract or otherwise, the Architect's duties and obligations shall be deemed to be subject to the exercise of reasonable skill, care and diligence and nothing contained in this as agreement or elsewhere shall be construed as imposing on the architect any greater duty*"

This is intended to prevent the inclusion of a parallel strict liability, in other words to avoid the *Costain v Charles Haswell* problem noted above.

Despite this inclusion, careful attention will need to be paid to any schedule of amendments to a standard PSC.

When does a fitness for purpose obligation arise?

Fundamentally, a fitness for purpose obligation can arise in one of two ways.

Firstly, it could be set out as an express term of the contract itself, generally a bespoke contract, as noted above.

Secondly, it can potentially be implied into the contract by operation of law.

The normal implied level through statute is to use reasonable care and skill (see section 13 of the Supply of Goods and Services Act 1982 and Section 49 of the Consumer Rights Act 2015). However, there are exceptions.

In the case of dwellings, Section 1 of the Defective Premises Act 1972 states that:

> A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—
>
> (a) if the dwelling is provided to the order of any person, to that person; and
>
> (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;
>
> to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.

A new section 1A now includes a similar obligation in relation to repair and refurbishment of dwellings.

Most commentators consider that this imposes a strict obligation. Although the DPA has been little used, as proving something is 'unfit for habitation' is a high hurdle to jump, the extension of the liability period for bringing such claims (under the Building Safety Act 2022) may mean that more claimants use this route.

It is also possible that the proposed new civil liability for breach of the Building regulations is a strict duty (s38 of the Building Act 1984, also introduced through the Building Safety Act 2022, but not yet brought into force).

What are the key risks with a fitness for purpose obligation?

A fit for purpose obligation is problematic for a consultant for two reasons:

1) The most obvious being the acceptance of what can ultimately be a fairly onerous obligation in the contract, and one which can be breached even if strictly speaking the consultant is not at fault; and

2) Professional indemnity insurance is unlikely to cover any liabilities arising under the clause.

Focussing on the second point, professional indemnity insurance usually only responds in instances of negligence, or breaches of obligations requiring "reasonable skill and care". Any obligations which go beyond this or which impose a higher burden may therefore not be covered by a breach of a fitness for purpose obligation, because they can be breached in instances where there is no negligence in play. In extreme circumstances, professional indemnity policies may not cover an entire contract if it has a fitness for purpose obligation in it, but this would be a matter for discussion with the consultant's insurance broker.

It is for these reasons that most consultants will look to avoid providing any such strict obligations, to the extent that statute will allow, and may wish to include express provisions to ensure that no such terms are implied into the contractual relationship.

If faced with a potential fitness for purpose obligation in an appointment (express or implied), the following should be considered:

1) Insurance - will the obligation cause any issues with the consultant's insurance coverage (which ultimately is likely to cause problems for both the consultant and its client).

It is advisable that the insurers approval is obtained, and if so, the following points may be relevant.

2) Risk allocation - consideration needs to be given when giving or asking for a "fitness for purpose" obligation as to the acceptable risk allocation between the parties. If being asked to give such an assurance, is this something which is acceptable given the risk appetite, value and importance of the contract etc.?

3) Drafting of the clause - what are the requirements, how is the requirement drafted and what does it mean in practice? What constitutes "fit for purpose" in the context and what standards is the consultant to be held to?

4) Capping liability - if a fitness for purpose obligation is to be included in a contract, is liability for breaches subject to a cap on liability?

5) Remedies - what remedies are available to the other party if the consultant breaches a fitness for purpose obligation?

This Risk Management Briefing is for information only, and insurance or legal advice should be taken to cover your particular circumstances.

This briefing was prepared by the CIC Liability Panel, chaired by Professor Sarah Lupton.

This briefing is available at www.cic.org.uk