

Updates to the Red Book and the latest on negligence

The Red Book is selling well - but things move on!

The revisions to the Housing Grants Construction and Regeneration Act 1996 are about to come into force and Tony Blackler has now completed the drafting of a supplemental agreement and Third Party Rights Schedule to be used with Red Book appointments, if employers wish to use the Third Party Rights Act rather than collateral warranties.

In respect of the latter, we first thought that a guidance note should be produced until updates are required to the Red Book. The impending revisions to the HGCR mean we may now go straight to updating the Red Book but if there is any delay in the legislation we will still produce a guidance note.

The collaboration with CIC, in respect of third party rights documentation and CIC scope of service, is very valuable but Tony's recent work has identified a couple of wrinkles! The first point is that the standard of skill and care required of the consultant in the SCALA Red Book is that of a consultant who has experience of projects of a similar kind. However, the CIC warranties state that the consultant in performing his services does so using the reasonable skill and care of members of the relevant profession - which is a lesser standard than is warranted to the client. It is doubtful if this will make any difference in most cases of professional negligence but it does represent an inconsistency which will be dealt with in the update and/or guidance note. By contrast the standard warranted by the consultant giving third party rights under the CIC schedule is that of the experienced consultant, so there is a matching obligation there.

The other difference is rather more important. In the CIC warranties the consultant is entitled to defend any

claim by a beneficiary using any defence he could have used against his client. So, for example, he could set off unpaid fees by the client against a claim for repairs to the building necessitated by his negligence. However, under the third party rights schedule the CIC have changed the rules so that the consultant is expressly prevented from raising such defences against the third party. The net effect of these differences is to put the beneficiary of third party rights in a stronger position than the party that has a CIC collateral warranty. Again, this point will be dealt with in the update and/or guidance note.

These matters and the current deepening recession led me to reflect on professional negligence. Both on the basis that it is better to avoid a problem or dispute than to fight after the event and that clients often feel cheated when they have been let down but can't get redress for what they regard as negligence, I thought I would touch on matters of duty and negligence.

Unless a higher, specialist skill and standard is specified, the standard of care to be expected of professionals is that of the ordinary competent and skilled practitioner of that profession. The duty of care is that of a reasonable professional. The standard of care is what he would have done in the



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Rob, author of the SCALA and LGTF 'Guide to Standard Forms of Construction Contracts', has offered to share his experience and expertise with you and looks forward to hearing from readers.



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circumstances. These obviously move on with developments within the professions and industry but the words of Tindal CJ in *Lanphier-v-Phippos (1838)* are still true today:

“Every person who enters into a learned profession undertakes to bring to an exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill...”

Another quote, from Mr Justice Roughton in 1996, should perhaps also be remembered in this increasingly litigious age:

“...(there is) a growing belief that every misfortune must, in pecuniary terms at any rate, be laid at someone else’s door, and after every mishap, every tragedy, the cupped hands are outstretched for the solace of monetary compensation...”

Sometimes it’s not someone else’s fault and sometimes, even when it is, it isn’t negligence! When it is, in construction it can usually be pursued in tort or in under contract but under both the same three conditions must be met:

1. It must be proved the professional owes a duty of care.
2. It must be proved there is a breach of that duty.
3. It must be proved that relevant damage has been suffered as a direct result ie the damage cannot be too remote from the breach.

(1) and (2) bring us back to the issues of standard and duty I referred to earlier. Context is important to

these also. For example, an engineer preparing detailing for a design and build employer’s requirements for the employer is carrying out a different function under a different standard of care from that when, having been novated, he is detailing the concrete, reinforcement etc for the contractor (*Blyth-v-Blyth*).

Proving negligence almost invariably requires expert opinion. Returning to my earlier point, it would seem to me, therefore, that such expert input would be better early on to avoid issues of negligence, in preference to pursuing such issues after the event.

Times are now hard and bids are becoming low! Contractors, including consultants, will often find it hard delivering for the low price they have bid. There will be the inevitable increase in claims, not only by contractors seeking to compensate their low bids, but also by clients seeking redress for what they regard as poor service. Is that poor service negligent? Is the scope of what was expected of the professional clear, as to the standard as well as the duty? Is the consultant failing to deliver the scope or merely delivering the scope and no more, because that is all he can afford to do?

So, I commend the SCALA Red Book to ensure you address these issues before the event, ie on appointment! I also recommend you overtly monitor the service received against the scope of service specified - SCALA Red Book or CIC schedule. Sort out warranties and third party rights. If things appear to be in danger of going wrong, the early appearance of an expert should be considered to demonstrate intent to ensure full consideration is received. All that may focus consultants on their duty to deliver and thus avoid nasty negligence claims! One thing is certain, clients, contractors and consultants are entering interesting times. They need to get things right. If they don’t, we know who will benefit!

See the new Legal Base for information on the Red Book and LegalHelpnet plus all the Legal Beagle articles.