

### A STUDY OF THE DUTIES AND LIABILITIES OF DESIGN AND ENGINEERING CONSULTANTS IN DESIGN AND CONSTRUCT CONTRACTS

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#### INTRODUCTION

It is likely that an architect or engineer will be engaged by the main contractor appointed under the design and construct contract, either by direct contract to develop the principal's design or by a novation agreement transferring the engagement of the consultant from the principal to the main contractor. In the latter scenario the consultant may still owe common law or statutory duties to the principal (and other third parties) in the event of loss caused by a faulty design or by negligent contract administration.

All too often a design consultant's contract will not be given the attention it deserves. The contract may be formed from a number of letters and emails, or from a combination of written and verbal agreements. The consultant's contract should comprehensively set out the design and contract administration tasks that the consultant is expected to undertake, full and clear details of the project that the consultant is working on and also any limits or exclusions of liability. It is vital that care is taken in preparing the contract and thinking about how that contract will sit with the other project contractors.

#### DUTIES OWED TO A CLIENT IN CONTRACT

The primary duties of design and engineering consultants, and the nature and extent of those duties, flow from the consultant's contract with their client. The contract will be the first point of review, along with the factual circumstances of the case, to determine whether the design has reached the necessary benchmark required by the client. It is therefore extremely important for the parties to have a written contract in place.

#### Express terms

Standard forms may be used as the basis for the parties' written agreement. The RAIA, in conjunction with the Association of Consulting Architects (ACA), has a standard form of agreement (RAIA Agreement)<sup>1</sup> for use on residential and commercial projects across Australia. The ACEA also has a standard form of agreement.<sup>2</sup>

Australian Standards has produced AS4122-2000 General Conditions for the Engagement of Consultants, and has also drafted a Consultant's Agreement specifically for design and construct projects, AS4904.<sup>3</sup> However, the AS4904 is currently only available as a draft standard DR99042 and is not yet in print.

The consultant's written agreement should work back to back with the main and subcontracts in a design and construct project to ensure consistency between the risk allocations to the respective parties.<sup>4</sup> If the consultant is novated from the principal to the contractor, the consultant will want to ensure that it is not taking on more onerous design liabilities.

A consultant may want to limit its liability to the client. Clause 9.1 of AS4122-2000 and clause 4.1 of

the ACEA Contract both allow the consultant to insert a maximum monetary amount for liability arising out of the performance or non-performance of services.

Clause 4.2 of the ACEA Contract expressly excludes the engineer's liability for indirect or consequential loss. It is likely that the client will want to delete or narrow this clause because a breach of contract could have far-reaching and costly consequences for a client if the development has been built to a faulty design.

Clause 4.3 of the ACEA Contract allows a limitation on the period of the engineer's liability, with a three year period as a fallback position. This allows the parties to override the periods set out in the relevant Limitation Act. Again, the client is unlikely to agree to such a clause and will seek to retain its statutory rights.

In AS4122-2000 and the ACEA Contract the liability of the consultant is reduced to the extent that the client has caused or contributed to the loss or damage. This limitation is an increasingly common clause that most clients are now willing to accept.

Interestingly, there is no limitation of liability in the standard RAIA Agreement. Any limitations such as those referred to above would have to be included as special conditions in the agreement.

#### Implied terms

##### 1. Duty to act with reasonable skill and care

In the absence of an express term, the duty to take reasonable skill and care in carrying out the services (which should be set out in the scope of work) is implied into every contract with a design and engineering consultant.

(i) The Standard of Reasonable Skill and Care

In *Voli v Inglewood Shire Council*,<sup>5</sup> an architect was found liable in negligence to the claimant in failing to ensure that a stage in the council hall was designed to be safe for any load that could reasonably be expected.

Windeyer J identified the standard of care required:

An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. He must bring to the task he undertakes the competence and skill that is usual among architects practising their profession. And he must use due care. If he fails in these matters and the person who employed him suffers damage, he is liable to that person. This liability can be said to arise from a breach of his contract or in tort.<sup>6</sup>

Therefore the standard required is that of the ordinary skilled person (in this case an architect) exercising and professing to have the relevant skill. The standard of care is similar for engineers.<sup>7</sup>

The court will be assisted by expert evidence on the standards ordinarily observed in the particular profession. However, in the case of *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd and Ors*,<sup>8</sup> Giles JA said:

Prudence is not the same as the exercise of reasonable care and skill, and that some engineers thought it would have been prudent did not mean that there was a failure of reasonable care and skill. The standard of care of a professional is 'not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant

profession' (*Rogers v Whittaker* (1992) 175 CLR 479 at 487).<sup>9</sup>

Expert evidence is not therefore determinative of the standard. The court must consider the expert evidence along with the facts and circumstances of the case.

A higher standard of care may be imposed on a consultant where specialist services are involved or the architect or engineer holds themselves out as having special skills, for example in geotechnical engineering. However, in *Gloucestershire HA v Torpy*<sup>10</sup> Judge Bowsher QC drew a distinction between specialist engineers and general practice engineers. The defendants were mechanical and engineering building services engineers who claimed to have extensive experience in incinerator technology. The judge rejected the argument that the engineers were specialists in incinerator technology as this was not their sole specialism and held that they only owed the duty of care and skill expected of general practitioners in mechanical and engineering building services.

The sophistication and knowledge of a consultant's client may also affect the standard of care required from the consultant. In *J Jarvis & Sons Ltd v Castle Wharf Developments Ltd*,<sup>11</sup> an architect was engaged by the developer to obtain planning permission for the development. The architect was not involved in the tender process or the contractor's discussions with the developer's project manager about changes to the proposed construction. The contractor was awarded the design and construct contract and the architect was novated to the contractor. When the local authority advised the contractor that the new construction was not in accordance with planning permission, the contractor

claimed that the architect should have advised it of the true planning position immediately upon novation.

The court at first instance found that the architect was in breach of its duty of care in contract and in tort. However, the architect's appeal was upheld. The Court of Appeal held that there was no express or implied duty on the architect to give advice to the contractor, only a duty to offer advice if the architect reasonably perceived that the contractor would require such advice. The contractor failed to demonstrate to the court that the architect should have questioned whether the contractor understood the planning issues at the development.

The standard of care will be determined at the time when the consultant provides the particular services. If the consultant does not have the particular expertise to undertake some or all of the work, the consultant cannot delegate the duties it owes to its client to a third party if there is no express or implied term in the contract to that effect. To paraphrase the judgment of Sir Walker Carter OR in *Moresk Cleaners Ltd v Hicks Ltd*,<sup>12</sup> a consultant in that situation must either decline the work, advise the client to obtain expert advice for that particular part of the work or engage an expert itself whilst retaining all responsibility to the client.<sup>13</sup> In the latter scenario, the consultant should ensure that the expert it engages owes the same duties that the consultant owes to the client so that liability can be passed down the contractual chain.

*Moresk* should, however, be contrasted with the later case of *London Borough of Merton v Lowe*<sup>14</sup> where an architect was not liable in respect of the defective ceiling mix specified by

nominated subcontractors. The architect had used the design subcontractors before on a similar project and was, on the particular facts, entitled to rely on the subcontractor's specification of the same ceiling mix.

The RAI Agreement and the ACEA Contract both address the engagement of third parties to undertake some or all of the consultant's work. The RAI Agreement states that specialist design subconsultants (who are to be listed in the schedule) are engaged 'for and on behalf of the client'.<sup>15</sup> However, the architect is not relieved from any of its obligations and liabilities under the agreement.

In the ACEA Contract, the engineer must obtain the prior written consent of the client before subcontracting any work,<sup>16</sup> but remains responsible to the client for the performance of the services.<sup>17</sup> If a specialist is required, the engineer may engage the specialist with the prior approval of the client 'at the client's expense and on its behalf'.<sup>18</sup>

Under both standard forms the consultant is under an obligation to check the design and warn the client of any defects in that design which a consultant of ordinary competence in its particular field reasonably ought to be aware of.<sup>19</sup>

However, the ACEA Contract expressly states that the engineer has no liability whatsoever for any acts or omissions of the specialists.<sup>20</sup> If this clause is not deleted from the contract, the client would have to bring separate common law proceedings against those third party specialists and has the burden of proving a breach of duty of care and losses suffered as a result of that breach.

## 2. The duty to warn

The duty to warn may form part of the standard of care expected of a consultant if their contractual duties extend to the administration of the construction contract. In the first instance decision of *B L Holdings v Robert J Wood & Partners*<sup>21</sup> architects were in breach of their relevant obligation and accordingly liable in failing to warn their clients of the danger that the planning application might be void. On appeal,<sup>22</sup> the court reversed the first instance decision and held that the architect was not negligent in failing to warn the owners after the planning permission was granted, since the architect had never experienced a situation where a planning permission, once granted, had subsequently become ineffective. The architect was also entitled to rely on the advice of an officer of the local planning authority that the building area would be under 10,000 square feet and therefore that there was no requirement for an office development permit.<sup>23</sup>

Construction consultants administering a project will also be under a duty to warn their client of the failings of other construction professionals engaged on that project.<sup>24</sup>

In the case of *Palermo Nominees Pty Ltd v Broad Construction Services Pty Ltd*,<sup>25</sup> and following *Sir Walker Carter OR's judgment in Moresk Cleaners v Hicks*,<sup>26</sup> the project manager for the design and construction of a nightclub was held to be under a duty to warn the client that expert advice was required to determine the capability of the acoustics in the nightclub.<sup>27</sup>

It is well advised that, in respect of any design which the designer knows carries an element of risk, the client is made fully aware of all possible risks and is also advised if there is an available

alternative design.<sup>28</sup> Even if a client knows of the risks, it is best practice for a designer to ensure that the client tacitly accepts the consequences of those design risks if the client still insists that the work should be undertaken.<sup>29</sup>

The duty arising in *Voli v Inglewood Shire Council*<sup>30</sup> to act with reasonable skill and care does not impose an absolute obligation on the consultant. The standard of care will be determined on the nature of the consultant's profession, the contract and the facts and circumstances of the case. If a professional makes an error of judgment, this does not necessarily mean that they have been negligent in undertaking their duties. For example in *East Ham Corp v Bernard Sunley & Sons Ltd*,<sup>31</sup> one of the architect's duties was to reasonably examine the building work and it was held unreasonable to expect the architect to have found all the defects in the work.

## 3. Design is reasonably fit for the purpose

Where an architect or engineer is engaged under a design and construct contract then he or she may, under certain circumstances, be liable under an implied warranty that the design will be reasonably fit for the purpose. It is important then that the 'purpose' of a particular project is clearly stated in the consultant's contract. A clear brief will also avoid any later disputes as to the scope of the services to be undertaken by the consultant.

A contractual term as to fitness for purpose may be implied if the consultant is required to take particular, or 'special', steps to fulfil his or her duty to the client to take reasonable care and skill. In *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners*,<sup>32</sup> an expert structural engineer

was engaged by a design and construct contractor to design the structure of a warehouse. The engineer was made aware that loaded fork-lift trucks would regularly cross the first floor of the warehouse and was also aware of the possibility of vibration caused by the trucks. The first floor cracked due to the vibrations. It was held that the engineer had failed to design the floor with sufficient strength to withstand this factor. The court held that the engineer had breached an implied term that the design would be reasonably fit for the use of loaded fork-lift trucks.

Similarly, in *IBA v EMI and BICC*,<sup>33</sup> the duty owed by a nominated subcontractor (and similarly the main contractor) requested by the client to design, supply and erect a television aerial mast went beyond the duty to exercise reasonable care and skill. The contractual obligations as to design were considered in obiter comments by Lord Scarman as follows:

... In the absence of a clear, contractual indication to the contrary, I see no reason why one who in the course of his business contracts to design, supply and erect a television aerial mast is not under an obligation to ensure that it is reasonably fit for the purpose for which he knows it is intended to be used ...<sup>34</sup>

In *IBA v EMI*, the higher duty to ensure that the design was reasonably fit for the purpose arose from the fact that the mast was being supplied as well as designed.

The extent of the obligation as to reasonable fitness for purpose was considered in *Barton v Stiff*.<sup>35</sup> Applying *IBA v EMI*, the judge, Hargrave J, held that 'the absolute warranty of fitness for purpose relates to the purpose as properly identified'.<sup>36</sup> This would mean that the 'purpose' would

be limited to that which could reasonably have been expected, or 'likely to be encountered'. Therefore the reasonably foreseeable purpose in *IBA v EMI* was that the television mast would withstand normal weather conditions for that particular area in which it was erected and transmit television and radio programmes.

Reliance on the designer and the designer's knowledge of that reliance is another important factor leading to the implication of a fit for purpose warranty. In fact, Lord Scarman in his obiter comments in *IBA v EMI* went on to say:

The critical question of fact is whether he for whom the mast was designed relied upon the skill of the supplier ... to design and supply a mast fit for the known purpose for which it was required.<sup>37</sup>

It is important that the courts look at the intention of the parties and construe the terms of their agreement before implying a duty to ensure that the design be reasonably fit for purpose. It may be clear on the face of the contract that a design is to be fit for purpose.<sup>38</sup>

A principal may want to widen the fitness for purpose warranty if there is a specific purpose or conditions to which the client wants the consultant to design. The consultant may be reluctant to accept such transfer of risk if the risk is expensive (or even impossible) to obtain professional indemnity insurance for. If the principal wants the warranty, then it may agree to pay for the difference in cover so that there are back to back warranties with the contractor.

4. Continuing review of design  
The law as to whether a consultant is obliged to review its design, under what

circumstances and over what period of time has fluctuated over the last 25 to 30 years.

In *London Borough of Merton v Lowe*<sup>39</sup> architects were retained to design and supervise the construction of an indoor swimming pool. Between practical completion and the issue of the final certificate, cracks were found in the ceilings, which had been designed by the architect's subcontractor. The builder was instructed by the architect to rectify the defective ceilings but the architects did not consider whether the design itself was the cause of the cracking.

The Court of Appeal upheld Judge Stabb QC's decision at first instance that the architect was under a continuing duty to review, and if necessary amend, its design as soon as it was aware of a defect, or potential defect, in that design.

The case of *New Islington Health Authority v Pollard Thomas & Edwards*<sup>40</sup> is a similar case to *Merton LBC v Lowe*. Between practical completion and the issue of the final certificate the claimant received complaints about the sound insulation in the property. The claimant asked the architect for details of the design for sound insulation and whether that design complied with the UK Building Regulations. The architect duly provided the information but did not review its design. Dyson J held, inter alia, that

(i) a designer who also supervised and inspected work would be obliged to review that design until it had been included in the work; and

(ii) the duty to review the design will arise only if the designer has a good reason for doing so.

In this case the claimant's request for information on the design was

not sufficient to impose a duty on the architect to review its design.

The New Islington decision in the UK continues to be good law and has subsequently been applied in other UK cases.<sup>41</sup> It is unlikely that the designer's duty to review its design will extend beyond practical completion of the work unless there are express terms to the contrary or where particular circumstances arise before or at the date of practical completion which are likely to re-occur.<sup>42</sup> Although these cases have not been tested in Australia, the current UK position makes commercial sense and reflects a practical reality for consultants which would avoid them pricing an onerous risk into their terms of engagement.

#### DUTIES OWED TO THIRD PARTIES IN CONTRACT

A design consultant may owe contractual duties to a third party by entering into a collateral warranty with that party. For example, a consultant engaged by the design and build contractor will not have a direct contract with the developer, but the developer may want to ensure, through the warranty, that it has a right of recourse against the consultant for any breach of the consultant's duty to use reasonable skill and care in performing its work. In addition, if the warranty is given in the form of a deed, the developer will have 12 years in which to bring an action for breach.

Due to the additional layer of exposure, the extended 12 year period and the possibility that the rights under the collateral warranty are assignable, consultants are often reluctant to enter into collateral warranties. The consultant's level of professional indemnity insurance may not cover them for this additional risk, and so the third party may have to provide some monetary consideration to the

consultant for entering into the warranty.

#### DUTIES OWED TO A THIRD PARTY IN TORT

Design consultants may be liable in the tort of negligence to third parties for causing death or personal injury, property damage or economic loss. It is first important to identify the difference between the duty of care owed by a consultant to third parties and the duty of care owed by a builder to third parties. In *Oldschool v Gleeson (Construction) Ltd*,<sup>43</sup> Judge Stabb QC, in obiter comments said:

... the duty of care which an architect or a consulting engineer owes to a third party is limited by the assumption that the contractor who creates the work acts at all material times as a competent contractor but if the design was so faulty that the competent contractor in the course of executing the works could not have avoided the resulting damage, then in principle it seems to me that the consulting engineer responsible for that design should bear the loss.<sup>44</sup>

#### Duty not to cause death or personal injury

It was held by Lord Oliver in *Murphy v Brentwood District Council*<sup>45</sup> that construction professionals owe a duty of care not to cause personal injury to those whom they could reasonably foresee might be injured as a result of their negligence. In *Clay v A J Crump & Sons Ltd*<sup>46</sup> a labourer employed by the builder was injured by a wall that collapsed on site. The architect engaged at the project relied on the advice of the demolition contractor that it was safe to leave the wall standing, but this did not absolve the architect from liability. Applying the 'neighbourhood principle' established in *Donoghue v*

*Stevenson*,<sup>47</sup> the court held that it was reasonably foreseeable that the labourer would be injured by the architect's negligence. The architect's work was held by *Ormerod J* to have:

... involved taking precautions or giving instructions for them to be taken so that the work could be done with safety.<sup>48</sup>

In *Berwick v Wickens*<sup>49</sup> the claimant's husband was killed when the building he was refurbishing collapsed. The claimant sued the original builder, the victim's employer John Lay and the structural engineer engaged by John Lay to assess the structural stability of the building. The engineer, whilst held to owe a duty of care to the victim, was not in breach of the duty. The engineer's investigations were held to have been properly undertaken and the building collapse was not foreseeable from the information available to the engineer.

The scope of the design consultant's duties in its contract will have a bearing on its liability in tort. In *Clayton v Woodman & Son (Builders) Ltd*<sup>50</sup> a gable collapsed and injured the claimant but the architect was held not to owe a duty of care to the claimant. The architect, in following the specification to retain the gable and having satisfied itself that the gable could be safely incorporated, had not stepped outside the province of its contractual responsibilities. The manner of work adopted by the builder was the cause of the injury, and the architect had given no direction to the builder as to how the work was to be undertaken. However, if the architect had given such direction and knew or ought to have known that the work would be done in a dangerous manner or could expose a third party to danger, it may have owed a duty.<sup>51</sup>

## Duty not to cause damage to property

The principles in *Donoghue v Stevenson*<sup>52</sup> and *Murphy v Brentwood District Council*<sup>53</sup> relating to the duty of care not to cause physical injury were similarly applied by Judge Bowsher Q.C in respect of property damage in *Baxall Securities v Sheard Walshaw Partnership*.<sup>54</sup> In that case, architects were engaged by a developer for the design and construction of a warehouse. The claimant was a lessee of the warehouse and stored electrical goods there. The goods were damaged when, due to the inability of the roof drainage system to cope with rainfall, rainwater flooded through. The claimant sued the architect in tort alleging (i) negligent failure to see that adequate overflows were installed and (ii) failure to design a roof drainage system to cope with rainfall levels that should have been anticipated. The architect argued that it owed no duty as the claimant was a subsequent occupier. Alternatively, it argued that no duty arose because the claimant ought reasonably to have discovered lack of overflows before taking the lease.

The claimant had had the building inspected by a surveyor. The court therefore held that the architect owed no duty in respect of the lack of overflows but that it did owe the second duty, because neither the claimant nor its surveyor could reasonably have been expected to discover that the roof drainage system was under-designed in that way. The Court of Appeal upheld the first instance decision.

Therefore, on Judge Bowsher QC's findings in *Baxall*, architects engaged by a design and build contractor owe a duty of care in tort to a subsequent occupier for latent defects caused by faulty design if there was no possibility

that an inspection to discover those defects would be conducted by the subsequent occupier prior to occupation.

A recent case in the UK Court of Appeal appears to widen the scope of the duty of care owed in respect of latent and patent defects. In *Pearson Education Ltd v The Charter Partnership Ltd*,<sup>55</sup> a case with almost identical facts to *Baxall*, the architects sought to rely on *Baxall* and argued that they owed no duty of care on the basis that the defect was no longer considered latent because the building had previously flooded. The Court of Appeal rejected this argument and dismissed the architect's appeal, finding that the subsequent tenant had no reason to know of the first flood and that there was no reason why they should have carried out an investigation of the rainwater system, or that the architect would have expected them to.

There was no break in the chain of causation by way of inspection (as had been established in *Baxall* in respect of the overflows). The Court of Appeal went on to suggest that, even if there had been, the claimant's failure to take reasonable care to obtain a survey when purchasing a property would amount to contributory negligence at the most. The court also suggested that the duty of care would only be negated in respect of defects that were extremely obvious to a reasonably competent adviser.

In cases of damage caused to third party land or buildings, as opposed to damage to property (for example the electrical goods in *Baxall*), there is a distinction to be drawn between physical injury and economic loss. In *De Pasquale v Cavanagh Biggs & Partners*,<sup>56</sup> an engineer breached its duty of care in failing to commission geotechnical

consultants to carry out a geotechnical investigation prior to design and also to engage them after discovering a damp spot in the excavated area prior to allowing further construction to proceed. The damp caused an adjoining building's foundation to be destabilised as well as that of the building being constructed. Both buildings suffered structural damage. *Chesterman J* held that the damage to the adjoining building was physical injury, thereby only requiring the plaintiff of that building to establish reasonable foreseeability of injury by the engineer for the duty of care to be made out.<sup>57</sup> On the other hand, the damage to the new building was characterised as economic loss, liability for which may be more difficult to establish.<sup>58</sup> His Honour stated that:

The damage [to the adjoining building] was caused by a factor external to the building itself: the loss of support to the foundations by the weakening of the soil. This means the damage is to be categorised as physical and not economic loss. The distinction is important because the basis for liability for economic loss is more confined than for physical damage. The loss is economic where damage consists of a defect in the structure itself arising from inadequate design or building so that the value of the structure is diminished and it may require remediation.<sup>59</sup>

## Economic loss

A consultant's duty of care in tort to avoid causing economic loss was established in the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.<sup>60</sup> The Law Lords found that a 'special relationship', that is a contractual or fiduciary relationship, had to exist between the parties for the duty to be imposed. In order to establish a special relationship, a third party must demonstrate its reliance

on the consultant's skill<sup>61</sup> and that the consultant assumed responsibility toward that third party.

A design consultant appointed by a design and construct contractor may owe a duty of care to avoid causing economic loss to the building owner. The existence of such a duty will depend upon whether the contractual structure is consistent with an assumption of responsibility by the consultant for the proper performance of design services.

In Australia, the High Court adopted the Hedley Byrne principle in *Bryan v Maloney*<sup>62</sup> (Bryan) and held that not only the original owner but also the subsequent purchaser of a residential building was owed a duty of care by the builder to avoid causing economic loss for structural defects. The decision in Bryan extended to design consultants, which meant that an architect or engineer may be liable to subsequent house purchasers for any economic loss due to defects in the design at the time of purchase which were caused by their negligence. There is no limitation on the period of time for which the consultant may be liable.

The Queensland Court of Appeal went on to limit the application of Bryan to residential premises in *Tod Group Holdings Pty Ltd v Fangrove Pty Ltd*.<sup>63</sup> In that case a parapet designed by a structural engineer for a commercial building collapsed and the owner sued in negligence. Although the damages were held to be for pure economic loss, the owner had failed to make out that it had relied on the engineer's design or that the designer had assumed responsibility. On that basis, and on the basis that the premises were commercial and not residential, the court found no special relationship of proximity

between the engineer and the subsequent owner.

After the *Tod Group Holdings* case, the High Court of Australia side-stepped the residential-commercial distinction and considered a different aspect of the relationship between the claimant and the defendant to determine whether a duty of care is owed. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*<sup>64</sup> (Woolcock) the majority of the court identified the notion of 'vulnerability' as an important requirement for liability,<sup>65</sup> in other words the injured party's inability to protect itself from the defendant's want of reasonable care. The concept of vulnerability continues to be applied in Australia.<sup>66</sup>

The High Court in Woolcock considered Bryan. The majority was of the view that the duty of care owed by the builder in that case to avoid causing economic loss to a subsequent purchaser depended upon the finding that the builder owed the first owner the same duty of care. In Woolcock however, there was no evidence to show that the original owner had relied upon the engineer. Furthermore, the subsequent purchaser of the building had the opportunity to engage an expert to inspect the building and to enquire as to whether the premises had any structural defects, but did not do so, and was not therefore 'vulnerable' to the consequences of any negligence by the engineer.

Following Woolcock, it would appear likely that if defects could have been discovered by a property inspection, a duty of care would not be owed to the subsequent purchaser of a building, whether residential or commercial. However this issue was considered in *Moorabool Shire Council v Taitapanui*.<sup>67</sup> Maxwell P stated:

It was not suggested in Bryan or in Woolcock that the ability to procure such an [independent] inspection negated the duty of care owed by the first builder to the first owner... Once it is concluded that the relationship between the surveyor is characterised by assumption of responsibility and known reliance (or dependence), it is difficult to accept the contention that the availability of private building inspection services negates the existence of a duty of care. Either the subsequent owner is dependent on the surveyor, or (as in Woolcock) they are not.<sup>68</sup>

*Ormiston and Ashley JJA* held that 'what ultimately determines whether a duty of care arises is the character of the relationship'<sup>69</sup> and whether the parties had a 'sufficiently close relationship' to give rise to a duty of care. A combination of the factors in Bryan and Woolcock was therefore applied in *Moorabool* in reaching the decision that a surveyor did owe a duty of care to a subsequent owner.

## DUTIES OWED TO A CLIENT IN TORT

In addition to the duties owed to his or her client under the contract, a consultant may also owe a concurrent duty of care in tort. In the famous 'duty of care' case of *Donoghue v Stevenson*,<sup>70</sup> Lord Macmillan said:

The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract.<sup>71</sup>

The extent of the duty of care owed by a consultant in tort may be determined by considering the

scope of work that the consultant is contractually obliged to undertake, and whether the imposition of a particular duty would alter that scope of work or impose more onerous tasks upon the consultant than contractually intended. It is unlikely that a consultant would be exposed to a greater duty in tort than the contractual duties he or she owes under the contract, particularly if there is a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.<sup>72</sup> The clearer the contract, the easier it is to determine the limits (or the exclusion) of the tortious liability.<sup>73</sup>

If on the other hand, the consultant carries out tasks that fall outside of the contract, it may be found to owe a duty of care in respect of those tasks. In *Kensington and Chelsea and Westminster AHA v Wettern Composites Ltd*<sup>74</sup> a structural engineer's duties included checking drawings for the adequacy of fixings but did not include the supervision of the installation of those fixings. When the engineer observed defects in the installation the court held that the consultant's duty of care to client in tort required it to follow up its observations.<sup>75</sup>

The advantage of concurrent liability is that a claimant may not be statute barred from making a claim. In other words, if a claimant's rights arise in both contract and in tort, the claim in tort may be more advantageous from a time point of view.

#### **PARTICULAR DUTIES OF THE CONSULTANT AS A CONTRACT ADMINISTRATOR**

An architect or engineer may be engaged by a principal not only to design but also to administer the design and build contract, for example inspecting the building work and/or issuing certificates.

#### **Duty to supervise or inspect**

The duties to supervise and inspect often go hand in hand. However, it has been said that the duty to supervise is more onerous in that it is a continuing, rather than periodic, obligation to ensure that the work is being undertaken safely and in accordance with the contract.<sup>76</sup>

One writer has expressed the view that courts should refrain from imposing a duty upon architects to take reasonable care in supervision because the parties can regulate this through their contractual terms.<sup>77</sup>

#### **Certification**

In *Sutcliffe v Thakrah*<sup>78</sup> the House of Lords held that an architect, when determining amounts to be certified under the building contract, owes a duty of care towards his client in the performance of all duties and must act fairly, impartially and in a professional manner. However, the function of certifying monies due does not make the architect an arbitrator.<sup>79</sup>

There have been differing views as to whether contractors can claim against a professional engaged by the employer for negligent certificates (usually under-certification of the work). In *Pacific Associates Inc v Baxter*,<sup>80</sup> the claimant contractors had been engaged in extensive dredging and reclamation work in the Persian Gulf. The contract provided that, in the event of encountering unforeseeable obstructions, the claimant was, after certification by the engineer, entitled to payment for costs. The court at first instance and on appeal held that, despite the imposition of a duty on the architect to act independently and fairly in certifying progress payments, no duty of care to avoid economic loss was owed. The contractor had the contractual right against

the principal to challenge the certificate or decision by means of an arbitration clause, and there was also a disclaimer in the contract in respect of the engineer's liability for acts or obligations under the contract. The contractor would have to prove particular reliance in order to establish proximity.

Similarly in *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd & Bruce Henderson Pty Ltd*<sup>81</sup> the contractor alleged that it had been substantially underpaid and sued both the employer and the architect. The contractor alleged that the architect owed it a duty of care in tort to act fairly and impartially in carrying out the duty of the certifier under the contract. Byrne J held that, although it was reasonably foreseeable that the architect's negligent certification might cause loss to the contractor, the architect owed no duty to avoid the contractor suffering economic loss. The contract between the contractor and the principal, together with the experience and bargaining position of the parties failed to establish that the contractor

... relied on or depended upon the careful and impartial performance by the architect of its certifying functions ... and whether the architect, for its part, assumed a legal responsibility to the contractor so to perform them ...<sup>82</sup>

As in *Pacific Associates*, Byrne J referred to the right of the contractor to challenge the architect's certificate through arbitration. Byrne J held (contrary, it would seem, to *Sutcliffe v Thakrah*) that the architect owed no duty to act fairly and impartially in the certification of progress payments on the basis that, under the contract, that function was being performed as agent for the principal, not in the

interests of the contractor.<sup>83</sup> Byrne J distinguished this particular duty from the architect's duty to use reasonable skill and care in performing contract administration functions. This finding was made on the particular facts of the case.

It seems that the court will first consider whether the contractor has an adequate contractual remedy against the principal and secondly whether the contract administrator assumed responsibility to the contractor beyond the scope of that contract.

The professional's tortious duty to the contractor may be different in respect of the provision of tender information. In *J Jarvis & Sons Ltd v Castle Wharf Developments Ltd*,<sup>84</sup> the developer engaged project managers, GMS, to seek tenders for the design and construction of an office and leisure complex. The claimant contractor's proposed scheme was modified during discussions between the contractor and GMS and the contractor was subsequently engaged by the developer. Work commenced but the local planning authority then informed the contractor that the scheme was not in accordance with planning permission. The contractor alleged that it had relied upon GMS's statements that the scheme accorded with the planning permission before starting the work. GMS denied that it owed a duty of care to the contractor and relied on the decision in *Pacific Associates*. The Court of Appeal held that there was no reason why GMS could not owe a Hedley Byrne duty of care in relation to the statements made to a contractor if the contractor was found to have relied on those statements. Reliance was not, however, proved in this case.

The Canadian case of *Edgeworth Construction v ND Lea & Associates Ltd*<sup>85</sup> also supports

the view that an engineer (or other consultant) owes a Hedley Byrne duty of care to a tendering contractor for economic loss suffered as a result of statements in the tender documents relied upon by contractors. Even though there was an express term in the contract that any representations given in the tender documents were furnished for information only and did not amount to warranties, the errors in the documents amounted to negligent misrepresentations that the engineers knew were likely to be relied upon. The engineers could have gone further to avoid liability by putting an express disclaimer on their design documents.

#### DUTIES UNDER STATUTE

In addition to contractual and common law duties, there are statutory obligations that a consultant must comply with.

#### Compliance with standards and codes of practice

Professional consultants should have a working knowledge of Australian Standards and the Building Code of Australia, and design in accordance with those codes. In *Bevan Investments Ltd v Blackhall & Struthers (No.2)*<sup>86</sup> a structural engineer engaged by an architect for design and supervision of the project was held to owe a duty of care to the proprietor to ensure that the structural design was safe and complied with codes of practice. The contractor had concerns about the design and obtained independent engineering advice, which concluded that the design was not safe. Beattie J held that

A design which departs substantially from them [codes of practice] is prima facie a faulty design, unless it can be demonstrated that it conforms to accepted engineering practice by rational analysis.<sup>87</sup>

A designer may also be found negligent for failing to comply with guidelines published by the relevant professional institution.<sup>88</sup> However, the applicable codes will depend upon the nature of the construction. In *Ministry of Defence v Scott Wilson Kilpatrick*,<sup>89</sup> structural engineers were engaged to design a scheme for the repair and refurbishment of a wooden shipbuilding slip built in the early 17th century. When the roof of the slip came off the Ministry sued the engineers for negligent design in failing to use the current codes of practice. The judge held that the design, in specifying nails similar to those used on the original construction and in adopting the original methods of workmanship, was appropriate.

Similarly, in *IBA v EMI*, Lord Fraser said:

I have reached the firm conclusion that BICC failed in their duty of care when they applied the code of practice that had been found appropriate for lattice masts to the new cylindrical mast at Emley Moor without noticing that the reason for disregarding ice on the stays was not applicable to a cylindrical mast. They were therefore negligent in their design.<sup>90</sup>

#### Compliance with Trade Practices Act

Section 52(1) of the Trade Practices Act 1974 (Cth) (TPA) states that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Similarly, section 53 prohibits false or misleading representations made by corporations in trade or commerce in connection with the supply of good or services. The relevant Fair Trading Acts (FTA) for each state<sup>91</sup> have similar provisions relating to unincorporated entities.

The High Court of Australia has held that section 52 is not restricted to consumers.<sup>92</sup> Architects and engineers may therefore be liable under the TPA and the FTA to both consumers and commercial clients.

In *Coleman v Gordon M Jenkins & Associates Pty Ltd*<sup>93</sup> an architect's representations concerning the likely cost of constructing a residence were held, at first instance, to be misleading and deceptive under section 52. Similarly, in *Council of the Shire of Noosa v J E Farr Pty Ltd*<sup>94</sup> an engineer's pre-contract representations were found to be misleading and deceptive, although the plaintiff was not held to have suffered any loss from those representations, which is required to succeed in such a claim.

A party is unable to contract out of its obligations under the TPA. However, a limitation clause may provide a defence to an action under section 52 of the TPA. In *Halton Pty Ltd v Stewart Bros Drilling Contractors Pty Ltd*<sup>95</sup> the plaintiff alleged that the defendant had breached section 52 when explaining the effect of the limitation clause in pre-contract negotiations. On the evidence the court held that the plaintiff had not been induced into entering the contract on the defendant's representations. Reliance, together with evidence of loss suffered as a direct result of that reliance, are key factors to succeeding in a section 52 claim.

## CONCLUSION

A design consultant is the lynchpin in a design and construct project and likely to be the one party that is involved in the project from start to finish. The level of reliance upon the consultant and the responsibility that the consultant assumes are far easier to determine from a consideration of the contractual terms in place

not only between the consultant and his or her client but also between the contractor and the principal, and the consultant and his or her subcontractors.

The consultant therefore has a responsibility to set the balance in the contract to avoid exceeding his or her insurable limits of liability. It is clear that statutory protective measures are in place for consultants, yet at the same time consultants are exposed to statutory protection for consumers and additional layers of liability to a wider class of people in the duty to use reasonable skill and care, for example subsequent purchasers. A consultant must also ensure that he or she is not exceeding the scope of his or her duties, or at least if they do undertake other tasks in the course of a project they are aware of the risks of doing

## REFERENCES

1. RAI/ACA Client and Architect Agreement, July 2005. All references in this paper are to the long form of agreement.
2. The ACEA Contract, renamed and revised in August 2004 from the previous Guideline Terms of Agreement between Client and Consulting Engineer for Professional Services.
3. Intended as a companion to the AS4902-2000 and AS4903-2000 subcontract conditions for design and construct.
4. For example obtaining, and the level of, insurance for physical damage to property.
5. (1963) 110 CLR 74
6. Ibid 84
7. See *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 1 W.L.R. 1095, CA at 1101; *Eckersley v Binnie Partners* (1988) 18 Con LR 1, in particular Bingham LJ speech at 80.

8. (2006) NSWCA 356
9. Ibid paragraph 158
10. (1997) 55 Con LR 124
11. [2001] EWCA Civ 19
12. [1966] 2 Lloyd's Rep 338, 343
13. In *Nye Saunders and Partners v Alan E Bristow* (1987) 37 BLR 92, the architect engaged a quantity surveyor without advising the client. The architect was, following the principles in *Moresk*, responsible to the client for those services. See also *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners* (2002) 16 BCL 116
14. (1981) 18 BLR 130, CA
15. Clause B4
16. Clause 8.2(1)
17. Clause 8.2(2)
18. Clause 8.3(1)
19. *Investors in Industry Commercial Properties v South Bedfordshire District Council* [1986] 1 All E.R. 787, CA, noting in particular the Court of Appeal's judgment at pg 807-808. See also *Baxall Securities Ltd v Sheard Walsaw Partnership* [2002] EWCA Civ 9; *Atwal Enterprises Ltd v Toner* (2006) SLT 537
20. Clause 8.3(2)
21. (1978) 10 BLR 48
22. [1979] 12 BLR 1
23. *Eckersley v Binnie & Partners* (1988) 18 Con. L.R. 1; *Plant Construction v Clive Adams Associates* [2000] BLR 137 (although this was contractor's duty)
24. *Chesham Properties v Bucknall Austin Project Management Services Ltd* (1996) 82 BLR 92
25. [1999] 15 BCL 20
26. [1966] 2 Lloyd's Rep 338
27. See also *Pozzolanic v Lytag Ltd v Bryan Hobson Associates* [1999] BLR 267, where project manager held to owe a duty

- to warn the client to obtain appropriate advice on insurance requirements.
28. Pullen v Gutteridge Haskins & Davey Pty Ltd [1993] 1 VR 27
29. Sahib Foods Ltd v Paskin Kyriades Sands [2003] EWHC 142, TCC
30. (1963) 110 CLR 74, see Windeyer J's statements at 84
31. [1966] AC 406
32. [1975] 1 W.L.R 1095, CA
33. (1980) 14 BLR 1 (HL)
34. Ibid 47
35. (2006) VSC 307
36. Ibid paragraph 37
37. (1980) 14 BLR 1, 47
38. Associated British Ports v Hydro Soil Services NV [2006] EWHC 1187
39. (1981) 18 BLR 130, CA
40. [2001] PNLR 515
41. Payne v Satchell [2002] P.N.L.R 7; Tesco Stores Ltd v Costain Construction Ltd [2003] EWHC 1487
42. For example water ingress as in University of Glasgow v William Whitfield (1998) 42 BLR 66, or where the design involves an element of risk; Pullen v Gutteridge Haskins Davey Pty Ltd [1993] 1 V.R 27; Eckersley v Binnie Partners (1988) 18 Con LR 1
43. (1976) 4 BLR 103
44. Ibid 131
45. [1991] 1 AC 398, 487
46. [1964] 1 QB 533, CA
47. [1932] AC 562
48. [1964] 1 QB 533, 556–557
49. Unreported, October 1 2000, Bell J
50. [1962] 1 WLR 585, CA
51. See also Coles v Montague Grant Architects Pty Ltd, unreported, WASC, FC, Malcolm CJ, Walsh and Murray JJ, 12 June 1995
52. [1932] AC 562
53. [1991] 1 AC 398
54. [2001] PNLR 256
55. [2007] EWCA Civ 130
56. (2000) 16 BCL 116
57. As discussed in section A above
58. As discussed in section C below
59. Ibid 127
60. [1964] AC 465
61. See IBA v EMI & BICC (1980) 14 BLR 1 (HL), 47
62. (1995) 128 ALR 163
63. (1999) 15(5) BCL 328
64. [2004] HCA 16
65. From Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad (1976) 136 C.L.R.529; Perre v Apand Pty Ltd [1999] HCA 16
66. Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd & Ors [2006] NSWCA 356; Eden Construction Pty Ltd v State of New South Wales (No 2) [2007] FCA 689
67. [2006] VSCA 30
68. Ibid 33–34
69. Ibid 71
70. [1932] AC 562
71. Ibid 609–610
72. As stated by Le Dain J in the Canadian case of Central Trust Co v Rafuse (1986) 1 DLR (4th) 481, approved by the High Court of Australia in Bryan v Maloney (1995) 182 CLR 609
73. RW Miller & Co Pty Ltd v Krupp Australia Pty Ltd (1992) 11 BCL 74 at 150
74. (1984) 1 Con LR 114
75. See also Holt v Payne Skillington [1996] PNLR 179, CA
76. See Rowlands v Collow [1992] 1 NZLR 178, Thomas J at 197; Sheldon v McBeath (1993) Aust Torts Rep 81–209
77. Sim, Disa, 'Expanding tort claims in construction cases: Time to contract?' (2003) 11 Tort L Rev 38, 53
78. [1974] AC 727
79. Ibid 744–753
80. [1990] 1 QB 993
81. (1997) 13 BCL 235
82. Ibid 246
83. See however the UK Technology and Construction Court decision in BR and EP Cantrell v Wright and Fuller [2003] BLR 412 which restates the principles in Sutcliffe v Thakrah [1974] AC 727
84. [2001] EWCA Civ 19
85. (1993) 107 D.L.R (4th) 169
86. [1973] 2 NZLR 45
87. Ibid 65–66
88. Carosella v Ginos & Gilbert Pty Ltd (1981) 27 SASR 515
89. Unreported, July 1997, Mr Recorder Coles QC
90. (1980) 14 BLR 1, HL, at 36–37. See also Holland Hannen and Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation (1985) 35 BLR1
91. Fair Trading Act 1987 (SA); Fair Trading Act 1987 (NSW); Fair Trading Act 1999 (VIC); Fair Trading Act 1989 (QLD); Fair Trading Act 1987 (WA); Fair Trading Act 1992 (ACT); Fair Trading Act 1990 (TAS)
92. Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594
93. (1989) ATPR 40–960
94. [2001] QSC 60
95. (1992) ATPR 41–158