The scope of designer's liability under construction contracts

In construction projects, the question of who bears the risk and responsibility for the design of the project is often a source of dispute between the project owner, on the one hand, and the architect/engineer or the contractor/subcontractor(s), on the other hand. In this article, we examine, from an English law perspective, the scope of design responsibility in respect of construction contracts, concentrating on the duty of care owed by designers, fitness for purpose obligations in construction contracts, and liability for a third party's design.

Duty of care owed by designers

Like many other systems of law, English law allows for concurrent and co-extensive duties of care under both contract and tort. Consequently, unless the terms of the contract exclude liability in tort, a designer could find that it faces breach of contract claim and/or a negligence claim arising from an alleged design defect.

For the purposes of a negligence claim, a claimant would need to establish that the designer's performance of its duties has breached the duty of care that the designer owed to its employer. The standard that a professional designer is required to meet is that of a reasonably competent designer, having regard to the industry standards or professional conduct rules applicable at the time of the actions in question. If a designer carries out its work to the same standard that another reasonably competent member of his profession would have met, then the designer will not be considered to have been negligent. Further, provided that the designer acted in accordance with generally accepted industry practices, the designer will not be considered negligent simply because there is a body of opinion within the profession that does not agree with that generally accepted practice. This position was established in the case of Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, and is often referred to as the 'Bolam principle'. However, if the designer holds itself out as possessing some specialist or greater skill or knowledge (i.e. special skill or knowledge over and above that possessed by a reasonably competent designer), the designer may be subject to a higher standard of care.

The designer is subject to much the same standard of care in the context of a breach of contract claim, which may arise as an express or an implied term of the contract. The contract will often expressly state that the designer is required to exercise reasonable skill and care in performing his contractual obligations, but even if it does not, English law will usually imply a term to this effect into the contract. Section 13 of the Supply of Goods and Services Act 1982 provides for this as follows:

"In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill."

It is important to note that the designer's duty does not necessarily require him to achieve a particular result. This is perhaps easier to illustrate by reference to other professionals, such as doctors and lawyers: a doctor cannot be required in every case to cure his patient, and a lawyer cannot be expected to win every case. The English Courts have therefore refused to imply an obligation into professionals' contracts that a particular outcome will be achieved or (in the case of a design professional) that the design will be suitable (or fit) for a particular purpose. In these circumstances, the designer is therefore only required to meet the same standard as another reasonably competent member of his profession would have met.

1 Henderson v Merrett Syndicates Ltd [1995] 2AC 145
3 Though see below for a different approach in the context of design and build contractors.
Fitness for purpose clauses

These limits to the scope of the designer's duty of care create a potential difficulty from an employer's perspective. In the event that the design is defective, the employer can only succeed in an action against the designer if it can be demonstrated that the designer failed to exercise reasonable skill and care. This may be difficult to prove, particularly on projects of high value and high complexity.

Accordingly, employers may seek to include an express fitness for purpose obligation on the designer in the contract. If the contract contains such a clause, the employer only needs to prove that the design was not fit for the relevant purpose, irrespective of whether the designer exercised reasonable skill and care.

Whilst including a fitness for purpose clause is clearly to the employer's advantage, designers often object to such an obligation, since they may not be able to obtain professional indemnity ("PI") insurance cover for such an obligation. This is because most PI insurance policies will cover the holder only in the event of a claim arising out of the holder's professional negligence (i.e. a failure to exercise reasonable skill and care), leaving the designer uninsured against a contractual claim for breach of a fitness for purpose obligation.

However, in the case of a design and build contractor or turnkey contractor, English law takes a different approach, and in the absence of an express term excluding such an obligation, a fitness for purpose obligation may be implied into such a contractor's contract with its employer. The different approach arises from the fact that a designer is simply providing a professional service, whereas design and build contractor or turnkey contractor is providing the employer with a complete 'product' for a certain type of use, and it is therefore more reasonable to expect that such a contractor should be under an obligation to ensure that the 'product' it supplies is of satisfactory quality and fit for purpose. It is also argued that this approach is reasonable since design and build and turnkey contracts are usually lump sum or fixed price agreement, and a fitness for purpose obligation is there to balance against the contractor's self-interest in saving costs and maximising profit by carrying out the design to the minimum acceptable standard.

Express fitness for purpose obligations are therefore not unusual in international EPC contracts, and both the FIDIC Silver Book and FIDIC Yellow Book contain such clauses.

Liability of the designer for subcontracted design work

Further issues arise in circumstances where the designer delegates or subcontracts aspects of the design work to a third party. It is not uncommon for a designer to delegate particularly complex design tasks to a specialist, for example delegating the design of a building's foundations to a structural engineering specialist.

The extent of a designer's authority to delegate in this way should be set out in the contract, since in the absence of an express contractual term to this effect there is a risk that the designer may not be considered to have the authority to do so.

Assuming that the designer is authorised to delegate aspects of the design to a third party specialist, the designer will be under a duty to use reasonable skill and care in selecting the third party. Provided that the designer acts reasonably in selecting a third party who appears to have the relevant specialist skill to undertake the work, the designer would generally be considered to have satisfied this duty. For example, in London Borough of Merton v Lowe [1981] 18 B.L.R. 130, an architect was held to have legitimately relied on the advice of a sub-contractor in relation to the use of a certain type of ceiling. However, in circumstances where the third party's work is defective, and a reasonably competent designer ought to have spotted the defect, the designer will be under a duty to warn the employer.

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6 Moresk Cleaners Ltd v Hicks [1966] 4 B.L.R. 50.
7 See also, Co-Operative Group v John Allen [2010] EWHC 2300 (TCC).
8 Investors in Industry Commercial Properties Ltd v South Bedfordshire DC (Ellison & Partners (a firm) and Hamilton Associates (a firm)) [1986] 1 All E.R. 787.
Conclusion

Defective design works can have catastrophic consequences for employers and designers alike, and it is therefore of fundamental importance to consider the issues relating to risk and responsibility when negotiating the construction contract. The designer will of course wish to limit as far as possible the scope of its liability, whilst the employer will wish to ensure that it has effective rights and remedies in the event of defective design work. As always, it is likely to be in the interest of both parties to deal with these issues as far as possible and agree upon the assignment of risk by express terms in the contract.