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PROTECTING THE CONSTRUCTION PROFESSIONAL

by John Walmsley

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OVERVIEW

- Negligence: The Basics
- Duty of care
- Design liability
- Duty to warn

  Tea and Coffee Break
- Exclusion and limitation of liability
- Limitation periods
- Insurance
- Regulation
- Contribution

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(1) Negligence: Basics

The tort of negligence has three basic requirements which must be proved by the claimant on a balance of probabilities, namely that:

- The defendant owed the claimant a duty of care not to cause the type of harm suffered
- The defendant breached the duty of care owed
- The breach caused the harm. This has two elements, both of which must be proved:

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Causation and remoteness

- factual causation: the claimant must prove that, **but for** the defendant's negligence, the claimant would not have suffered loss; and

- legal causation or remoteness: whether the defendant's negligence was the legal cause of the loss

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2. Duty of care

The three-fold test established in *Caparo Industries PLC v Dickman* [1990], which asks whether:

- the damage which occurred was foreseeable;
- there is sufficient proximity in the relationship between the parties; and
- it is fair, just and reasonable in all the circumstances to impose a duty of care.

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3. Assumption of responsibility test

What is the test?

- The assumption of responsibility test asks:
- Has the professional assumed responsibility towards the claimant?
- Was there reliance by the claimant?

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Assumption of responsibility principle

The House of Lords' decision in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1963] established that there is a general duty to take care in the making of statements where:

- There has been an assumed responsibility towards the claimant
- A special relationship exists between the parties

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4. The test in *Caparo* – professional advisers

In Caparo, the question arose whether a firm of accountants owed a duty of care not to cause pure economic loss to existing shareholders and investors who relied on negligently audited accounts.

It was insufficient to establish a duty of care merely by reliance on the accounts and the foreseeability of loss.

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In Caparo, the House of Lords held:

- The specific purpose of the accounts was to enable the shareholders of the company to exert control over the company
- The duty of auditors was owed to the company
- The purpose of the audited accounts was not to enable investors to decide whether or not to invest and, therefore, no duty was owed to investors who relied on the accounts for this purpose
- The requirement of reliance exists to impose a limitation on the number and classes of potential claimants. But no such limit can apply where the claimants are identifiable and limited in number

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The test in **Caparo –**is that a duty not to cause pure economic loss may arise where:

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- The advice is required for a purpose (whether particularly specified or generally) that is made known (either actually or inferentially) to the adviser at the time the advice is given

- The adviser knows (either actually or inferentially) that the advice will be communicated to the advisee (either specifically or as a member of an ascertainable class) so that it should be used by the advisee for that purpose

- It is known (actually or inferentially) that the advice is likely to be acted on by the advisee for that purpose without independent inquiry

- It is so acted on by the advisee to his detriment

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5. Breach of duty: standard of care

Where a duty is owed in contract or tort, the claimant must establish that there has been a breach of that duty. In doing so, the claimant must show that the professional did not comply with the standard owed.

The Bolam Test

Bolam v *Friern Hospital Management Committee* [1957] laid down the applicable test for the standard of care for professionals.

Although Bolam dealt with medical negligence, the test has been upheld by the House of Lords and is the appropriate test to use in all professional liability cases.

What is the *Bolam* test?

- A professional person is not negligent if he conforms to a practice accepted by some responsible members of his profession, even if other members take a different view

- Importance of expert evidence

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6. Loss

The principle in SAAMCO: loss must be within scope of duty of professional giving inaccurate information

Principle has been developed by the House of Lords in *South Australia Asset Management* v *York Montague Ltd* [1997] (SAAMCO).

The basic measure when assessing losses resulting from negligence is found by:

- comparing what the claimant's position would have been if there had been no breach of duty and the claimant's actual position.

- Often, without the negligent advice, the claimant would not have entered into the transaction.

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In SAAMCO, the House of Lords placed important restrictions on the losses which could be claimed in the context of inaccurate information.

- Only those losses that are attributable to the breach are recoverable
- To be so attributable, a loss must come within the scope of the duty owed
- The starting point is, therefore, to define the precise scope of the duty
- This test is more easily stated than it is to apply in practice

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Example - In the case of a negligent valuation provided for a lender, the lender has less security than he would have had if the valuation had been accurate.

- SAAMCO held that only those losses falling within the amount of the overvaluation are attributable to the breach

- The amount of the overvaluation, therefore, caps the lender's recoverable damages

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SAAMCO in practice:

A crucial distinction must be drawn between the provision of information to enable someone else to decide on a course of action and actually advising someone on what course of action to take.

In the latter case, an adviser must take all reasonable care to consider all the potential consequences of that course of action.

If he is negligent, he will be responsible for all the foreseeable loss which is a consequence of that course of action being taken.

There will be no SAAMCO cap on the damages.

- For example, a construction professional may be asked to give his professional advice on a certain design or structural issue

- Question of defining the scope of the duty owed by the adviser and the answer depends on the precise terms of his instructions

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- The adviser will want to ensure that his retainer does not render him an adviser on the merits

- On the other hand, if the client requires the professional adviser to provide more general advice, the client should ensure that this is expressed in clear terms.

- The duty owed in a particular case would depend on all the relevant surrounding circumstances.

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Design Liability – Fitness for Purpose or Reasonable Skill and Care?

- One of the most important issues – level of responsibility contractors assume in relation to design
- Design consultants are not under a legal obligation to provide guaranteed result – unless they agree in contract!
- Duty to use reasonable skill and care:
- Section 13 of the Supply of Goods and Services Act 1982;and
- Common law test for negligence

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- In practice in professional appointments – two duties are usually combined into a single clause requiring the consultant to use the level of reasonable care and skill to be expected of an experienced member of his profession
- Contractor with design responsibility – implied legal obligation to provide a design which is fit for purpose
- Fitness for purpose obligation not normally covered by PII

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- JCT – limit contractor's liability for design to the standard required of an architect or other professional designer – impose reasonable skill and care duty

- Beware amended JCT that impose a fitness for purpose obligation – fitness for purpose 'in disguise'

- Namely, requirement that '*design of various elements of works be co –ordinated and integrated with one another*' or '*the works shall comply with any performance specification or requirement included in the contract*'

- Use of word 'all' – does it increase professional's burden?

- Bespoke contracts rather than standard form contracts – context is all…
- NEC3 and Clause X15
- Recent developments

MT Hojgaard v *Robin Rigg (*2015)

- Case concerned a contract for design, fabrication and installation of the foundations of 60 wind turbine generators for the Robin Rigg offshore wind farm in the Solway Firth

- The turbines, including the foundations were fabricated and installed in accordance with the design

- But there was a problem – the international standard for the design of offshore wind turbine and grouted connections ('J101') contained an error.

- The contract contained a number of different documents
- The Court (first instance) held that the contractor was in breach of the contract in relation to the service life requirement (20 years)
- Contractor appealed to the Court of Appeal
- The Court of Appeal drew a distinction between the obligation to ensure a lifetime of 20 years and an obligation to provide a structure with a '*design life*' of 20 years
- Not the same
- No absolute warranty of quality on contractor
- Inconsistency within the contract but taken as a whole the contract did not impose an obligation to guarantee 20 year life

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Decision

- Court of Appeal allowed contractor's appeal
- Why is there said to be an inconsistency between an obligation of reasonable skill and care and one of fitness for purpose?
- Fact that there was clear reference to reasonable skill and care does not mean that it would not be possible to have a strict obligation
- Court of Appeal placed great emphasis on lack of express warranties

- In essence, case highlights need for employers and contractors to very carefully consider the wording of the obligations in relation to design and relationship between an obligation to take reasonable skill and care and any warranty of fitness for purpose or other stricter obligation

- Employer has appealed to Supreme Court

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Duty to Warn

- The duty to warn arises as no more than an aspect of duty to act with the skill and care of an ordinarily competent professional.

- In some circumstances the professional must go beyond what is specified as desired performance in a contract – carrying out a design

- Account for any risks of which professional is aware by virtue of that expertise

- Warn others who may not be so aware…

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- Case of a structural engineer – where the SE observes a state of affairs so obviously dangerous that the duty is necessarily triggered by that observation

- Only duty to warn that has been consistently found to exist –

- Scope of contract requires inspection or supervision ; or
- Where a party has observed an obviously dangerous state of affairs and remained silent

- Could there be wider duty to warn in construction contracts and professional appointments imposed by courts?

- *Goldswain* v *Beltec* (2015)
- Mr G and his partner decided to convert cellar below ground floor flat into living accommodation
- Lower the floor and underpin the outer walls to create more height
- Beltec were instructed to carry out a survey
- (1) existing basement/ground floor;
- (2) provide structural designs for excavating basement, underpinning to perimeter walls, support to internal walls and structure
- (3) details for damp proofing and drainage

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- Fee of £1,350 plus VAT agreed which allowed for single visit to site. Subsequent site visits would be charged at £200 plus VAT per visit

- Beltec visited property and sent five design drawings to Mr G which were submitted to the local authority for Buildings Regulations approval

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- Drawing showed what permanent works needed to be done

- New reinforced concrete foundations (the underpinning) to be placed under the old foundations all the way round the basement and the existing floor was to be lowered with the new reinforced concrete floor to be placed and tied in with the underpinning

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- Beltec's specification required the underpinning to be carried out in one-metre sections with temporary structural propping between one pin and another to provide horizontal reinforcement
- Mr G engaged AIMS Plumbing and Building Services Limited (AIMS) to carry out the work
- AIMS had previously carried out a similar basement underpinning project and their quotation made reference to Beltec's design
- AIMS reviewed Beltec's drawings and calculations

- Beltec subsequently visited the site
- Expected to find the reinforcement in place and the pin ready to be cast in accordance with the drawings

What Beltec found:

- Pin was already cast
- Possibly no reinforcement
- No drawings on site!

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- Beltec's drawings were not being followed by AIMS and Beltec realised this fact and supplied another copy to AIMS and stressed the importance of following drawings
- Beltec did not warn Mr G about the discovery
- Underpinning was completed without any of the reinforced concrete slab or thickened parts of slab connected to the underpinning having been cast

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What happened next?

- Cracks started to develop
- Cracks became serious that daylight could be seen through
- Eventually, part of the building collapsed

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- Insurer declined cover
- Cause of failure (according to structural engineer's report) was inadequate construction and design
- Collapse due to '*a combination of vertical movement down of the newly installed underpinning foundation due to pressure failure together with lateral sliding of the basement wall to the left flank*'

- Mr G commenced legal proceedings against AIMS but they had become insolvent
- Mr G sued Beltec
- Was Beltec negligent in failing to warn both AIMS and Mr G about their discovery when they visited the site?

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Mr Justice Akenhead set out guidelines about duty to warn

- Courts must determine what the scope of the contractual duties and services were. Context of the contractual engagement
- Professional almost invariably must exercise reasonable skill and care. The duty to warn is no more than an aspect of the duty of a professional to act with the skill and care of a reasonably competent person in that profession
- Whether, when and to what extent the duty will arise will depend on all circumstances

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- The duty to warn will often arise where there is an obvious and significant danger either to life and limb or to property. It can arise when a professional *ought* to have known of such a danger, having regard to all the facts and circumstances
- Where it is alleged that a professional ought to have known of the danger – the Court will be unlikely to find liability merely because a professional sees that there was a possibility of danger
- The basic standard of care is that of a reasonably competent professional

- Starting point – consider whether a duty to warn exists by reviewing scope of Beltec's contract and the division of work between the SE and the C
- Letter of Instruction signed by Mr G
- *'This letter instructs [Beltec] to carry out structural designs in accordance with their estimate letter..'*
- Judge reviewed the Construction (Design and Management) Regulations 2007

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- *'Common ground between the parties that the engineer has responsibility for the permanent works and the contractor for the temporary works, the temporary works in effect being the work necessary to achieve the permanent works design; usually, the temporary works are just that, temporary, and do not remain once the permanent works are completed'*

- *Court held that Beltec had no duty to warn as there was no obvious danger seen by Beltec and their contractual duties were merely to design, not supervise*

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The Law after *Beltec*

- Engineer under a clear duty to warn where he observes a state of affairs which poses an obvious and significant danger of personal injury or damage to property unless there are circumstances which justify no warning being given
- Engineer hired to inspect or supervise
- Ought to have known – having regard to all the facts and circumstances (although no decided case on the point)
- Unusual risks embodied within a design
- Risks within the knowledge of the reasonably competent contractor
- Risks created by a negligent contractor

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Exclusions and limitations of liability clauses

- Professionals attempt to limit their liability under certain circumstances.
- Advise client of any limitation of liability in writing and specifically draw their attention to it
- Where your Practice is an LLP – you should also explain any limitation of personal liability for members, directors and employees

Example of such a limitation of liability clause:

- *'Our liability to you for breach of your instructions shall be limited to £X, unless we expressly state a higher amount in the letter accompanying these terms of business. We shall not be liable for any consequential, special, indirect or exemplary damages, costs or losses or any damages, costs or losses attributable to lost profits or opportunities*.'

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The Trustees of Ampleforth Abbey Trust v *Turner & Townsend Project Management Limited* (2012)

- Case principally concerned the issue of professional negligence and letters of intent
- Additional consideration for the Court – if negligence was established against Turner & Townsend ("T & T") on the facts, could T&T rely on the benefit of an effective limitation clause?
- The first issue that arose in respect of the clause was whether it was incorporated into the contract between the parties and second, if it was incorporated whether it was deprived of effect by reason of Section 3 of the Unfair Contract Terms Act 1977 (UCTA)

- The terms of appointment or contract between the parties were not signed and the terms of the fees payable to T&T were not discussed and agreed expressly
- The Court held that the fact that the terms of appointment were not signed did not mean that there was no acceptance of them on an objective basis
- It therefore followed that the limitation clause was incorporated into the contract between the parties

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The clause read as follows:

" Liability for any negligent failure by us (T&T) to carry out our duties under these terms shall be limited to such liability as is covered by our professional indemnity insurance policy terms. Liability is also limited to such a sum as it would be equitable for us to pay having regard to the extent of our responsibility for any loss or damage suffered by you on the basis that all other consultants, contractors and subcontractors who also have a liability shall be deemed to have provided contractual undertakings to you on terms no less onerous than these terms and shall be deemed to have paid to you such sums as it would be just and equitable for them to pay having regard to the extent of their responsibility for any such loss or damage and in no event shall our liability exceed the fees paid to us or £1 million whichever is the less (my emphasis)."

- T&T stated that it would take out a professional indemnity policy with a limit of indemnity of £10 million which it would maintain for 6 years from the date of completion of the services

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The material parts of sections 2, 3 and 11 of the UCTA 1977 provide as follows:

"2. NEGLIGENCE LIABILITY

(2) In the case of other loss or damage [i.e. other than personal injury or death], a person cannot [by reference to any contract term] exclude or restrict his liability for negligence except insofar as the term ... satisfies the requirement of reasonableness."

"3. LIABILITY ARISING IN CONTRACT

(1) This section applies as between contracting parties where one of them deals… on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term -

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach... except insofar as ... the contract term satisfies the requirement of reasonableness. "

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11. THE ‘REASONABLENESS’ TEST

(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act ... is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(4) Where by reference to a contract term ... a person seeks to restrict liability to a specified sum of money, and the question arises ... whether the term… satisfies the requirement of reasonableness, regard shall be had in particular ... to -

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(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term ... satisfies the requirement of reasonableness to show that it does. ”

- The Court held that the limitation clause would result in a limit of liability equal to the fees paid to T&T which was approximately £111,000
- In the absence of any explanation as to why T&T should have stipulated insurance cover of £10 million despite a limitation of liability to less than £200,000, the Court considered it unreasonable that the contract purported to limit liability in this way.

- *Bloomberg LP* v *(1) Sandberg (2) Sandberg LLP (3) Buro Happold Ltd and (third party) Malling Pre – Cast Ltd* (2015)
- Landlord – Bloomberg LP entered into a lease with a tenant
- Tenant was required to undertake works at the property, appointed Malling Pre-Cast Ltd for cladding works
- Bloomberg had benefit of a collateral warranty from Malling which included at clause 6 the following limitation:

  " no proceedings shall be commenced against the Contractor [Malling] after the expiry of twelve years from the date of practical completion"

- At time of dispute – the 12 year limitation period had expired and Bloomberg was precluded from pursuing a claim against Malling
- Tenant appointed Sandberg and Sandberg LLP and Buro Happold to provide consultancy services and a condition survey respectively following defects in the cladding works which required considerable remedial works by the landlord
- Bloomberg claimed against Sandberg and Buro Happold

- Consequently, Sandberg and Buro Happold sought a contribution from Malling under section 1 (3) of the Civil Liabilty (Contribution) Act 1978
- Sandberg and Buro Happold argued that clause 6 was only a bar to Bloomberg's right of action against Malling and they were still able to claim a contribution from Malling

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- The Court held that clause 6 did not apply to third parties
- The underlying cause of action was not extinguished
- Sandberg and Buro Happold could claim a contribution from Malling
- The Civil Liability (Contribution) Act 1978 is in place to benefit third parties and it is yet to be decided if parties could contract out of the Act
- Contracting parties need to be aware that they may remain liable to third parties under the Act even if limitation has passed under the contract. Expiry of limitation under contract does not stop statutory contribution claims.

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- *Persimmon Homes Ltd* v *Ove Arup & Partners Ltd (2015)*
- Exclusion clause for asbestos liability
- Persimmon was part of a consortium which bought and developed a large site in Wales.
- Arup advised and provided professional services to the consortium
- Asbestos contamination discovered
- Consortium alleged that Arup ought to have discovered the contamination and claimed damages

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- Arup argued that its liability for negligence was excluded under clause 6.3 of the contract which provided:

  "The Consultant's aggregate liability under this Agreement whether in contract, tort (including negligence) for breach of statutory duty or otherwise (other than for death or personal injury caused by the Consultant's negligence) shall be limited to £12,000,000.00 (twelve million pounds) with the liability for pollution and contamination limited to £5,000,000.00 (five million pounds) in the aggregate. Liability for any claim in relation to asbestos is excluded"

- Trial of the preliminary issues
- Did the words "*Liability for any claim in relation to asbestos is excluded*" have the effect of excluding liability for the claim, and, if not, whether the Defendant's liability would be limited to £5,000,000?

Decision:

- Court noted that there had been a shift in approach of English courts to exclusion clauses since the older cases relied on by the consortium
- First reason, the UCTA 1977
- Second reason, recognition that parties to commercial contracts are and should be left free to apportion and allocate risk and obligations as they see fit
- Particularly, when insurance is available to mitigate risks

- Court held that the words "*Liability for any claim in relation to asbestos is excluded*" did have the effect of excluding liability for the claim
- Court said that had it found that those words did not exclude liability, it would have found that liability was limited to £5,000,000

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Where are we now?

- Where commercial parties of equal bargaining power have freely negotiated the terms of agreements, the courts are likely to enforce the terms of those agreements
- When negotiating construction contracts, parties should therefore carefully consider potential implications of any exclusion clauses or limitations
- Courts can no longer be relied upon as a fall back to contend that exemption clauses are either unenforceable or should be restricted in their application

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Limitation Periods

- Limitation period is the period of time within which a party to a contract must bring a claim
- Statutory limitation periods
- Limitation Act 1980
- Contract and tort (negligence) – 6 years for simple contracts
- Deed (e.g.land transactions) – 12 years
- Fraud, concealment or mistake – 6 years

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- Time periods begin either on the date the breach of contract occurred or the date the negligent act or omission occurred.
- Known as the date of accrual
- Limitation period does not run from the date of contract itself.
- Common to refer to actions which fall outside these statutory time limits as ‘time barred’

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Latent Defects

- 1986 – Latent Damage Act. Extension to ordinary 6 year statutory limitation period

- Negligence claims for latent defects – a defect in a property, caused by a fault in design, materials or workmanship that existed at time of construction was completed – not apparent at the time of completion

- Where there is a latent defect – time limit is the later of:
  - 6 years from the date of accrual of the cause of action being raised; and
  - 3 years from the earliest date on which potential claimant knew, or reasonably ought to have known, the material facts to bring an action
  - 15 years long stop date from breach of duty

- Default position:
  - If contract governed by English law makes no mention of limitation periods – then statutory periods provided by Limitation Act will apply
  - Must plead limitation or time bar as a defence

- Is possible to reduce limitation periods for breach of contract and negligence
- Shorter limitation periods will be subject to the reasonableness test under the legal provision preventing unfair contract terms
- Position of parties (e.g. commercial clients)

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Insurance Arrangements for Construction Professionals

- PII covers you for compensation you may have to pay your clients because of problems with your work
- Limit of Indemnity you choose will include legal defence costs and subsequent damages awarded against you.
- Mistakes corrected?
- Reimburse you for fees that your client may refuse to pay?

- Limit of indemnity – cover for the total of all claims made against your business during the policy period

- ‘Claims made’ rather than ‘losses occurring’ basis

What risks are protected?

- Negligence
- Infringement of intellectual property rights – copyright or trademark
- Defamation (libel and slander)
- Loss of professional documents

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The Small Print!

- Beware of the excess. Schedule of Insurance will show the specific excesses applicable to policy
- Only covered for work that you disclose your business undertakes and that insurers agree to insure
- Insurers will not pay claims which arise because of contractual terms (LOE) – go beyond duty of care owed at common law

- Claims or circumstances known about which could give rise to claim in future and knew about or ought to have known about – not covered
- Cover restricted to business activities carried out in EU
- Does not cover US

- Covered - Dishonesty by individual partners, directors, employees, self-employed freelancers directly contracted by you and under your supervision

- Not covered – any investment of, or direct advice on the investment of, client funds

- Remember premium and insurance cover will be based specifically on details provided
- Unique combination of demands, needs and circumstances
- Information provided should be complete and accurate. Any changes in circumstances should be immediately notified

- Failure to disclose any information material to the insurance could invalidate policy and claims may not be paid
- Read and check all insurance documents to ensure you are aware of cover, limits and other terms that apply
- Other insurance polices
- JCT 2016 editions - professionals

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Regulatory Matters

General considerations for client care letter or letter of engagement

- Professional Body's requirements
- Length and Style
- Information Requirements (AML)

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What must you tell your client in writing?

- Nature of work to be performed or undertaken (Extent of duties owed subject to implied duty of care)
- Who will be undertaking work
- Hourly rates and budget or estimate of costs (cost information and fee arrangements)
- Service levels and contact details
- Regulatory Status
- Complaints

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- TOB – no regulatory requirement for lawyers to set out terms of business. Good business practice to do so (The Law Society)
- Why?
- Information on PII. Process for terminating retainer. Data protection issues. Storage of documents. Interest on client accounts

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Claim for breach of contract

- *In breach of contract, [professional] failed to carry out their services with the reasonable skill and care expected of a properly qualified [professional] in the performance and discharge of the duties and services agreed to be performed under the contract*
- *Your client care letter and TOB are the basis of the contract with your client*
- *Client care letter should be signed by both parties or include clause dealing with situation where client does not sign and return letter*

- Consumer Contract regulations

- On 13th June 2014, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 came into force

- Provide for certain information to be provided to a client depending on where the contract is made

- Concerned with contracts made ‘off premises’ and ‘distance selling’
- Where this is the case – need to provide information to client about the right to cancel
- Criminal offence punishable by a fine!
- Enforceability of your retainer with your client

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Contribution

- For example, a court could find that the employee was 70% to blame, Adviser A was 10% to blame and Adviser B was 20% to blame. However, if the other parties were insolvent or had fled the country, then Adviser A will not be able to recover any money from them and must therefore pay the full amount of the loss
- A claim for contribution under the 1978 Act must be brought within 2 years of judgment or settlement of the original claim
- Section 10 of the Limitation Act 1980

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Conclusion and Top Tips

1. Ensure that proper risk management procedures are adopted and you stay up to date in your chosen field of expertise;
2. Make sure that you have the appropriate level of PII
3. Carefully review Client Care Letters and TOB to keep them maintained, updated and signed by clients and they properly reflect the terms and limits of the retainer;

4. Advise your insurer promptly of any circumstances that may give rise to a claim;
5. Note limitation periods and when potential claims might be time barred; and
6. Obtain legal and other professional advice!
7. Questions?

DISCLAIMER

- This presentation contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances

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