The allocation of design risk: Is it fit for purpose?

THE WORDS 'FIT FOR PURPOSE' reached the House of Commons in 2006 when the former Home Secretary, Dr John Read, used them in a negative context about the competence of his department. This term has now fallen into common use in the English language with seemingly little regard for its correct application.

This paper revisits its legal connotations and the difficulties this creates for design and build (D&B) contractors and their professional consultants.

Origins

The term 'fitness for purpose' emanates from the *Sale of Goods Act* 1979 as amended by the *Sale and Supply of Goods Act* 1994 which imposes implied terms on any seller of goods when acting in the course of a business. These include a term that the goods supplied will be of satisfactory quality and, where the purchaser makes known any particular purpose, are reasonably fit for their intended purpose.

The different obligations on contractors and consultants

Since contractors are responsible for the provision of goods and the incorporation of these into the completed works, the obligation of a contractor in respect of the works falls under the *Sale of Goods Act*.

However, designers are suppliers of a service and thus fall under the *Supply of Goods and Services Act* 1982. With regard to the standard of performance, there is an implied term that the services will be performed with reasonable care and skill.

The famous case of *Bolam v Friern Hospital Management Committee* [1] held that the standard of the professional was that of its professional peers.

Obligations on the design and build contractor

However, the D&B contractor has dual obligations in being required to both design and construct the works. It could therefore be assumed that it is under conflicting obligations in respect of the two distinct functions of design and construction.

Clarity was provided in *IBA v EMI and BICC* [2] where it was stated by the Court of Appeal judges:

> "*We see no good reason... for not importing an obligation as to reasonable fitness for purpose into these contracts or for importing a different obligation in relation to design from the obligation which plainly exists in relation to materials.* "

It can therefore be seen that a D&B contractor is under an overall total obligation of reasonable fitness for purpose unless there are clear words to separate the two distinct obligations of design and construction.

Some standard contracts absolve the D&B contractor of the fitness for purpose design obligation. These include the JCT 2005 design and build contract (Clause 2.17.1) and the ECC 2005 incorporating secondary option X15. Other standard forms, including ECC 2005 without option X15, expressly impose the higher fitness for purpose obligation.

In order to achieve full risk transfer, D&B contractors seek to employ their consultants on back-to-back terms such that the consultant performs the design services under its appointment so as not to place the D&B contractor in breach under the main contract.

Since a fitness for purpose risk is difficult to quantify in respect of both probability of occurrence and magnitude of loss, professional indemnity insurance policies expressly exclude this risk. Consultants normally rely solely on their insurance to protect them in the event of disputes and therefore seek to exclude any requirement for them to accept a fitness for purpose obligation.

Reasonable skill and care, and fitness for purpose compared

In essence, a fitness for purpose design obligation is one whereby the designer warrants that the design will be functional — irrespective both of extraneous factors and the level of skill and care used in preparing the design. It is perhaps best illustrated by a practical example as follows:

> Consider a building which has been designed by a consultant using soil parameters derived from boreholes situated at the proposed foundation location. The designer uses appropriate design standards and concludes that spread footings will be acceptable.
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> The contractor commences construction and, after excavating the foundation, finds that there is a large undetected mineshaft which will require backfilling which will take several weeks, thereby causing severe delay to the programme.
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> If the designer was employed on the basis of reasonable skill and care, it is most unlikely that it would be held to have been negligent since it had followed exactly the same procedures as its professional peers. Even if it was held to have acted negligently, the loss would be covered by its professional indemnity insurance.
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> The situation would be very different if the consultant had contracted to provide a fitness for purpose obligation since, by definition, the design is not fit for its purpose since it is incapable of supporting the structure without remediation work to the subsoil. As stated above, the loss would be excluded under any PI insurance policy.
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> Who owns the risk?
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> If the consultant is permitted to exclude the fitness for purpose risk, then the D&B contractor is left with a fitness obligation, whilst its consultant has the lower obligation of reasonable skill and care. Thus, in the event of a design

being unfit for purpose, but not having been produced negligently, the D&B contractor would be liable without being able to pass this on to its consultant.

Extent of risk

Clearly, any design which interfaces or relies on ground conditions for its integrity, innovative designs or ones using state-of-the-art materials imposes a high fitness for purpose risk. By contrast, feasibility studies, preliminary/outline designs and tried and tested (e.g. off-the-shelf) products are of low fitness for purpose risk.

Possible solutions

It is easy to understand why fitness for purpose is an issue for both D&B contractors and their consultants. Understandably, the D&B contractor does not want to take a risk which it cannot pass on and, equally, the consultant does not want to accept an uninsurable risk which, if manifested, could result in it going out of business. For this reason, many consultants take the approach that fitness for purpose is an absolute 'deal breaker', irrespective of whether the actual risk is real or largely academic.

Rather than the D&B contractor taking the risk, there are compromise solutions available for consideration, including the following:

• Employer retained risk
Under conventional procurement, the employer takes the fitness risk for the design and, as the party best placed to own this risk, it is suggested that this could pertain with design and build. This is facilitated by using a form which expressly defines the design obligation of the contractor as being one of reasonable skill and care.

• Contractor/consultant risk share
The D&B contractor and consultant could agree to share the risk of the design being 'unfit' on agreed commercial terms to reflect the risk taken between the parties in respect of uninsured losses. In these circumstances, the consultant could, for instance, agree to be liable to re- perform the design whilst the D&B contractor could agree to be liable for the other losses arising from this breach.

• Consultant takes the risk
For low fitness for purpose designs as illustrated above, rather than fitness being an absolute issue of 'no negotiation', the consultant could consider accepting the risk since it is difficult in such circumstances to envisage it being liable without also being negligent and therefore being covered by its insurance.

Conclusion

In view of the absence of insurance cover, and the desire of consultants to avoid any liability for uninsured obligations irrespective of the actual risk, it is difficult to see fitness for purpose being resolved without all parties having sensible discussions to ascertain how this risk can be best allocated.

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[1] (1956) 1 WLR 582;101 SJ 357; (1957) 2 All ER 118
[2] (1980) 14 BLR 1; HL; affirming (1978) 11 BLR 29, CA