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The Contractor’s Liability for Workmanship and design – is it a matter of competence or status?

John Adriaanse

ABSTRACT

The decline in the use of traditional contracts has led an increase in the use of ‘design and build’ contracts. This contract resolves the fuzzy edge; i.e. the interaction between workmanship and design in a construction contract. The standard forms of building contracts, the JCT 80/98/05 (amongst others), have complex provisions for dealing with defective workmanship. These include the quality of workmanship, materials and the interaction between workmanship and design. These differ when the contractor takes responsibility for the design expressly and then carries out the works. Standard forms of contract do not always allocate these responsibilities in a clear manner. An examination of the common law dealing with the interpretation of these provisions in the standard forms, indicate that the courts are much concerned with the status of the parties. These decisions emphasise the competence of the contractor in using reasonable care and skill in carrying out the work, as the benchmark for allocating liability for defective work.

KEYWORDS

Workmanship, Design, Standard Form Contracts, Common Law, Terms.

1. INTRODUCTION

This paper provides an analysis of the liability of contractors for workmanship and design. The position at common law and under the Standard Forms of Building Contracts is examined. The purpose is to gain a proper understanding of the allocation of risks inherent in construction. BS 4778 defines risk as a ‘combination of the probability, or frequency, of the occurrence of a defined hazard and the magnitude of the consequence
of the occurrence’. Risks in construction work equate to time, injury and consequently money. To sustain and develop construction needs a clearer understanding of the contractual framework for risk allocation. In the process, liability for workmanship and design under the Traditional Contract and the Design and Build Contracts is analysed within the context of the common law. Specific contractual provisions dealing with these matters will be further examined in deciding what workmanship requires, and how it differs from design. The nature of the risk the contractor takes and what is the approach of the courts takes in dealing with defective workmanship and design will be assessed.

2. THE TRADITIONAL CONTRACT

This contract is structured around an employer prepared design and supervision of the work. The contractor constructs the work against plans, drawings and specifications (normally contained in a bill of quantities). In this contract the contractor has no responsibility to actively search for errors in the documents. If errors are found, the contractor must inform the contract administrator of these and await further instructions. It is then entitled to an extension and time and possibly extra payment. Examples can be found in the JCT 98 clause 2.3 and JCT 05 clause 2.14.1. The main point about this type of contractual arrangement is that the contractor builds what is designed. The employer gives no guarantee that it can actually be built and cannot tell the contractor how to build it (although it can reserve this right).

However, this is not the true position. In major construction contracts, the role of the contractor is that of manager of the construction process. It uses its management know-how to (i) procure the requisite skills needed and also (ii) assess the extent to which they are being provided. The contractor may also be obliged in some instances to make good a detail that is necessary for the success of the applications selected by the architects. This may require a ‘design’ input when deciding to how to achieve certain results. In other words, the contractor has to decide what to do, suggesting that in making decisions, the contractor actually carries out ‘design’.

2.1 THE COMMON LAW AND DEFECTIVE WORKMANSHIP AND MATERIALS

The common law will imply into the contract, the obligation that the contractor will do the work in a good and workmanlike manner; ...will supply good and proper material; and that it will be reasonably fit for human

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1 The Standard Form of Building Contract 98 Edition, private with quantities (JCT 98)
2 The Standard Form of Building Contract with Quantities, 2005 Edition, (JCT 05)
Where no terms are agreed (say the contract is made orally) the law will imply into the contract the obligation that particular work when complete should be (i) of merchantable quality, (ii) fit for its intended use and (iii) erected with reasonable care and skill. The warranties (i) and (ii) were implied into contracts for work and material by the case of Young & Marten. It in effect makes the contractor strictly liable for the quality of the materials supplied and used, even though it had no way of checking this. In practice though, the position is not so clear-cut. The implication of a term does depend on whether the employer relied on the skill and judgment of the contractor. There is no reliance where a professional adviser prepares a specification. If the contractor supplies what was specified and the material proves not to be fit for its purpose, the contractor escapes liability. Where the material proves to be saleable at the same price for other purposes, the contractor will also not be liable for the defective material supplied and used.

The obligation to use reasonable care and skill in carrying out the work is wide. This means that the contractor must take carry out the work in a competent manner. It will be seen that this obligation is found at common law and in the interpretation of the standard forms. Part of this is the duty to warn the client that the plans are defective in some way.

### 2.2 THE CONTRACTOR’S DUTY TO WARN THE EMPLOYER

This rule can be found in two situations. The first is where the employer does not employ a professional to supervise the work and the second is where it does. In the first the position is clear. The contractor has a duty to warn that the employer that there are defects in the plans. What if the contractor chooses not do so? What is the position where the contractor uses its own initiative to remedy a design fault in the plans drawn up by an architect? During the work, the contractor discovered an error in the drawings, and chose (sensibly) remedy it. Unfortunately, the matter was not discussed with the owner. The remedy failed and the owner had the defect remedied and sued the contractor to recover the costs of so doing. In awarding the costs of remedying the work to the owner, the court of appeal accepted that ‘a reasonably competent building contractor should have reported the problem to their client.’

In *Lindenberg* too, the court decided that a reasonably competent contractor would have warned the employer that the plan was defective.

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4 Lord Denning MR in *Greaves (Contractors) Ltd v Byanham Meikle & parts* (1975) 4 BLR 59
5 The steel balconies in *Discain Ltd v Opecprime Developments Ltd* [2001] EWHC Tech 450
6 *Young & Marten v McManus Child* [1969] 1 AC 454 HL (defective roof tiles)
7 *Rotherham MBC v. Frank Haslam Milan & Co. Ltd and ors* (1996) 78 BLR 1 CA (expanding steel slag)
8 *Brunswick Construction Ltd v Nowlan* (1974) 21 BLR 27
9 *GCA Brown Ltd v Carr & anor* [2006] EWCA Civ 785
10 *Lindenberg v Joe Canning and others* (1992) 62 BLR 147
The drawings were prepared for the employer by the building surveyor showed an internal wall to be non-load bearing. Relying on this information, the contractor began demolition work without any temporary propping for the ceiling. The wall proved to be load bearing and substantial deflection occurred in the upper floors. HHJ Newey QC concluded that the builder should have realised that the thickness of the wall indicated that it was more than simply a means of separating rooms. He should have also been aware of the steel joists in the ceiling and proceeded with extreme caution. Acting with less care than expected from an ordinary competent builder was a breach of contract. The builder’s defence was that the work was carried out in accordance with instructions given on the drawings was rejected.

This decision can be explained on the grounds that the contract contained no express terms dealing with the matter or excluding it. *Lindenberg*, was however, approved by the Court of Appeal in *Plant*¹¹. A pit was to be dug to remove the concrete base of a stanchion that supported a roof. This required (i) underpinning of the stanchion and (ii) provision of temporary support for the stanchion and the roof. A subcontractor was responsible for the design of the temporary support. The client’s in-house engineer vetoed the suggested design and issued instructions dictating the manner of support to be adopted. The method of support (acrow props), proved to be inadequate and the roof collapsed.

The appeal raised the following issues: did the sub-contractor have a duty to warn that the system proposed by the engineer was inadequate: what steps should they have taken in the face of the instructions to proceed with an inadequate system?

Held that there was a duty to warn the client that the proposed method was inadequate, as part of its implied contractual duty of reasonable care and skill. To discharge this duty it should have protested more vigorously. Giving judgment the court reiterated that: 'any analysis of implied terms in a building contract must start with a proper account of its express terms. Subject to the express terms, there will normally be an implied term that the contractor will perform his contract with the skill and care of a competent ordinary contractor in the circumstances of the actual contractor.'

What then should the contractor do in the circumstances where it was instructed to carry out work that it considers dangerous? HHJ Hicks QC in a supplementary judgement in *Plant*¹² suggested that the contractor should: raise the safety implications with the employer and the likely risk to the contractor’s employees. This should do this orally at first, and if ignored should put their concerns in writing. It that was too was ignored, they should write to the senior management, approaching successively higher levels each time. They could go further and threaten to or actually report the matter to the Health and Safety Executive. If all attempts fail, they should abandon the work.

¹¹ *Plant Construction Plc v. Clive Adams and ors* [2000] BLR 137 CA

In practice these options are at all easy to carry out. It should be stressed that in both Lindenberg and in Plant, the work was itself was clearly dangerous. In SM Goldstein\textsuperscript{13} the position where the work done was defective and inherently dangerous was examined. The court concluded that it was no defence for the contractor to say that the architect had failed to notice the defect. A reasonable contractor would refrain from building something unsafe. It should also have followed the manufacturer’s instructions in carrying out the work. It was also held that the existence and scope of the contractor’s duty was not affected by the employment of an architect, safety supervisor or others to design, advise and supervise the work. Note that the actual case was decided in the tort of delict (negligence). The result however, would be the same in English law since the quality defect in the work caused damage to other property.

2.3 THE CONTRACTUAL SCHEME FOR DEALING WITH WORKMANSHIP

The JCT 98 in clause 8 and JCT 05 in clause 2.3 provide the contractual framework for dealing with defective workmanship, materials and goods. Overriding it is clause 2.1 that states the contractor’s is to carry out and complete the works in compliance with... standards therein specified, provided where... approval of the quality/standards of is a matter for the opinion of the Architect ...(it) shall be to the architect’s reasonable satisfaction of the Architect’. Clause 2.3 adds the phrase ‘proper and workmanlike manner’ but it is not suggested that this expands the duty.

The complex provisions dealing with defective were referred to in Rotherham above, but in that case they did not cover the actual defect in work that complied with the specification. The cases which follow both involved as did Rotherham defects that surfaced after the practical completion of the work. In LB of Barking\textsuperscript{14} at 483 Cotton LJ adopted the analyses of Stuart-Smith LJ in Crown Estate\textsuperscript{15} There at p. 15, he identified three ways for dealing with defects in quality of the work in the construction contract under consideration:

\begin{itemize}
  \item The criteria stipulated in the contract documents, for example a British Standard is specified.
  \item The standards and quality is not stated in the contract documents. The terms implied will be that the materials will be of a reasonable quality and fit for their purpose and workmanship will be to a reasonable standard.
  \item The standards and quality expressed to be to the architect’s satisfaction.
\end{itemize}

\textsuperscript{13} SM Goldstein\textsuperscript{12} & Co (PTY) Ltd v Catkin Park Hotel and anor [2004] BLR 369 (Supreme Court of South Africa)
\textsuperscript{14} LB of Barking & Dagenham v Terrapin Construction Ltd (2000) BLR 479 CA
\textsuperscript{15} Crown Estate Commissioners v John Mowlem (1995) 70 BLR 1 CA
The application of these three ways can be further shown by examining each one in turn. The first example deals with express terms regulating the quality of the workmanship and the materials (clause 8 of JCT 98 and 2.3 of JCT 05). The second with terms implied at common law. See for example the cases of Discain (2002) and Young & Marten (1968) mentioned above. The third is another express term, which leaves the quality and standards to the reasonable satisfaction of the architect: clause 2.1 of JCT 98.

In Birse\textsuperscript{16} the defects and the contractual provisions dealing with it, were applied by HHJ Lloyd QC. From his judgment it is possible draw together a substantial account of the duties and obligations of a contactor under the standard form of building contract. The project was the construction of a residential college using the JCT standard form of building contract 1980 edition with quantities together with Contractor’s Design Supplement. The employer claimed against both the Architect’s and the contractor for remedied and unremedied defects.

**The application of clause 8**

The list of defective work alleged was great, and three quite common place examples have been chosen to illustrate the precise nature of the contractor’s obligation of workmanship. These are:

- where there is a specification - but its use was inappropriate;
- where there is a specification plus a manufacturer’s method statement;
- where there is no specification.

Example 1: The contract required external rendering which had to be egg-shell smooth. This type of rendering had not been used externally before in the UK. There was a detailed specification, plus the British Standard for external plastering BS 5262, the manufacturer’s guidelines and a method statement by the sub-contractor carrying out the rendering. The employer argued that the cracking and grazing of the render was due to a breach of contract by the contractor. At Para 73 HHJ Humphrey Lloyd QC made a number of observations about the contractor’s responsibility for workmanship and materials:

i. Its ordinary obligations are not diluted in some way or come to a standstill when the work includes special or specialist work and materials.

ii. The standards of workmanship and materials are commensurate with the specialist work or materials.

iii. The standard of ‘good’ workmanship or ‘good’ practice is to set by the work in question.

\textsuperscript{16}Birse\textsuperscript{16} Construction Ltd v Eastern Telegraph Company Ltd [2004] EWHC 2512 (TCC)
Although the contractor took the risk of achieving the required finish, the specification BS 5262 states that steel trowels must not be used for external renders. The architects in requiring a smooth finish specified the use of a steel trowel. However, using it brings laitance to the surface, which is rich in cement and liable to craze. But a smooth finish can only be obtained by using a steel trowel and repeatedly working the render until the aggregate is smooth. Drawing these contrary requirements together HHJ Lloyd QC conclusions at Para 82:

‘Although the contractor had a high degree of responsibility for applying the requisite standard of workmanship and good practice in order to implement a design successfully, I do not consider that [they] in this instance was obliged, in effect, to make good a detail that was necessary for the success of the application selected by the architects.’ In other words the fault lay with the specification and not the contractor’s workmanship. Had he held otherwise, the contractor would have had to decide how to meet the required finish i.e. make out design choices.

Example 2: Belgian made Blanc de Bierges paving was specified in the contract and laid throughout the college. These paving slabs made of pre-cast concrete was chosen because (i) the slabs have a hand applied textured surface and (ii) look less ‘manufactured’ than other conventional concrete slabs. They are deliberately manufactured to different dimensions. Though nominally 600 mm square x 50mm thick, they may in practice deviate ± 10% from that size. In addition, they are also smooth on one side and rough on the other, with the smooth side laid on the ground side. The guidelines for laying the slabs were provided by the manufacturers who also made three visits to the site to demonstrate their method of laying the slabs. It had to be laid on wet mortar and special jointing tool provided by the manufacturers had to be used. At some stage, the sub-contractors reverted to a semi-dry mortar bed and the use of a different and wider tool. As laid, the slabs were either hollow underneath, rocking or in some cases lifted from their mortar bed. The joints between slabs crumbled and in some cases the mortar between them was half-filled.

The judge observed that the specified method required the joints to be filled. In his judgment it was feasible to do so. The contractor might have found it ‘difficult, time-consuming and costly’ but that was their risk under the contract. It not complying with their obligations, they were in breach. He concluded at para. 123 that in his judgment, the contractor ‘did not lay the slabs in accordance with the requirements of the contract, viz. in accordance with the manufacturer’s instructions or with good workmanship and skill, either in not following the recommendations of Blanc de Bierges or in accordance with good practice….It failed to appreciate the implications, in terms of the degree of care and application of [architect’s] choice of materials…During the contract and the trial it maintained, wrongly, that it needed only use the standard of workmanship and practice applicable to ordinary paving slabs…whereas the obligations was to use the standard of skill required by the materials specified in the contract.

Example 3: Mosaic tiling was specified for the showers and bathrooms. The mosaic tiles came as small pieces of glass that came stuck
onto sheets of paper. The paper was on the front of the tiles and had to be removed after application. The expert for the employer reported that a specialist tradesman achieved an excellent finish in the swimming pool ‘and… the rest of the mosaics were of much lower quality and in some places quite appalling.’ The judge observed at Para 206:

The contractor had a number of defences. ‘As I understood it, [they] wish to rely on the unreality of being able to meet [architect’s] requirements in the real world. This in turn raises the running issues of the standard of workmanship expected of [the contractor] and the satisfaction of the architect…’

Further on he returned to the question of what standard of workmanship was required by the contract. At Para 207 he said: ‘In my judgment it is necessary to consider, once again, [the contractor’s] primary obligations. There are no specific standards applicable to the mosaic tiling. Clause 8.1.2 of the JCT 98 states that the workmanship shall be of a standard “appropriate to the Works”, provided that workmanship shall be to the reasonable satisfaction of the architect where and to the extent that this is required in accordance with clause 2.1.4. Accordingly the standard is [the architect’s] satisfaction. In deciding that the contractor was liable for the costs of rectifying the defects he noted that ‘this was not an instance where the architect’s satisfaction was impossible, impractical or unreasonable.’ In fact it might be added that this is a risk that the contractor took. If the required standard of the work is unclear at the tender stage, the actual costs of doing it to that standard required by the architect might far outweigh the sum allowed at tender stage.

3. THE DESIGN AND BUILD CONTRACT

Where the contractor carries out the design and then builds, the liability for design depends very much on whether the common law applies or a standard form contract has been used. Viking17 confirmed that at common law, the contractor has a fitness for purpose obligation. Lord Scarman too, in IBA, said that ‘in the absence of any terms (express or implied) negativing the obligation, he who undertakes to design an article for a purpose made known to him undertakes that the design is reasonable fit for its purpose’18 In Associated British Ports19 the contractor accepted an fitness for purpose obligation under the ICE 6th edition and was held liable for failing to achieve a result. In that particular contract the term was specially negotiated but in modern contracts is an unusual one to find. In the JCT, ICE and NEC, families of construction contracts, the obligation of design is limited to the use of ‘reasonable care and skill’. The effect of such a clause is said to be unclear, however where the meaning of the express clause is clear, the courts are unlikely to interpret it as in fact saying that

17 Viking Grain Storage Ltd v. T H White Installations Ltd (1985) 33 BLR 103
18 Independent Broadcasting Authority v EMI Electronics Ltd (1980) 4 BLR 1 at 48
19 Associated British Ports v Hydro Soil Services NV & Ors [2006] EWHC 1187 (TCC)
the contractor is obligated to produce a result. Note that the contractor in carrying out the design still has liability for the materials used, since the employer will have relied upon its skill and judgment.

The contractor will have tendered in response to the employer’s requirements, which will usually be based on an incomplete design. What then is liability of the contractor for this design? In Henry Boot\textsuperscript{20} the contract was to demolish, design and reconstruct a building in Glasgow and let under JCT 80 conditions of contract with contractor’s design supplement 1981 edn., (revised July 1994). Clause 2.2.1.4 places on the contractor the ‘like liability to the Employer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out to be competent to take on work of such design ...’ Note that s. 13 of the Supply of Goods and Services Act 1982 implies a duty of reasonable care and skill into a contract for services. At common law there is also a duty of reasonable care and skill in a designer’s contract.

The scope of work contained in the design supplement was the design and construction of the basement walls. During the excavation of the works, water and soil flooded the sub-basement excavations. Consultants employed by the employer had carried out the design. The contractor argued that its obligation was only to prepare working drawings from the design provided and not to check its feasibility. HHJ Seymour QC said at para. 68 that in his judgment that clause 2.1.2 of the conditions required the contractor to develop the conceptual design provided by the engineers ‘into a design capable of being constructed’. In order to complete the design the contractor was required to: (i) examine the design at the point at which it was taken over (ii) assess the assumption on which it was based and (iii) form an opinion on whether those assumptions were valid.

It therefore appears that a contractor, who undertakes an obligation to complete a design begun by someone else, will have to first examine whether it had been prepared with reasonable care and skill. The word ‘completion’ requires a need to understand what has been done and judging its sufficiency. It should be noted that these comments relate to the particular wording of the contract conditions. They do contain a general warning to contractors accepting a pre-existing design element that they are required to complete. They might be better off limiting their liability for the suitability of that design by a suitably worded clause. Such a clause can of course cause conflict. It led to protracted litigation in Emcor Drake and Scull\textsuperscript{21}. A clause in the in the completed tender stated that ‘It is assumed that the existing drawings and documents referenced in Appendix A are in accordance with the Construction Contract requirements and are free from errors and omissions. Any costs associated with rectification of these materials/drawings/ designs have been excluded from our price...’ The parties failed to agree a written contract after lengthy negotiations. It is

\textsuperscript{20} Co-operative Insurance Society Ltd v. Henry Boot Scotland Ltd [2002] EWHC 1270 (TCC)
\textsuperscript{21} Emcor Drake and Scull Ltd v Sir Robert McAlpine Ltd [2004] EWCA Civ 1733
possible to limit liability to the price of the work. In *Shepherd Homes*\textsuperscript{22} the piling sub-contractor successfully limited its design liability to the contract price (£100K compared to eventual remedial costs of £10m).

### 3.1 THE DESIGN AND BUILD CONTRACTOR AND CONTRACTS WITH CONSULTANTS

With the growth of these contracts\textsuperscript{23}, the need to sub-contract design and supervisory duties has grown. Where the contractor employs a professional to design elements of the work, care needs to be taken to avoid a mismatch of liabilities. At common law or in the contract the contractor may have accepted a fitness for purpose liability while the professional has only a duty of reasonable care and skill. The contractor may then complain of a design fault when it in reality, the fault is with the workmanship.

In *Freyssinet*\textsuperscript{24}, beams designed and installed by a sub-contractor, and checked by a consulting engineer developed cracks. This resulted in the contractor carrying out expensive remedial work. It brought proceedings against both parties to recover these costs. The court treated both as professionals and as such entitled to the *Bolam*\textsuperscript{25} ‘state of the art’ defence. What this means is that if a substantial body of a profession was using a particular method at that time, the fact that the method was wrong is not negligence. The design fault in the beam was that it did not take into account early thermal movement. At the time of the work, the BS 8110 for structural use of concrete in buildings did not refer to early thermal movement. As a result both were held not liable to the contractor.

By contrast in *Cliffe*\textsuperscript{26}, the contractor sued the consulting engineer and the architect. The consulting engineer had sub-contracted work to the architect without obtaining the permission of the contractor. The contractor alleged that they had both failed to exercise reasonable care and skill resulting in a number of defects occurring during the work. The judge held that although the duty was indeed owed to the contractor, the defects themselves were a consequence of either (a) the contractors lack of supervision or poor workmanship. HHJ Wilcox QC, OR in giving judgment made a number of observations on the nature of a contractor’s duties in a design and build contract. In such a contract ‘... the contractor may supplant the architects in some of their traditional roles... In particular, involvement in the choice and the co-ordination of the specialist systems and sub-contractors, the integration of those systems, the approval of all drawings and site supervision. The result may achieve economies and render the tendering contractor more economic. It does however put a

\textsuperscript{22} *Shepherd Homes Ltd v Enica Remediation Ltd and anor* [2007] EWHC 70 (TCC)

\textsuperscript{23} 40% of contracts are design and Build (RICS Contracts in use 2004)

\textsuperscript{24} *PSC Freyssinet v. Byrne Brothers (Formwork) Limited* [1997] 15-CLD-09-24

\textsuperscript{25} *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582

\textsuperscript{26} *Cliffe (Holdings) Ltd v. Parkman Buck Ltd & Edmund Wildrinton* (1997) 14-CLD-07-04
premium upon the strength of the organisation and experience of the contractor in the enhanced role it plays in such a contract. [In essence HHJ said much the same in Birse about the contractor's role in the traditional contract]. Merely by employing an architect in a restricted role, such in this case, can it expect the architect to compensate for the shortcomings of the other sub-contractors? Prudent contractors, he concluded needed to check their plans and the professionals they employed could assume that they were competent. These views were echoed in two other recent Court of Appeal decisions.

In Jarvis & Sons27 the contractor started work on site before planning permission was granted. The architect had been involved in the planning application on behalf of the employer. Its contract was novated to the winning tenderer. The contractor sued the architect in contract and tort for failing to advise that planning permission had not been granted. The Court of Appeal held that where the client has relevant experience in the relevant area (and the here it was a very experienced contractor with particular expertise in design and build), the duty was to only give advice if it was sought. Since they had started work when they were well aware that no concluded agreement had been reached on their proposals, any advice the architects gave would have been superfluous.

In Bellefield28 too, the issue was to what extent the contractor could rely on its professional advisers. The contract was a traditional one, although the contractor effectively acted as a design and build contractor by engaging a firm of architects to assist it. It was thus under a fitness for purpose obligation but that was not an issue in the case. The court concluded that the function of the architects was limited to producing drawings and/or instructions necessary to demonstrate the final result required by the contractor and its sub-contractors. As far as the undertaking to the local authority to provide a sufficiently safe design the court dismissed any suggestion that the architects had enlarged their duty. At para. 70 Ward LJ said:

‘again one comes back to the position that [the architects] were not supervising or inspecting architects: they were working with an experienced contractor who had, so far as the evidence showed, given [the architects] no reason to think that their design intentions were not being followed on site.’

Further problems with responsibility for a pre-contract design can arise where as a condition of the contract, the contract with the designer is novated to the successful design and build contractor. Can the contractor sue the designer for pre-novation defects in the design work carried out for the employer? This matter was addressed in Blyth and Blyth Ltd29. A deed of novation was entered into and the terms of the deed had to be construed by the court. The contractor failed in its claim against the designers based

27 Jarvis & Sons Ltd v. Castle Wharf Developments and ors [2001] EWCA Civ 19
28 Bellefield Computer Services v. E Turner & Sons Ltd and ors [2002] EWCA Civ 1823
29 Blyth and Blyth Ltd v. Carillion Construction Ltd [2001] ScotCS 90
on breaches of contract alleged to have occurred prior to the deed of
novation. Part of the claim was for inaccuracies and deficiencies in the pre-
tender information. Acting on the accuracy of this information the contractor
submitted a lower tender than it would have done had the designer carried
out its duties with reasonable care and skill. This failure to obtain
compensation for pre-tender breaches does to some extent reflect the
position in the traditional contract. See for example the case of Pacific
which confirmed that the contractor could not sue the engineer in tort for
providing inaccurate information at the tender stage. The difference
between the two cases being that the claim in Blyth was in contract not in
tort.

4. CONCLUSION

In both type of contracts analysed, the courts require a high degree of
competence in demonstrating the duty of reasonable care and skill
required. The cases indicate that this is a highly elastic concept very
dependant on the facts of a particular case. Unlike the protection of given
professional status (the Bolam defence) the contractor is subject to the test
of the average competent contractor doing that work. The difference is that
a professional is judged by its peers, whereas a contractor is judged by
construction professionals. As a result the contractor is always likely to be
faced by a wide interpretation of ‘competence’ since its status is that of a
contractor.

As such it has a duty to warn of defects in the drawings and takes
steps where the work required is dangerous. It has to be aware that in
carrying highly specialist work the standard of workmanship required will be
dictated by the work itself. Work that in practice turns out to be difficult,
time-consuming and costly is classified as the risk it took under the under
the contract. So is the fact in the traditional contract the contractor as
manager of the process takes the risk that the materials and workmanship
will not comply with the contract. Where workmanship is required be to the
reasonable satisfaction of the architect, the unspecified nature of this
satisfaction can be costly.

With regard to the design and Build contract, the standard form
contract relieves the contractor of a fitness for purpose obligation, in
carrying out the design. What this means in practice is that the employer
needs to prove negligence. The contractor also has to check the pre-
existing design. Where it employs professionals, they need not give advice
except when asked, can assume the contractor is competent and the
design input will only have to reach the level of reasonable care and skill.

The cases analysed in this paper show that the contractor in both
types of contract is regarded as possessing high levels of management
skills. In modern contracts it has an enhanced role and high degree of
responsibility is transferred from the employer. Where it is sued by its

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employer or sues its professional advisers the contractor will find that the courts impose a high duty on it. It will be expected to have the high organisational skills and the wide experience that comes under the all-embracing category of a competent contractor.