

AON

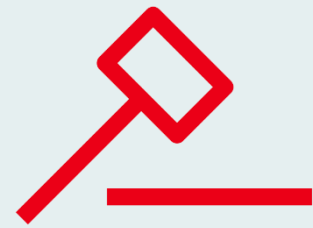
CESA PRACTICE NOTES

Liability for checking another's designs



Overview

Important considerations :



Delictual liability



Delict



Contractual
Liability



Errors and
Omissions



Negligence



Design Check

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Contract v Delict

Members may be held liable for errors in other Consultants' or Designers' work when they carry out a check for a particular authority or client.

Where a Consultant carries out such a check, the relationship between the Consultant and the authority or client is contractual in nature.

A Consultant may also be delictually liable for loss or damage suffered by a third party, negligently caused by the Consultant whilst rendering a professional service.

Consultants who carry out surveys, making reports, checking calculations, etc., will be in the category of possible defendants who might be sued by third parties (including future owners) who are not in a direct contractual relationship with them, and who suffer financial loss reasonably foreseeable by them when rendering their services.

If a contract is in place, i.e. between the client and consultant that must be used to dictate/ navigate the dispute.

If there is no agreement in place the third parties may be entitled to sue In terms of the law of delict- delict must in fact then be proven- the elements being:

- Conduct
- Wrongfulness
- Fault
- Causation
- damage

Obtaining clarity



At common law and in terms of the usual standard form agreements the Consultant is obliged to 'exercise reasonable skill, care and diligence' in relation to the specific work undertaken by the Consultant, and it is important therefore that there should be no ambiguity in the instructions accepted by the Consultant.

Clarity on Mandate:

Members are advised to ensure that their terms of reference are clearly stated in the contract when accepting commissions to check other designer's works. If an Authority or client simply asks for necessary 'structural' checks to be made, it is advisable to obtain clarification, in writing, of precisely what that means.

In addition, when making the final report on the drawings, calculations etc., the Authority or client should be made aware of the items which have not been checked, e.g. site and soil conditions, capacity of existing foundations to accept additional load, etc.

Members would, in fact, be well advised to record their terms of reference (if necessary, in summarised form) in their final report to the Authority or client concerned.



For example, although a Consultant may limit his liability towards a client in contract to twice the professional fees, should a claim for Delictual damages by a third party be made against the Consultant arising from work done under that contract, the agreed limit of liability would not be applicable.

The reason for this is that the third party was not a signatory to the contract and therefore is not bound by its terms and conditions.

"you cant limit your liability with someone you don't contract with".

Insurance Aspects

The policy will respond to an allegation of professional negligence.

If the allegation is that the insured signed off on an incorrect design then this would be deemed an allegation of negligence and the policy would most likely respond subject to the other terms and conditions of the policy.

However, the liability in this scenario would most likely sit with the original designer so the policy would initially respond to defend the insured on this basis.

Claiming in terms of the law of Delict

Delictual damages might be greater than contractual damages as a Consultant cannot limit the extent of Delictual damages that he may be liable for to a third party.

It is harder to prove a claim in delict. If the person who claims does not have a contract with the insured, then there is the issue of duty of care which is a big hurdle to get over.

Conclusion

Some protection may be afforded *in terms of third party indemnity

“Indemnity by the Company: the Company shall indemnify the Supplier against all claims by third parties which arise out of or in connection with the rendition of the services save to the extent that such claims do not in the aggregate exceed the limit of compensation.”

However, practitioners need to be aware of all the risks involved

