

# Beale & Company

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## Consultants – Is your duty of care under attack?

### Webinar

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## Introductions

- + Will Buckby
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## Agenda: Consultants – is your duty of care under attack?

- + Duty of Care - Why is it important?
- + Standard Forms - Historical Approach
- + New Standard Form Professional Services Contracts
- + Bespoke Client Agreements
- + Recent Case Law
- + Drafting Tips
- + Practical Consideration and Conclusions





## Duty of Care – reasonable skill and care

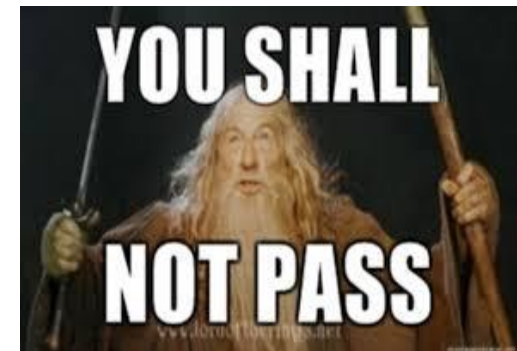
- + Failure to exercise the requisite degree of skill and care: constitutes the tort of negligence or breach of contract
- + Common Law:
  - carry out services exercising “*reasonable skill and care*”
  - *Bolam* test: ordinary skilled and competent professional in the relevant profession
- + If no express duty of care is incorporated, the common law duty of care will be implied as a term of the contract
- + Implied by statute:
  - “*implied term that the supplier will carry out the services with reasonable care and skill*” (s.13, Supply of Good and Services Act 1982)
- + Contractual duty of care:
  - “*reasonable skill, care and diligence*”





## Duty of care – strict obligations

- + Non-standard conditions (and now some standard forms) often contain absolute or strict obligations
  - ACE 2009 – no strict obligations
  - RIBA 2010 – no strict obligations
  - RICS 2011 – number of strict obligations
  - NEC4 PSC – number of strict obligations
- + Law will take a literal approach to these – failure to comply will be breach regardless of negligence and reasons beyond control
- + *'Shall', 'ensure', 'secure', 'comply', 'procure', 'to see that'* etc
- + *"Exercising reasonable skill and care, the Consultant shall..."*





## Duty of care – fitness for purpose



- + Fitness for purpose obligations effectively require a party to guarantee a particular result
- + Consultants can be liable even if they have used reasonable skill and care and not been negligent
- + Professional indemnity insurance implications!
- + Fitness for purpose obligations may not be immediately obvious
  - as with absolute/strict obligations look out for provisions aimed at guaranteeing performance
- + Inappropriate for professional consultants appointments



## Duty of care – what professional indemnity insurance policy?

- + Negligence
  - failure to exercise reasonable skill and care
- + Absolute or strict obligations
  - liability can arise for failing to achieve the stated result, even if there has been no negligence
- + Fitness for purpose
- + Negligence or civil liability based policy?





## Duty of care – historical approach



- + Similar to common law standard of “reasonable skill and care”
- + Test – ordinary skilled and competent professional
- + RIBA Standard Form Agreement 1999
  - *exercise reasonable skill and care in conformity with the normal standards of the Architects’ profession* (clause 2.1)
- + ACE Agreement 1
  - *exercise reasonable skill, care and diligence in the performance of the Services* (clause F2.1)
- + RIBA Standard Conditions of Appointment for a Consultant 2010
  - *exercise reasonable skill, care and diligence in conformity with the normal standards of the Consultant’s profession* (clause 2.1)





## Duty of care - approach under NEC4 Professional Services Contract

- + Standard of care is *the “skill and care normally used by professionals providing services similar to the service”* (clause 20.2)
- + “normally used” – ambiguous
- + As NEC4 PSC written in present tense – assumption of strict obligations:
  - Clause 30.3 – “Consultant does the work ... by the Key Date”;
  - Clause 20.1 – “The Consultant Provides the Services in accordance with the Scope”; and
  - Clause 24.2 – “The Consultant obeys an instruction ... given by the Service Manager”





# New Standard Forms – duty of care under attack!



FORM	PUBLICATION DATE
ACE Professional Services Contract 2017	January 2017
ACE Sub-consultancy Agreement 2017	January 2017
FIDIC Clients/Consultants Model Services Agreement (5 <sup>th</sup> Edition) (“White Book”)	February 2017
FIDIC Sub-Consultancy Agreement (2 <sup>nd</sup> Edition)	February 2017
IChemE Professional Services Contract Silver Book 2017 (First Edition)	February 2017
NEC4 Suite of Contracts	June 2017
New RIBA Forms	Later in 2018

## New Standard Forms – reasonable skill and care (1)

- + Clear shift in the standard of care to a more “elevated” duty of care
- + ACE Professional Services Agreement 2017 (ACE PSA)
  - “*In providing the Services the Consultant shall exercise the reasonable skill, care and diligence **appropriate to a consultant qualified in the relevant discipline engaged in the performance of such services for projects of a similar size, nature and complexity to the Project***” (clause 2.1(i))
- + FIDIC White Book (5<sup>th</sup> Edition)
  - *Consultant to exercise the “reasonable skill, care and diligence to be expected from a Consultant experienced in the provision of such services for projects of similar size, nature and complexity”*
  - Higher standard of care than that which was in the earlier version of the White Book
- + IChemE “Silver Book”
  - Completely new addition to the IChemE suite of contracts
  - The Consultant is required to exercise “*the reasonable skill and care to be expected from a qualified and competent consultant experienced in the provision of services of similar scope, size and complexity to the Services*”





## New Standard Forms – reasonable skill and care (2)

- + **Risk with elevated duty:**

- + Consultant will be judged against higher standard (qualified, experienced, competent consultant)

- + Wording typically seen in bespoke Client agreements

- + Now widely accepted as “market standard”

- + PI Insurance – coverage?





## New Standard Forms – various strict obligations

### + Statutory Obligations

- “The Consultant shall **comply with all** regulations, statues, ordinances and other forms of standards, codes of practice and legislation applicable to the Services and the Agreement” (clause 3.3, FIDIC White Book 5<sup>th</sup> Edition)
- Mutual obligation to “**comply with all** Legislation” (clause 6.1, IChemE Silver Book 2017)

### + Client’s reasonable instructions

- The Consultant shall **act in accordance with any reasonable instructions** given by the...” (clause 2.3, ACE PSA 2017 or clause 2.5, ACE PSSA 2017 )

### + Main Agreement

- “The Sub-Consultant **shall observe perform and comply** with the obligations and provisions of the Main Agreement so far as they relate and apply to the Sub-Consultancy Services....” (clause 2.2, ACE PSSA 2017)

### + Scope

- “The Consultant **acts in accordance with** the health and safety requirements in the Scope” (clause 24.3, NEC4 PSC)



IS IT OKAY  
TO BE  
STRICT?



## New Standard Forms – fitness for purpose!?

- + Clause 3.3.2 provides:
  - *“To the extent achievable using the standard of care in Sub-Clause 3.3.1, and without extending the obligation of the Consultant beyond that required under Sub-Clause 3.3.1, the Consultant shall perform the Services with a view to satisfying any function and purpose that may be described in Appendix 1 [Scope of Services]”* (clause 3.3.2, FIDIC White Book 5<sup>th</sup> Edition)
- + Fitness for purpose obligation?
- + Sub-Clause 3.3.1 trumps this: *“Notwithstanding any term or condition to the contrary in the Agreement or any related document [...] the Consultant shall have no other responsibility than to”* exercise the elevated reasonable skill, care and diligence obligation
- + Arguably therefore, Consultant’s has no responsibility other than to exercise reasonable skill and care etc.
- + Catering to the international market where fitness for purpose obligations are common (such as the Middle East)



## New Standard Forms – deleterious materials

- + Professional's duty to “*exercise reasonable skill and care*” - will extend to specifying of materials
- + ACE PSA 2017 expressly includes new obligation re deleterious materials
- + “*Exercising the reasonable skill, care and diligence [...] the Consultant shall not specify or approve for use any products or materials which are generally known by consultants of the Consultant's discipline to be deleterious, in the particular circumstances in which they are specified for use, to health and safety and/or durability of building or structures*” (clause 2.1(ii), ACE PSA 2017)
- + Widely drawn clause:
  - + “generally known” - uncertain and unspecific
  - + “time of use” v “time of specification”
  - + “specify or approve” – outside control?
  - + Risk of further enhancing duty of care?





## New Standard Forms – collaboration and good faith



- + Increased emphasis on collaboration and good faith in the new standard forms
- + Stems from NEC3 PSC obligation: “*spirit of mutual trust and co-operation*”:
  - “*collaborate in a spirit of trust and mutual support*”; (clause 4.1, ACE PSA and ACE PSSA)
  - “*act in good faith and in a spirit of mutual trust*” (clause 1.16.1, FIDIC White Book 5<sup>th</sup> Edition)
  - “*fairly, openly and in good faith with each other*” (Clause 2.2, IChemE Silver Book)
- + **But what does this mean?**





## Costain Ltd v Tarmac Holdings Ltd [2017]

- + NEC3 Framework Agreement and Supply (Short) Contract:
  - Standard clause 10.1 requiring the parties to act “*in the spirit of mutual trust and cooperation*”
- + Arguments regarding claim being time barred and ambiguous drafting
- + Costain argued that Tarmac’s failure to point out the full effect of drafting breached the “spirit of mutual trust and cooperation” pursuant to clause 10.1 of the Supply (Short) Contract
- + Held:
  - Tarmac did not fail to act in the spirit of mutual trust and cooperation – not “lulled” Costain into false belief
  - Clause 10.1 did not require Tarmac to double check time barring drafting
  - Mutual trust and cooperation similar to “good faith”, creating a positive obligation “to correct a false assumption obviously being made” and does not create an obligation for a party to “put aside its own self-interest”



"Sure I shot him — but I shot him in good faith!"



## Duty of care – new early warning provisions

- + New regime!
- + Imposes duty to notify of any early warnings
- + Process is fairly similar to the NEC3 PSC approach to early warnings
  - Clause 4.2 requires each party to notify the other as soon as they become aware of “*any matter likely to affect the provision of the Services, including delay and additional costs*”
  - Within 7 days of this notice the parties are to have discussions and if appropriate a meeting to consider “*actions or measures in response to the matters...notified*”
- + Consultants will need to exercise care when operating early warning regime – can be administrative and serious consequences for failure to comply
- + Professional indemnity insurance implications
- + Notably, there is a potential pitfall for Consultants whose “*hands maybe tied*” with liability as any matter agreed will need to be binding and in full satisfaction of any claim (clause 4.2, ACE PSA 2017)





## Bespoke Client Agreements – attacking the duty of care (1)



- + Often impose higher standard of care:
  - A requirement to use the same level of skill and care as would be expected of a competent professional operating in that specific sector
  - A requirement to act diligently
- + Variations which we commonly see:
  - ‘all skill and care’; ‘all proper skill’
  - ‘due professional skill’; ‘due skill and care’
  - ‘highest standard’
  - ‘expected of an expert...’
  - “professional is a specialist in...”
- + Consultant will be judged against the higher standard and not against the criteria for using reasonable skill and care
- + Should only accept if risk in practice is minimal or other commercial considerations apply
- + Strict obligations/fitness for purpose?





## Bespoke Client Agreements – attacking the duty of care (2)

- + Obligations to perform the services to the client’s satisfaction (or even “reasonable” satisfaction) could amount to fitness for purpose obligations and/or extend duty of care
- + “all reasonable endeavours” can require a party to act against its own commercial interests (“best endeavours” is more onerous and generally means “leaving no stone unturned”)
- + Compliance with “third party agreements” or back to back obligations – may themselves contain absolute, performance based obligations/guarantees
- + Obligations that the consultant owes a duty of care to a third party (such as company in the same Group as the Client) – gives rise to a duty of care to the third party





## Recent Case Law





## 199 Knightsbridge Development Ltd v WSP UK Ltd [2014]



- + Claimant developer engaged a consultant to design cold water system for a prestigious apartment in Knightsbridge
- + Design failed resulting in a major flood
- + Contractual duty:
  - “exercise a reasonable level of skill and care as (was to be) expected of a qualified Consultant in the same profession, experienced and competent in carrying out work of similar size, scope and complexity as the Project”
- + Court held WSP breached its duty
  - Bolam Test;
  - *Nye Saunders v Alan E Bristow* - evidence at the relevant time?
  - If the consultant had foreseen the problem, could the damage have been prevented? Yes
  - Reliance on (unsatisfactory) prevailing professional standard is not sufficient
  - Higher standard of care
  - However case failed as Claimant was unable to show causation of loss



## Interplay between strict v reasonable skill and care obligations

- + Interplay between ‘strict requirements’ and obligations to use reasonable skill and care/good industry practice considered in recent cases:
  - *Costain Ltd v Charles Haswell Partners Ltd* [2009] EWHC B25 (TCC); and
  - *MW High Tech Projects UK Ltd v Haase Environmental Consulting GmbH* [2015] EWHC 152 (TCC)
- + Parallel obligations to use ‘reasonable skill and care’ and to comply with strict requirements in relation to compliance with contract specifications
- + Could be in breach of one of the obligations while compliant with the other



## *MT Højgaard A/S v E.ON Climate And Renewables UK* [2017] - Facts

- + E.ON engaged MT Højgaard to design, fabricate and install foundations for 60 wind turbine generators at an offshore wind farm
- + Clause 8.1(x) of the Contract:
  - “*design, manufacture, test, deliver and install and complete the Works so that each item of Plant and the Works as a whole shall be [...] fit for its purpose as determined in accordance with the Specification using Good Industry Practice*” and internationally recognised standards
  - DNV-OS-J101 was the applicable standard
  - “Good Industry Practice” required exercise of reasonable skill and care and compliance with the DNV-OS-J101 standard
- + Technical Requirements:
  - meet the international standard for the design of offshore wind turbines (DNV-OS-J101)
  - “*The design of the foundations shall ensure a lifetime of 20 years in every respect...*”
- + Works completed in February 2009
- + In April 2010, defects discovered which arose from a significant error in the DNV-OS-J101
- + Dispute arose over liability for agreed remedial works of c. €26.25m







## MT Højgaard A/S v E.ON Climate And Renewables UK [2017] – Decision and Guidance

- + Supreme Court found (overturning Court of Appeal) that MT Højgaard was liable to E.On
  - ‘Reasonable skill and care’ clause, was not expressed to be overriding, so did not ‘take precedence over’ Technical Requirements
  - Requirements to meet DNV-OS-J101 and to ensure lifetime of 20 years took effect as independent ‘dual obligations’. MT Højgaard met first requirement, but not second
- + Guidance:
  - Contracts can impose “*dual obligations*”
  - Each contract taken as a whole, including the contract conditions and the technical requirements should ideally ‘sing together’ both in overall approach and detailed drafting
  - Every effort should be made to eliminate inconsistencies to minimise the risk of unexpected findings on issues of contract interpretation
  - Timely reminder of the perils of imprecise drafting!





## Lejonvarn v Burgess [2017]

- + Recently considered the circumstances in which a duty of care can arise in complete absence of a contract
- + What a party says and does in particular circumstances can be enough to justify the finding of a duty of care in relation to services provided
- + Factors which contributed to finding of a duty of care:
  - Not a case of brief advice
  - Services provided over a lengthy period
  - Involved significant commercial expenditure on behalf of Burgess
  - Neither party saw this as a favour given without legal responsibility
  - Lejonvarn did hope the services would lead to further work
  - Losses flowed from failure to perform competently
- + Duty was to: *“exercise reasonable skill and care in providing the professional services which Mrs Lejonvarn did in fact provide ... she did not have to provide any such services, but to the extent that she did she owed a duty to exercise reasonable skill and care...”*





## Drafting Tips and Practical Considerations (1)



- + Where possible, try and limit standard of care to “reasonable skill and care”
- + Include an overarching duty to exercise reasonable skill and care
  - But remember, an obligation to use reasonable skill and care is not an overriding provision unless stated
  - Best practice to qualify strict obligations by “exercising reasonable skill and care” – “subject to” wording may not always be sufficient
- + Check for hidden obligations
  - strict and fitness for purpose obligations may not always be obvious
- + Civil liability policy is much preferred to a negligence based one!



## Drafting Tips and Practical Considerations (2)

- + Is the consultants' duty of care under attack?
  - We think so!
  
- + “Elevated” standard of care is now “market standard” as is:
  - Strict obligations
  - Express obligations to avoid deleterious materials
  - Obligations akin to good faith (“acting in the spirit of mutual trust and cooperation”)
  - Early warning regimes





## New Standard Forms - articles



- + “NEC4 Professional Service Contract - Briefing Note Two: Liability - Expanding the Consultants' risk” (February 2018)
- + “NEC4 increases consultants' risk” (December 2017)
- + “NEC4 Professional Services Contract - Briefing Note One: Defined Cost - Rethinking Business Models” (August 2017)
- + “IChemE publishes new Silver Book professional services contract to complete its set of standard forms” (April 2017)
- + “Everyone’s at it! NEC4 to join the growing list of new standard form contracts” (March 2017)
- + “Formal borders? Landscaping the duty of care in the absence of contract” (April 2017)
- + “New FIDIC Agreements for Consultants” (March 2017)
- + “Early warning obligations in Consultancy Appointments” (February 2017)
- + “Publication of ACE Professional Services Agreement 2017” (February 2017)



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