What to consider if a third party threatens to sue your firm

In our increasingly litigious society even the most experienced and conscientious engineer can be vulnerable to claims by his / her employer or a third party. It is important that your firm is proactive (rather than reactive) in planning and agreeing the protocol to be adopted in the event that a claim is pursued against it. This will greatly assist you in defending the claim efficiently with the least amount of stress and inconvenience to your day to day business.

Claims Manager

A person should be nominated in your firm to act as the “claims manager”. He / she should be the point of contact for all parties involved in the claim including the claimant, staff members, insurers, external solicitors and experts. Such an appointment facilitates the smooth defence of a claim. One person will be knowledgeable of all matters relevant to the dispute. He / she will have the ability to coordinate and control the investigations effectively and maintain a consistent approach to the claim on behalf of the firm to external parties.

Notification of the claim or potential claim to your insurance company

An engineer is obliged under the terms of his / her professional indemnity insurance policy to report any claim by a third party or knowledge of potential circumstances which may give rise to a claim to insurers within a restricted timeline. The obligation is to notify a claim or potential circumstance even if the engineer believes it may be spurious.

The timeline for notification to insurers varies from policy to policy. In some cases, an engineer may be obliged to notify a claim or potential circumstance within seven days of it arising or in others the obligation is to notify the matter to insurers “as soon as reasonably practicable”. All employees should be made aware of the timeline for notification set down by the insurance policy.

Failure to comply with the timescale for notification is one of the principal grounds for insurers refusing to provide cover to an engineer for a claim. Engineers should therefore observe the rule of thumb that, if in doubt, you should notify all circumstances or claims to insurers without delay.

Top Tips:

- Nominate a “claims manager”.
- Notify all circumstances or claims to insurers without delay.
- Take statements from witnesses ASAP.
- Assemble all related documents.
- Consider what documents will need to be disclosed to the claimant by way of discovery.

An engineering firm should consider whether internal legal advice about a claim needs to be set out in writing or if it can be provided orally.

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without delay or at the very least take advices from your broker on the best course of action.

The insurance policy may prescribe a particular form or procedure for making the notification to insurers. If not, then bear in mind the following practical points:-

- It should be clear that a formal notification is being made pursuant to a specific professional indemnity policy.
- Full details of the claim or circumstance should be provided to include details of the project in question, the parties involved and the nature of the complaint which has arisen. The content of the notification should be unambiguous. If a notification is too vague, it may not be accepted.
- If new issues emerge, you should consider whether a further notification is required because the first notification may have been too narrow.

Once your insurance company has accepted the notification, it will usually appoint a firm of solicitors to act on your behalf in the defence of the claim. These solicitors will liaise with you regarding the merits of appointing independent experts to investigate the claim and to agree a strategy.

Witnesses

Any member of your firm who has knowledge of the project in question or matters in dispute should be interviewed as soon as possible. Statements should be taken from witnesses in early course as recollections can fade over time. The statement should include the witness’ detailed recollection of relevant events during the course of the project and the subsequent issues which arose.

If this employee leaves your firm, contact details should be retained for him or her. This is important because, if the dispute proceeds to Court, it may be necessary to call the witness to give evidence or to assist in the defence of the claim.

Retention of project documents

Once a claim is intimated, all documents related to the project should be assembled (to include documents stored electronically). Depending on the nature of the dispute, the following non-exhaustive list of documents can be vital to the defence of any litigation:-

- The terms of engagement executed by your firm and its employer.
- All site investigations, percolation tests, records of trial holes etc.
- Any design documents including drawings, specifications and calculations.
- Written records taken by the site engineer during the construction stage of the project such as photographs and site diaries.
- Minutes of site meetings documenting agreed decisions.
• Any certificates of compliance issued with respect to planning permission or building regulations.
• All fee related correspondence exchanged between your firm and the employer.

Employees should be advised not to amend or destroy existing documents after a claim has been intimated by a third party against the firm. The firm’s normal policy for destroying documents, for example twelve years after a project has been completed, should also be modified to ensure key documents are preserved.

Discovery & privilege

If a dispute proceeds to litigation, a claimant is entitled to seek documents from the engineer relevant to the subject matter of the dispute which might assist its case. This process is known as discovery. The purpose of discovery is to ensure both parties know the case which they have to meet before trial and to avoid what is known as “trial by ambush”.

Some types of documents do not need to be discovered as they are deemed to be “privileged”. The main categories of documents which are protected from production are:-

• Legal advice privilege: Communications passing between the engineering firm and its legal advisors in relation to a claim.
• Litigation privilege: Certain communications made when litigation is likely or has begun between the legal advisors and third parties (potential witnesses, for example) where the main purpose of the communication is to seek or obtain evidence for use in the litigation.

A recent decision of the European Court of Justice confirmed that communications passing between in-house lawyers and other employees of the company were not deemed not to be privileged. The basis for this decision was that the Court felt an in-house solicitor does not enjoy the same level of independence from his client compared with an external solicitor. Although this applied to documents relating to EU Commission investigations only, it is possible that this may be revisited in the context of all communications with in-house lawyers.

This limitation has to be taken into consideration by engineering firms when preparing documents about a claim which they may not wish to have to subsequently disclose to the claimant by way of discovery. An engineering firm should consider whether internal legal advice about a claim needs to be set out in writing or if it can be provided orally. All documents created for the specific purpose of providing information required by the firm’s external solicitor (including witness statements) should be identified and marked with the phrase “Privileged and confidential communication prepared in anticipation of litigation at the specific direction of legal counsel”.

Site visits

After a claim is intimated, you should consider conducting an immediate site inspection to record the condition of the structure which is the subject matter of the complaint. The site inspection will form an important part of the in-house investigation into the merits of the claim. It will also provide a contemporaneous record of the condition of the property in case it is materially altered or remediated after the site inspection. Your insurers may decide subsequently to appoint an independent expert to carry out a further site inspection for the purpose of his / her own report. It is still useful for you to have completed an initial site inspection so that your firm can provide its views on the merits of the claim to insurers.

In order to conduct a site inspection, it is necessary to obtain consent from the claimant or the property owner (if these individuals are not one and the same). If the claimant or property owner is legally represented, inspection facilities must be sought through their solicitors. The solicitors may wish for their expert engineer to attend the site inspection with you. If this is insisted upon, you should ensure that you do not do or say anything which might constitute an admission of liability in relation to the subject matter of the complaint or to say anything which might prejudice the subsequent defence of the claim.

Conclusion

Litigation is unfortunately becoming a greater risk which engineers have to face in the course of their business. The best form of protection is for an engineering firm to be as prepared as possible for this eventuality. A coherent plan of action and good forms of communication internally within the firm are vital tools to ensure the best defence to the claim can be presented.

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