Opening the floodgates

The floods over the past weeks could lead to a wave of claims and other legal actions. Construction firms should make sure they can stay afloat in a world where flooding is the new normal.

As widely reported, flooding has led to devastation in many parts of the country. Some claim the government’s intended future spending and intention to “fix those defences overwhelmed […] and to make them more resilient” will be insufficient to address future rainfall at current levels, let alone the more dramatic rainfall some predict will occur in the future due to climate change.

A consequence of the flood damage is the flow of legal and insurance claims. The Association of British Insurers has said that the final bill for insurers for the flood damage caused by this winter’s storms is likely to reach £1.3bn. Parties suffering flood related losses may seek to recover from their professional advisers and their insurers if they consider they have received inadequate designs or advice. There is concern that the floods, and consequently the flow of claims, will continue unless significant improvements to the UK’s flood management systems are made.

For future projects, particularly in areas at risk of flooding, it is recommended that the effect a flood could have on the live project be specifically addressed from the outset.

For those working on projects which have been affected by flooding, terms of appointments should be carefully checked and any relevant notices regarding extensions of time, delay, disruption, payment, suspension, termination or force majeure should be issued. Notifications should be made to insurers where appropriate. It would also be prudent to record and take photos of the flooding and its impact.

For future projects, particularly in areas at risk of flooding, it is recommended that the effect a flood could have on the live project be considered and specifically addressed from the outset and in contract documentation to ensure that adequate protection is provided. The JCT includes the wording “exceptionally adverse weather conditions”, loss occasioned by “specified
perils” (which includes flooding) and force majeure as “relevant events” which may allow the contractor to obtain extensions of time but not recover loss/expense as a result of flooding. The NEC3 includes the terms “weather measurement” and “prevention” events which may allow for compensation events to be awarded.

The test for professional negligence from the case of Bolam vs Friern Hospital Management Committee provides: a professional "is not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body […] skilled in that particular art”, although it must be responsible and reasonable for the professional to act in that way and the consultant cannot unreasonably continue with an outdated practice.

Consultants must comply with this standard (as well as the duties set out in their appointment). In order to do so, it is vital that those advising on issues relating to flood risk/water/drainage keep up to date with developments and industry guidance and practice to ensure that they provide adequate designs and advice to their clients, which may include recommending innovative solutions. Consultants should ensure that their advice and assessments, as well as discussions, correspondence and client decisions, are documented so that the factual position can be established in the event that a claim does occur.

Consultants should resist the inclusion of any obligations to provide advice relating to flood risk in their appointments if they are not providing such advice. Consultants should also obtain written instructions as to the flooding design and the design flood level on which they are to base their design where relevant and should make clear in their design and to their client what assumptions have been used. If there is a concern that the client has not sufficiently considered flood risk, or advice provided by others is inadequate, the consultant should raise appropriate warnings to their client given that a duty to warn may, in certain circumstances, be implied (see for example Hart Investments Ltd vs Fidler).

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David Rooke, deputy chief executive of the Environment Agency, has said: “We are moving from a period of known extremes into a period of unknown extremes.” If levels of rainfall continue or increase as a result of the influence
of climate change or otherwise, it may be that industry norms and accepted practice begin to change.

The “design floods” used for developments in the UK are generally required to provide protection for flooding with a 1 in 100 chance of occurring each year (rivers), and for flooding with a 1 in 200 chance of occurring each year (seas). There have been calls for the level of protection to be increased.

The RIBA has pressed for “resilient design” – buildings and infrastructure that can survive flooding without having to undergo extensive remedial works and can quickly recover – to be considered if complete flood resistance cannot be achieved in a given location.

The construction industry will no doubt rise to the challenge of climate change and strive to provide engineering solutions to meet those challenges as it has done throughout history. But along the way it must take care to protect itself from attempts to lay blame and recover losses.

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For further information please contact:

Sheena Sood
Partner
T: +44 (0)20 7469 0402
E: s.sood@beale-law.com

Kristina Vongas
Associate
T: +44 (0)20 7469 0436
E: k.vongas@beale-law.com