



A BRAVE NEW WORLD:

THE CLAIMS CONTEXT

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INTRODUCTION

In the first quarter of 2020 we hosted a series of roundtable meetings with a broad range of representatives from across our construction professional client base. In those meetings we explored different parties' perspectives on the various commercial and environmental challenges they face for trading in the immediate and longer term futures, all with a view to then publishing a further and more substantial report reflecting the findings. That report, 'A Brave New World', is being made available to our clients, in serialised form, across the remainder of this year, with the first part of that serialisation having already been sent in July.

To create perspective on why we embarked on the Brave New World engagements, we prepared a claims based paper, published in two parts, to highlight some current experiences and potential trends. We then want to establish 'lessons to be learned' to support necessary conversations so we have a realistic chance of successfully navigating future industry challenges.

Part of the context of those roundtable discussions continues today: an insurance market which was and still is contracting in capacity due to widespread claims-driven underwriting losses in this class, all with a knock-on effect on pricing.

Little did we know at the time of our roundtables that the world was about to be hit by the Covid-19 pandemic, one of the many consequences of which has been the sudden triggering of an economic recession.

Historically, liability insurers have experienced a deterioration in claims during recessions, partly because claimants suffer an inflated sense of loss during times of economic hardship, and partly because co-defendant firms have a habit of going bust when trading conditions tighten unexpectedly (leaving the surviving insured parties to defend or settle the entirety of the claim). Either way, the short-term outlook for a sector of the insurance market which was already under pressure is not positive.

Now therefore, as ever, our clients need to be on their guard and we have a collective responsibility to learn from the past as we look ahead to the future.

With that in mind, this report reviews the ten highest value settlements concluded under our construction facilities during the calendar year 2019 – a year that doesn't stand out in our history as being in any way exceptional. Significantly higher value claims are found in several previous years. A review of the top ten claims focuses exclusively on one significant tier of settlements. In this paper we set aside the attritional effects of the many further tiers of claims that sit beneath and are a significant factor in themselves.

Each of the following ten claims tells a different story and helps to illustrate that whilst some claims grow out of a toxic mix of coexistent factors, other high value claims can be traced back to a single innocuous event which was sufficient to cause a major problem. That is significant because it serves to bolster the otherwise somewhat glib point that the potential for claims exists in the simplest of tasks if risks are not properly managed.

As stories these ten matters are undoubtedly of interest in themselves, but their enduring value lies in what can be positively gleaned from them. At the end of each one we therefore offer some observations, but we are also always interested to hear the particular views and reflections of practitioners among our client base.

The financial values appearing in the heading for each matter represent the total cost to insurers, inclusive of defence costs but net of any policy excess.



1 THE UNDER-DESIGNED BASEMENT SLAB

£10.4M

Our clients were civil and structural engineers to a D&B contractor on a mixed use development with a large basement. There were various alleged defects but the main one related to the basement slab.

Whenever structural engineers design slabs which sit in/on the ground they have to take into account the ground conditions and assess a variety of items including groundwater, contamination etc. A failure to take those ground conditions into account and provide for them in the design can cause the slab to fail.

In this instance the engineers had designed the basement slab assuming a worst case flood event based on the interpretation of a report obtained from the developer's geotechnical engineers. In principle, professionals are entitled to rely on advice provided by a specialist in another discipline when that advice comes 'downstream' which in the context of construction means that it is provided by or on behalf of the employer. In other words, incorporating a rogue specialist element into a broader design which then fails as a consequence does not necessarily amount to breach of duty on the designer's part. On the other hand, a designer - who whilst not a specialist in that other discipline should nevertheless have noticed that something was awry and negligently failed to question it - will be responsible in the usual way for the consequences of that failure.

It all depends on whether expert witnesses are of the view that a member of a given profession, exercising reasonable skill and care, would have identified an issue and acted upon it; or whether they simply could not have been expected to discern that there was something wrong in what was presented. That distinction typically turns on just how niche the specialist element was and how much a practitioner outside that specialist field could have been expected to understand about it.

The claimant contractors succeeded against the engineers, although rather than pursuing a cash award they had sought only a declaration that the engineers had been negligent. They then proceeded to pursue recovery for the cost of the remedial scheme which (inclusive of costs, consequential losses and various other heads of loss) was pleaded by the contractors at a sum not so far below the original contract price. Matters were ultimately resolved without the need for further litigation or adjudication.

KEY OBSERVATIONS

- Innocent assumptions always carry inherent risks. Good communication, particularly between consultants, and a request for clarification could ultimately have saved millions of pounds in this dispute.
- Another common theme is that risks always thrive at the interface between different parties on the project team, especially where they have no direct contractual relationship and therefore, at least in theory, no channel of direct communication. That absence of a direct contractual nexus tends to be seen as an obstacle to communication and a reason not to ask questions. That is understandable in part given the traditional wisdom that consultants best manage their risk by not providing advice to parties other than their own clients (because to do so blurs contractual lines and inadvertently creates duties of care where none previously existed) but the alternative of not addressing relevant points at all then jeopardises the overall scheme.
- The above risk is all the more enhanced when the parties are separated not only in contract but also in time and space. In practice consultants usually do cooperate by answering questions from all quarters when the project team are working alongside one another in immediate proximity, whether physical or virtual. However, in our example, poor communication between consultants proved fatal.

- In this instance the geotech perhaps also acted negligently in providing information in ambiguous terms. In different circumstances he might have been jointly and severally liable with the designer, in which case we could have claimed a contribution from him. Joint and several liability, however, involves being liable to the same party for the same loss, whereas in this case the designer and the geotech had been engaged separately by the developer and the contractor.
- The practical difficulties of remediating a slab which is situated in a basement meant that defects were always going to be expensive to put right. But when the pleaded value of the claim is well in excess of two thirds of the contractor's tender price one cannot help but wonder whether the latter was significantly underestimated. If that is true then this project was always going to be a commercial disappointment for the contractor, in which case some form of attempted recovery against someone was perhaps inevitable. Nonetheless, on the face of it, this was a genuine claim for losses which (on the contractor's figures) far exceeded the amount of Professional Indemnity cover maintained by an engineer whose appointment contained no cap on liability.



2 OVERVALUATION OF CONSTRUCTION WORKS

£898K

Our client in this next case had been engaged as fund monitoring surveyors for a bank who were funding the construction of a new-build luxury hotel and spa. Essentially their role involved providing valuations of the works at periodic stages of the development which in turn triggered the release of loan funds to the developer.

When the developer went bust the bank effectively repossessed the incomplete works, just as a domestic mortgage lender would do in the event of a default by the borrower. The bank sued the fund monitors, demanding:

1. Recovery of the entirety of their alleged losses (c.£10m) on the basis that they would never have lent any money to the developer had the consultants properly advised them at the outset that the project was financially unviable;

Or, in the alternative:

2. Recovery of a proportion of their losses (c.£2.3m) on the basis that the consultants' monthly drawdown reports over-certified the amount of work actually done by the contractor.

Whilst our teams expert was dismissive of claim 1, he advised that our clients must have over-valued the works during construction. Ultimately, insurers settled with the bank for £750k inclusive of costs.

This case belongs to a category of claims against consultants who haven't designed anything and whose roles would traditionally have been regarded as low risk for that reason. Part of the problem, however, has been that those consultants have assumed liability to a party whose interest in the project is a purely financial one. Their clients have no intention of using or 'enjoying' the completed development in the medium or longer term and so they are more likely to sue in the event that they lose money. Fund monitoring for a lending institution is an excellent illustration of this but there are clear parallels with other examples:

- In one claim, the investors in an airport toll road whose usage generated insufficient income to produce a return, brought a class action against the advisers on whose traffic forecasting they had relied in deciding to invest in the scheme;
- In another claim our clients inspected numerous new-build residential developments and advised latent defects insurers that they all appeared to be in order. When numerous latent defects subsequently emerged and the insurers incurred underwriting losses as a result, they sued the surveyors and won.

The problem is arguably compounded by the relatively unsophisticated nature of the work involved when compared with the highly technical input of design engineers. That perceived lack of sophistication belies the potential risks involved, and in a competitive market it is probably impossible for consultants providing those services to negotiate a fee which is commensurate with that risk. PI insurers face similar challenges when offering renewal terms to those consultants. Logically, part of the solution has to be for consultants undertaking work in this category to negotiate caps on their liability in contract.



3 A MISPOSITIONED PILE

£1.03M

Our clients had designed the structural elements of a social housing scheme which was to be built on piled foundations. Their design positioned one of the piles over an existing 10 metre deep mains sewer running along the perimeter of the site. The contractors followed our engineer's drawings but hit the sewer when installing the pile in question.

Our client had no defences on liability in this instance. The engineers had been supplied with a copy of an underground services plan from the relevant utility company which showed the location of existing sewers and they used that plan when designing their piling layout. They simply made an innocent error in relation to one pile and failed to pick it up. The piling contractors hit the sewer without realising the damage that they had done on impact. They therefore proceeded to pour concrete into the excavation which hardened, causing a backing up in the sewer, and had to be bored out before the sewer could be rebuilt.

The utility company meanwhile had to arrange a temporary diversion to another nearby sewer. The repair works also entailed partial closure of the road above the damaged pipe. Those factors increased the value of the claim which was pleaded at £1.1m. Our defence team negotiated settlement at £1m.

KEY OBSERVATIONS

- There is little to say by way of comment on this matter beyond the obvious one that it illustrates how relatively unsophisticated errors can lead to high value claims which then prove impossible to defend.
- It also says something about the precarious nature of the work in hand – all it typically takes in these scenarios is for a single isolated error to creep in (possibly a discrepancy which is difficult to detect even with appropriate checking processes in place) and the scheme can run into serious difficulty. Inevitably that informs the insurance market's perceptions of risk but it should also be recognised by project owners in recognising the true value of what consultants do.



4 THE EXTERNAL GROUND SLAB FAILURE

£3.9M

This matter related to the failure of a ground slab at a large leisure facility which had been built on reclaimed land. The ground was therefore relatively poor and was always going to be a major consideration from a design perspective.

Geotechnical reports recommended that the buildings be piled and that the external slab be grouted or vibro-piled. The structural engineers however proposed an alternative for the external slab. This involved raising the site levels with imported hardcore material; incorporating a geo-grid reinforcement to create an effective raft; and then laying the slab on top. Both the contractor and developer approved this scheme.

For the greater part the slab performed as intended. However, there were clear signs of failure in localised areas where differential settlement had occurred relative to the rest of the slab. Those failures were attributed to the engineer's design. There was also evidence of workmanship errors by the contractors, specifically with regard to inadequate compaction in wet ground. Unfortunately, the engineers had inspection duties in addition to design obligations, but they negligently failed to identify the workmanship issues in discharging their site role. They therefore took partial responsibility for those defects in addition to their design errors.

The engineers may have been right to deviate from the geotech's recommendations because there was a large public sewer lying beneath part of the site which made grouting unfeasible. However, their own alternative scheme ultimately failed on its own merits. A major remedial scheme was required and it took a long time to reach agreement on what form those works should take. After some negotiation the claimant contractors offered to accept a settlement payment from the engineers which far exceeded the available £5m policy limit. It eventually settled at mediation for a little over £3.3m.

KEY OBSERVATIONS

- It is no coincidence that claims involving subsidence often feature brownfield sites – there may be a good reason why no one is currently using the land and it may be to do with the suitability of the ground for development. There are various specialist techniques for improving the stiffness of the ground in order to manage the associated risks. Some are more economical than others but the cost implications will always be a major driver behind the eventual decision – and all the more so on design and build projects such as this. One of the reasons why the engineers deviated from the geotech's recommendations and developed their own proposal was to save money and increase the contractor's prospects of winning the work, although there were also other practical considerations at play in this case as noted above.
- The pleaded value of this claim far exceeded the available policy limit and the engineers had no liability cap in their appointment.
- This is a good illustration of why Professional Indemnity in construction is described as a 'long-tail' class of insurance. The engineers notified their insurers of a potential claim eight years after practical completion and the dispute settled at mediation a further seven years later. The claim therefore concluded fifteen years after they had decided how much PI cover to buy; and they paid their policy excess fifteen years after banking their fee.

5 DELAYS DUE TO A DEFECTIVE TENDER DESIGN

£794K

Our clients were the structural engineers for the refurbishment of an existing building. The work involved extending the floors on some of the upper storeys by installing steelwork extending outwards from the existing concrete frame.

When the steelwork fabricator produced his connection design information accompanied by some associated queries, it became clear that there were significant elements in the engineer's steelwork design that needed to be re-done.

The contractor brought a claim against the developer for variations and for 16 weeks of delay, much of which they attributed to the steelwork design. The greater part of the developer's settlement with the contractor therefore formed the basis of a recovery action by the developer against the consulting engineer. Our defence experts advised that the engineers were liable, their primary weakness being their failure to provide a feasible construction method at tender stage.

There were however some mitigating arguments available in connection with causation of the delay given various other problems in the mix at the time, and also a failure on the part of the contractor to mitigate its losses. The developer's recovery action was pleaded at £2m but settlement was negotiated at £550k.

The primary risk management issues identified in our post-loss review were that :

1. the engineers should have made sure that their structural specification clearly recorded that it was the contractor's responsibility to design the connections between the steelwork and existing structure;
2. they had failed to provide an indicative construction sequence at tender stage, apparently in breach of the CDM duty on designers to explain a feasible construction method.

KEY OBSERVATIONS

- Delay claims can be challenging to defend if they are not actively pursued until some time after the chronology of events upon which they hang. That is typically the case if the contractors allegedly incurred losses at a relatively early stage, as was the case here, but then wait until the final account before advancing their claim.
- The claim itself might not conclude until some time afterwards. Human memories fade over time and witness evidence is therefore less reliable than contemporaneous documentary evidence. It is therefore invaluable to our defence if the consultant's files are complete and in good order, ideally with contemporaneous notes and/or photographs which snapshot the state of play on site at various stages.

We hope you have found part one of A Brave New World: The Claims Context interesting and insightful. Part two will consider a further 5 examples from our files, which will also conclude with our closing thoughts and key observations on all of the top ten construction claims from 2019.



6 FAILURE OF AN INTERNAL FACTORY FLOOR SLAB

£2.5M

This claim related to widespread cracking which formed in the internal floor slab shortly after completion of a new build manufacturing facility.

There were numerous criticisms of the design of the slab including: that it was too thin given the live loads to which it would be subjected as vehicles within the facility (essentially specialist lifting rigs) went about their daily operations; the movement joints had been designed too deep; isolation joints should have been specified around the steel columns; tolerances for the thickness of the slab should have been adequately specified, and so on.

There were, however, also numerous criticisms of the contractor's performance. In spite of this long list of allegations, or perhaps because of it, it proved impossible for the parties' respective experts to reach a firm agreement as to what the causes of the cracking were. The main risk to the designer's position was that two out of the three expert witnesses were of the view, albeit for different reasons, that the slab had been designed too thin.

Whilst on paper our own expert's view was perhaps more convincing, there was always a risk that the court would have preferred the evidence of the other two (one of whom in particular had a very strong presentational style). This risk was magnified as, in effect, the other parties

had two chances to convince the court that the root cause of the failure was design. Even if the design was essentially correct, as our team robustly maintained that it was, then workmanship must have been to blame, in which case the engineers would probably still have been exposed in view of their inspection duties.

We proceeded to trial nevertheless since settlement negotiations had broken down. As the trial took its course it became clear that the claimants were reassessing the risks to their own position, and that commercial settlement at a significantly lower figure might be possible after all. This became more attractive again to us at the point where one of our factual witnesses conceded under cross-examination that ‘with hindsight’ the engineer should have identified a key workmanship defect (the subcontractors were using the wrong sized spacers for determining the correct depth of the steel reinforcement mesh within the slab).

With that in mind, and given also the risks of being outnumbered on the expert evidence before the court, we negotiated an all-inclusive contribution of £2.1m on the basis that the contractors would pay the same amount. This constituted a significant improvement on the sum claimed which was nearly £8m including interest.

We offer the following observations:

KEY OBSERVATIONS

- This case is a good illustration of ‘litigation risk’, the collective term for all the things that can go wrong at trial. Even with the best legal advice from the most seasoned practitioners, it is ultimately impossible to predict for certain how a court will choose between conflicting evidence from expert witnesses or from witnesses of fact. Furthermore, some witnesses perform better than others under cross-examination, which can operate to distort the technical merits of the evidence.

- Notwithstanding litigation risk, we had for a long time been optimistic as to the likely outcome of this dispute, based on legal and expert advice, and insurers therefore reserved at a relatively modest level for three years until an increase to over £2m around six months prior to the trial. By that stage the notification to insurers was four and a half years old. This illustrates what we mean when we describe Professional Indemnity claims as ‘volatile’: sometimes it is impossible to reserve adequately until late in the day, and experienced insurers are painfully aware of this
- It is not unusual for experts to struggle to agree on the causes of failure even after lengthy debates in several rounds of meetings between specialists. If the respective parties’ experts cannot narrow the points of dispute between them then settlement negotiations can stall. That is in neither party’s interests if the alternative is to proceed to trial since litigation risk is (in principle) just as great for claimants as it is for defendants.

7 SPECIFICATION OF UNSUITABLE MATERIALS

£788K

This case concerned the corrosive failure of two cast-iron bends within the drainage installation of the renal department at a hospital. Our clients were the services engineers.

Cast iron drainage was unsuitable for use in that specific location given the combination of body fluids which are extracted in renal dialysis and, crucially, the highly corrosive chemicals used for the ongoing routine cleaning of the pipes. Independent experts advised that the engineers in this case should have been aware of what the cleaning and maintenance regime was likely to involve and should have specified a more suitable material. We were forced to concede breach at an early stage and went on to negotiate settlement on the best available terms which amounted to £803k.

This was an ‘open and shut’ case in terms of liability and the strategy was to secure favourable terms by settling quickly rather than running unfeasible defence arguments and forcing the claimants to incur increased costs. That would only have increased the value of their claim and jeopardised the engineer’s commercial relationship with a much valued client.

The good relationship worked both ways in this instance, which made a refreshing change. Specifically, the contractor claimants were more realistic than claimants can often be in relation to their remedial proposals. That enabled insurers to set an accurate reserve at an early stage and it kept defence costs to less than 5% of the overall insurer spend.

8 INADEQUATE TEMPORARY WORKS

£1.46M

Our clients were engaged by a design and build contractor building a small hotel and some apartments adjacent to a row of Victorian terraced housing. The owners of the end terrace house complained when during the course of excavations for the new build works they spotted cracks forming in the interior of the party wall.

Our engineers had designed traditional ground bearing underpinning to the end of the terraced wall. This was initially the subject of some scrutiny by the contractors but their efforts in that regard produced little by way of ammunition against the engineer. Instead they revealed serious workmanship defects with the underpinning subcontractor's work, principally surrounding the dry packing at the junction between the existing brickwork (which was in poor condition in view of its age) and the underpinning beneath it.

More damaging from our perspective was the allegation that the engineer had failed to undertake adequate inspections of the site prior to construction. Had he done so, with particular attention to the wall in question, he would have realised that the wall was not stable and he would have recommended temporary lateral supports to the entire wall length of the wall prior to the commencement of the underpinning. This would apparently have prevented the vast majority of the damage that subsequently occurred to the wall, notwithstanding the workmanship issues referenced above.

Matters were apparently exacerbated by the fact that once the cracking had been identified there was a general lack of diligence in addressing it by way of further temporary works and mitigating any delays. Our position was that the latter of these two issues reflected poorly on the contractor who had failed to manage the project appropriately from the outset. The former issue was potentially more of a risk for us in principle but in practice it was used by the contractors in an attempt to leverage their position on quantum rather than as a properly particularised additional allegation of breach.

KEY OBSERVATIONS:

- This case is a further reminder of the impact of delays on the value of a claim. Of the £1.9m claimed by the contractor, only a modest amount related to the direct cost of remedial works. The bulk of the pleaded loss related to liquidated damages incurred by the contractor for delays to completion, additional prelims, additional financing costs etc.
- The point is of general application for any consultant assessing liability risks and it is relevant to issues such as negotiating liability caps and keeping PI insurance limits under review. Any such assessment involves thinking carefully about what is the worst that could happen but this typically extends beyond the immediate and direct consequences. Consequential losses often far exceed the cost of fixing the physical manifestation of any defects.
- The issue enters a further dimension in the context of design and build where liquidated damages provisions in the main contract can (arguably) operate to relieve the employer of their duty to mitigate losses in the event of a problem.
- Notwithstanding the seemingly obvious issues with the underpinning subcontractor's work, the main contractor decided to pursue a claim solely against the engineer. That is not unusual – contractors often have closer commercial relationships with their subcontractors than their appointed consultants, and they also know that consultants tend to be considerably better insured. That meant we had to make a tactical decision whether (a) to join the subcontractors as a party to the claim or (b) to settle the claim and seek a contribution afterwards. Both options had risk based pros and cons. In the event we chose the latter option and the final figure shown above is net of that significant contribution.



9 FAILURE TO IDENTIFY WORKMANSHIP DEFECTS DURING INSPECTIONS £1.1M

Our clients were the services engineers for a 46 unit new-build residential scheme. Significant defects were discovered post-completion and as each one was remediated the list grew longer because further defects were uncovered.

There was a long list of services-related defects including:

- inadequacy of fire protection measures where services ducts etc. passed through walls/floors/ceilings;
- various drainage defects (incorrect falls/ wrong connections/ missing supports/ unvented waste pipes);
- inadequate wiring installation;
- incorrect type of ductwork.

There was a very much longer list of defects which were not services related. The entire claim was pleaded collectively against the various defendants at over £17m.

Our engineer's duties were fairly limited in their terms - obligations to produce designs and performance specifications. To the extent that they had any design obligations, our independent experts were satisfied that they had been discharged to the required standard.

However, they also had express obligations to request information from all subcontractors with design responsibility, to check those designs and advise the contract administrator in order to 'ensure' that the same were satisfactory. In practice, given the general breadth of this obligation and the onerous express terms in which it was framed, this meant that the engineers were significantly exposed to any services-related design defects regardless of whether they had originated with them or from another source.

But their greater exposure arose out of their inspection obligations in relation to what all parties acknowledged had been shoddy workmanship. The extent of any engineer's duty to inspect always depends on the circumstances of the project and the express terms of the appointment which in this case (again) were broad and onerous, extending to:

- advising the client on the need for specialist inspections/tests;
- regularly visiting site to inspect progress and quality to determine compliance with the main contract;
- undertaking or arranging testing of materials to ensure compliance with the contract;
- examining subcontractors' detailed proposals for commissioning and performance testing; and
- inspecting relevant elements on completion and reporting defects.

The fact that works might have been covered up and concealed before an engineer was able to inspect is not an effective defence argument, even (as in this case) where the engineer had previously specifically asked for certain items not to be covered up pending inspection.

Proceedings were issued by the developers against the services engineers and six other parties including the insolvent contractor and the latter's PI insurers under third party rights legislation. Two days of mediation failed to resolve the dispute but it concluded a few weeks later for £10.6m. Insurers for the contractors and the architects contributed the greatest share and our engineer contributed the least.

We offer the following observation:

KEY OBSERVATION

- This is an example of a claim which is not in itself unusual other than insofar as it involved a services engineer contributing nearly £1m in settlement funds and incurring a further £220k in defence costs. These don't come along very often – when they do, they typically attach to firms like this one whose claims experience was otherwise almost entirely clean. That pattern of very few claims (or none) for an extended period followed by a single catastrophe level 'hit' makes it difficult for services engineers in particular to assess properly the adequacy of their policy limits without advice from an experienced broker.

The other more common themes that it illustrates are as follows:

OTHER COMMON THEMES:

- The engineers in this case accepted onerous contractual obligations to undertake checks on the designs of the services subcontractors. Liability for any defects in those designs should always sit principally with those subcontractors but engineers with a checking role will always be significantly exposed for a contribution (perhaps 20% to 30% as a rule of thumb). If the relevant subcontractors are no longer trading or are insolvent/uninsured then claimants can be entitled to recover in full from the checking engineer alone.
- What looks like an 'onerous' obligation on paper might not be onerous in practice if the risks flowing from that obligation can be managed and controlled. That can depend on resources, which in turn depends of fees. In this case the engineer had agreed an overall fee of less than £13,000, of which £3,815 related to construction stage duties. They tried to argue after the event that those limited fees implied limited inspection obligations and that the wording of their agreement should be interpreted in that context. Needless to say, a judge would never have accepted that argument.

- The chronology of events was also important here. The engineers had fallen victim to a familiar sequence of events in which, under pressure from their client's lawyers, they were railroaded into signing appointment terms which were considerably more onerous than those on which they had originally agreed to work and which had formed the basis of their discussions around fees many months previously. The engineers were told that there was no time to review the formal terms presented for signature because this would delay concluding the main contract. The engineers agreed to cooperate at the time but learned their lesson later on.
- Proper supervision, build quality and thorough testing and commissioning had all been compromised by the contracting team. They had rushed completion in order to maintain their own cash-flow but also under pressure from the developer whose focus was on selling the units as quickly as possible. Both the main contractor and the M&E subcontractor went out of business soon after practical completion. Whilst their liabilities were insured to some extent the engineers were a more attractive defendant given their strong financial position and the onerous appointment terms they had agreed.
- A feature of claims against services engineers is that they often involve a long list of alleged defects. Most of them may be relatively minor in isolation but taken together they may add up to a significant sum. In this case they all aggregated into a single claim for insurance purposes (meaning that the engineer paid only one policy excess) because the original notification was sufficiently broad in its terms to capture everything that subsequently emerged when the claim developed - but it might not always work out that way.



10 INDENTATIONS IN A HARD STANDING AT AN AIRFIELD

£662K

Soon after completion of some repair work to the taxiway and apron at an airfield it was discovered that indentations had appeared in the surface course of the apron where aircraft parked.

It was alleged that the cause of failure was the engineer's specification of asphalt for the surface course for both the taxiway and the apron. The claimants contended that asphalt was not sufficiently hard-wearing and that the engineers should have specified concrete instead. The claimants valued their claim at around £950k plus roughly half as much again in costs.

The engineer's weakness was that their choice of asphalt, whilst reasonable and compliant (and significantly less costly than concrete) should have been accompanied by a warning about the risks of asphalt suffering from indentations. Notwithstanding this we had reasonably strong counter-arguments on causation given the evidence of poor workmanship rather than the decision to use asphalt.

OBSERVATIONS:

- Causation arguments can come in handy on ‘failure to warn’ allegations, especially where heeding the warning would have required additional spending for the client, who in this case (for example) would have needed to spend considerably more to use concrete instead of asphalt. The claimants in this case failed to provide any direct evidence to show what action they would have taken had they been advised along the lines they allegedly should have been.
- On the other hand, there is plenty of scope for argument around what constitutes an adequate warning even where we can show that a warning was in fact issued. Somewhat annoyingly, it is always possible for a claimant to argue after the event that the consultant should have done more to communicate the warning in stronger terms and to spell out the risks of not following that warning. That approach carries more weight where the claimant is a layperson – much less where they were an experienced contractor as in this case.
- Another weakness for the claimants in this case is that by the time we were in the final throes of settlement discussions they had undertaken no remedial works, causing us to question whether they would ever in fact do so – and if there was no need for them to do so then what loss are they entitled to sue for? Counsel advised that this argument doesn’t operate to defeat a claim but it can be useful nevertheless in negotiations.

CONCLUSION

In reviewing only the top ten construction claims within a single calendar year we have barely scratched the surface. Beneath that surface lie a great volume of comparable stories illustrating subtly different points of their own. Nonetheless, even this specific sample reflects themes which are common in our experience from year to year.

In no particular order the following factors are pertinent:

1. The design and build environment has always been fertile ground for disputes.

A fixed price main contract means that contractors often can't recover losses from up the chain – downstream recovery is their only option. The more aggressive the contractor's tender, the greater the risks for his suppliers. That should be at the forefront of any consultant's mind during any discussions around finding ways to reduce the tender price.

2. The three highest value settlements all relate to the design of slabs. Like claims involving wind turbines or things that are built deep in the ground, slabs are often expensive to remediate. They therefore often find their way into the top ten list from year to year. Out of the c.£23m of insurer expenditure outlined in this paper, £16.8m arose out of inadequate slab designs. This underlines the need for robust liability caps in relevant appointment agreements.

3. A strong expert report does not in itself determine the likely outcome of a negligence claim. 'Litigation risk' is the collective term for all the things that can go fatally wrong at trial, by which time all parties have spent considerable sums of money protecting their respective positions and therefore the stakes 'at risk' are high. The strength of a defendant consultant's position in practice is a complex equation comprising multiple variables, not merely one independent expert's review. The availability of contemporaneous documentary evidence on well-maintained project files is particularly important in this regard.

4. **It is naïve to think of inspections, valuations or reviews at arm's length as being 'low risk' merely because they are ancillary to the primary activity of designing or building.** There may be some validity in this perception some of the time, but all of these activities carry the risk for the relevant adviser of being dragged into claims that lie primarily against others. Those risks should be properly assessed, managed and realistically priced just like any others.
5. **Assumptions carry inherent design risks.** From time to time claims arise out of novel designs, but most new ideas are tested so rigorously before any drawings are issued that those situations are relatively rare. Claims arising out of assumptions on the other hand are far more common. We group the two together because they raise the same issues – the need to be completely clear about the client's requirements, and (if appropriate) provide advice subject to caveats in permanent written form.

Looking beyond the specific parameters of this paper, our construction PI experience is characterised by a low frequency of relatively high value claims (such as those outlined in this review) and a considerably higher frequency of relatively lower value claims. That is entirely typical for this class of insurance, not only for insurers but often also for individual insureds. Many insured businesses trade for an entire generation or longer with a virtually untarnished claims record, but those same practices are then taken by surprise when they are hit with claims of the magnitude discussed in this report.

Our Brave New World project discusses in more detail how – and potentially why – high value claims are on the increase. In the meantime, the core message is that all consultants are at risk of such claims, particularly as we head into a potentially deep and lengthy recession. It is at these moments in the economic and insurance cycle that investment in long-term partnerships are tested and are a genuinely valuable asset to our clients.

And finally, any practice who has not recently reviewed the adequacy of its policy limits is now urged to do so.

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