

## **New Homes: New Challenges Professional Consultants' Certificates**

It is vitally important for construction professionals to manage the scope of their retainers and the extent of their potential liability.

The use of contractual appointments provide the design team with some degree of certainty; it is a bargain struck between two parties, with legally enforceable terms and conditions and one of the reasons why a contract should always be agreed with Clients. However, issuing a professional consultant's certificate adds a new dimension as it creates a legal liability to third parties and it is important for Architectural Technology professionals to understand its implications.

The case of *Hunt and others –v- Optima (Cambridge) Limited & Others* (“**Optima**”) has recently put these certificates in the spotlight.

### ***Optima: the facts***

Optima built two blocks of flats. The architect, Strutt & Parker (“**S&P**”), certified the flats. Some certificates were provided to purchasers before sale, some were provided after sale. The flats were defective. The owners of the flats (the “**Claimants**”) brought claims against Optima for breach of contract and against S&P for breach of contract and negligence.

In the first instance, the High Court found in favour of the Claimants. It was held that the certificates were akin to collateral warranties, which created a contractual link between the Claimants and S&P. It was also held that, despite some of the Claimants not being in possession of the certificates prior to purchase, they could successfully sue S&P for negligent misstatement.

S&P appealed. The Court of Appeal overturned the High Court's judgment. Their Lordships held that the certificates were not contractual warranties. They also found that the Claimants who did not have possession of a consultant's certificate prior to the sale could not bring a valid claim for damages as reliance on advice is necessary to bring a claim for negligence. If the certificate did not exist at the time of the sale, it was found that the purchaser could not have relied on what it said. However, it is important to note that S&P did not appeal any of the claims where the Claimants had a certificate before they agreed to purchase the flats, as they arguably relied on those certificates.

### ***The Risks***

Whilst the judgment of the Court of Appeal goes some way towards taking the edge off the first instance decision, the *Optima* case has been highly publicised and it is important to remember that many of the Claimants were successful. There is a risk of claims against architectural technology professionals arising out of these judgments, especially when set against the wider drive within the construction industry to build new homes.

## ***The Solution***

An aggrieved homeowner will fight tooth and nail if they perceive there to be defects in their new home. When you also add fee hungry lawyers willing to satisfy their desire for a legal battle and Contractors regularly becoming insolvent or lacking the pockets to meet any claim, it can mean that your professional indemnity insurance is being used as a float for the project. It is important for professionals acting as consultants to assess whether they are happy with this state of affairs before agreeing to certify any works, particularly where the fee charged bears no resemblance to the potential liability which could fall on the professional.

If the payment for certifying is felt to be worth the risk, and you are in a position to inspect the Works (inspection of the Works is essential before issuing a Certificate), architectural technology professionals may take prudent steps to protect their position. Case law suggests that this may involve:-

1. timing inspections to ensure that they coincide with important stages of the project;
2. undertaking random inspections to ensure that the contractor cannot cover up defective work;
3. keeping an inspection plan;
4. retaining evidence that defective work has been noted and corrected; and
5. keeping a detailed written and photographic log of site visits, including defective work.

Never agree to provide a Certificate for any work undertaken before you got involved with the Project.

Next time you sign a consultant's certificate, it is important to bear in mind the problems that it may create.

Another factor that may need to be considered is whether or not a Professional Consultant's Certificate actually meets the needs of the Client and any potential purchasers. While no-one would question the value of involving an Architectural Technologist or the use of Certificates, in some cases it may be more appropriate for the Client to take out a Building Warranty especially when dealing with larger projects.

The push to increase the rate of construction for new homes is likely to present professionals with new business opportunities, but also new challenges, risks and possible claims and it is important to consider the implications of any services before you agree to provide them, and also to ensure that, in compliance with CIAT's Code of Conduct and the conditions of CML's Professional Consultants' Certificate, that your professional indemnity insurance carries adequate cover.

Members can download the Institute's information sheets on CML Certificates and Construction/Building Guarantee Insurance Policies 'v' Professional Consultants' Certificates from the [website](#).

Members whose clients require a Self Build Warranty rather than stage inspections certified by a Professional Consultants' Certificate are reminded that there is a facility for them through CIAT Insurance Services in partnership with LABC/Premier Guarantee, and those members should contact CIAT Insurance Services directly on 0161 236 2532.

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