

# SEC *briefing*

Voice of the Specialist Engineering Contractor

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## Advice on Design Liability: Will You Pay for Consultants' Mistakes?

Most people would expect that – legally speaking – they would only be responsible for the quality of the performance of their own contract (and that of any sub-contractor) but, when it comes to design work, this commonsensical position does not apply. If you have, to any extent, contracted to carry out design involving the development of a consultant's design you could be responsible for the consultant's work. Such was the startling conclusion reached in **Co-operative Insurance Society Ltd v Henry Boot (Scotland) Ltd** (Technology and Construction Court, 1 July 2002).

This case has – potentially – far-reaching consequences for specialist engineering contractors. The decision was not appealed and, therefore, we will have to live with it for the time being. Before the considering the implications of this case, we should briefly deal with the facts and decision.

### The Facts

Henry Boot had agreed to carry out certain works at a property in Glasgow owned by the Co-op. The work involved the demolition of an existing steel framed building and the erection of a new office building involving a reinforced concrete frame. A new sub-basement, having bored pile walls along three sides, was to be excavated and formed below the existing basement level. During the carrying out of the works, water and soil flooded into the sub-basement excavations.

The Co-op's position was that the failure of the piles and temporary support – which lead to substantial delay and expense – was the responsibility of Henry Boot.

The agreement between the Co-op and Henry Boot incorporated the JCT Form of Building Contract, Private with Quantities (1980 Edition) together with the Contractor's Designed Portion Supplement (1981). The standard documents had been amended by the Co-op. The Supplement is only for use with the Standard Form of Building Contract (with Quantities) where design of part of the works is to be completed by the contractor. Under Article I of the Supplement, the contractor is required to complete the design "in accordance with the directions which the Architect/Supervising Office shall give for the purpose of integrating such design with the design for the Works".

Henry Boot's position was that, insofar as the design of the bored pile walls had been prepared by consulting engineers, it had no responsibility for their design. Henry Boot's only obligation was to complete the design by providing working drawings and, other than a duty to warn about design

deficiencies, it was not required to revisit design prepared by others to such extent as to assume responsibility for that design.

## The Decision

His Honour Judge Seymour found in favour of the Co-op. Henry Boot's obligation was to develop the conceptual design (produced by the structural engineers) for the bored-pile walls into a complete design capable of being constructed. The process of completing the design must involve examining the design at the point at which responsibility was taken over to develop it, assessing the assumptions upon which it was based and forming an opinion on whether those assumptions were appropriate.

The crux of the judgment is contained in the following words:

*"Ultimately, in my view, someone who undertakes, on terms such as those of the Contract ....., an obligation to complete a design (emphasis added) begun by someone else agrees that the result, however much of the design work was done before the process of completion commenced (emphasis added), would have been prepared with reasonable skill and care. The concept of 'completion' of a design, of necessity, in my judgment, involves a need to understand the principles underlying the work done thus far and to form a view as to its sufficiency. Thus I reject the submission of [counsel for Henry Boot] that all Boot had to do in any circumstances was to prepare working drawings in respect of the bored pile walls."*

## The Implications of the Decision for Specialist Engineering Contractors

The implications of this judgment for specialist engineering contractors (which invariably carry out some level of design work) is far-reaching. For example, it could mean that a steelwork contractor who carries out some elementary design for the connections could be responsible for the consulting engineer's design for the whole of the steel frame. Again, an M&E contractor who had designed simple brackets or similar modes of fixing pipework or ductwork could be assuming responsibility for the design of the whole installation.

The consequences could even be more serious. The Government has confirmed that it will introduce legislation on its proposals for corporate manslaughter. This new offence will be made out where death is caused by a management failure by a company in that its activities were managed or organised in a way that failed to ensure the health and safety of persons affected by those activities. If an accident results from a failure in design the liability of a contractor, whose contribution to that design was minimal, could be far-reaching and out of all proportion to that contribution.

Judge Seymour's judgment appears to conflict with the view of His Honour Judge William Stabb QC in *John Mowlem & Co Ltd v British Insulated Callenders Pension Trust Ltd* (1977) 3 Con.LR 64. In that case Judge Stabb concluded:

*"I should require the clearest possible contractual condition before I should feel driven to find a contractor liable for a fault in the design, [such] design being [design] which a structural engineer is alone qualified to carry out and for which he is paid to undertake, and over which the Contractor has no control. I agree that the construction for which [counsel for the consulting engineer] contends places the Contractor in an impossible position. He cannot alter the faulty design without being in breach of contract."*

In the Henry Boot case not only was the contractor required to work within the parameters of the structural engineer's design, he was required under the Supplement to subject his design proposals to the directions of the architect/supervising officer for integrating his design with that of the rest of the works.

For further information on all aspects of SEC Group and its activities contact:

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Continued overleaf

Two further points require stating. The first is that the judgment is an English decision. The courts in Scotland may adopt a different approach. Secondly, a consultant (engaged by the client rather than the contractor) is unlikely to owe a duty of care to the contractor in the circumstances of the Henry Boot case (unless there was an issue of personal injury). As a result the contractor is unable to pursue the consultant for shortcomings in the latter's design.

## What should you now be doing?

Although attempts are being made in JCT to review the standard forms of contract and, if necessary, amend them in light of this decision, such attempts are unlikely to be successful because of opposition from the British Property Federation (which represents developers). Therefore you will need to consider taking your own steps to protect yourself.

The first task is to carefully scrutinise your tender and contractual documentation for the words "undertake to complete the design" or similar. If you have found these words, the red warning light is now switched on.

Next, it is vital that you clarify the extent of your own design work. This should, of course, be addressed in the documents forming part of the contract. In practice you may need to review as much of the consultant's design as is necessary to carry out your work. In any event the law expects you to warn of such deficiencies in design work undertaken by others as would be noticed by any reasonably competent contractor.

Finally, you should seek to ensure that your design responsibility is confined to the actual design work that you are contractually required to carry out. A suggested provision is set out in the panel below:

*"Insofar as we are contractually required to contribute to the development of the design of any element of the contract/sub-contract works\* our responsibility for such design is confined to our design work as described in the contract/sub-contract documentation\*. We do not accept responsibility for any element of the design work undertaken by third parties (other than our servants, agents and contractors) or for considering or reviewing such design work for the purpose of establishing its adequacy or whether there exists deficiencies in the design."*

*\*delete whichever is inappropriate.*

**You may wish to speak to your professional indemnity insurers about this case and seek support for including a provision in terms of the above suggested clause. If further help is required in this matter you are urged, in the first place, to contact your trade association.**

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