

In May 1988 the Secretary of State for Trade and Industry announced the appointment of three fact finding study teams

"In the light of current concern about the cost and availability of professional indemnity insurance and the extent of professional civil liability for negligence."

The fact finding teams were given a brief to look into the problems of three selected professions, one of which was those involved in the construction industry viz architects, building surveyors, civil engineers, services engineers, structural engineers and QSs.

Terms of reference were to establish the facts about the cost and availability of PI insurance, the extent of professional liability for negligence and the way in which the law operates.

A report has been published by HMSO of the work of the three teams entitled *Professional Liability*. This report summarises the work and draws out more general conclusions in the light of wider public interest and makes recommendations.

### Risk management by professionals

The study's conclusions include:

- Many clients are moving away from standard conditions of engagement and seeking to enforce more onerous conditions.

- Larger practices devote much effort to negotiating realistic conditions of engagement but the less wary accept risks they cannot control and liabilities they may regret.

- Current conditions of appointment published by the RIBA, RICS, ACE and PSA were widely criticised on a number of grounds which include a failure to identify and allocate inherent risks.

- Fee competition too often ignores good practice rules which may result in consultants being appointed without being fully aware of their liabilities.

### Collateral warranties

The terms *collateral warranties* or *duty of care* agreements are loosely

# LOOKING AT PROFESSIONAL LIABILITY

*Roger Knowles discusses the recent DTI report*

applied to contractual agreements between consultants or contractors and a third party, other than the client, who has an interest in the development. The report states that the growth in the use of warranties will inevitably continue as the opportunity of bringing an action in tort has been restricted due to the House of Lords decision in *D and F Estates Ltd and Others v The Church Commissioners for England (1988)*.

The experience of consultants has been that many warranties include unacceptable terms such as contractual terms which do not feature in the agreement between client and consultant and provision for novation every time a property changes hands.

### Standards of service

Clients have the right to expect their chosen professionals to perform their services with diligence and care.

Those clients who responded to a survey were usually satisfied with the quality and the reliability of the services which they received from those professionals.

Unfortunately the report adds that the professions, with the notable exception of quantity surveyors, do not always adopt their client's priorities as their priorities.

The complaints related in the main to a failure to control costs and complete on time.

### Professional indemnity insurance

The survey of consultants concluded that PI premiums ranked among the most costly of unavoidable overheads amounting on average to an 11% addition to technical and professional labour costs.

Many practices reported being unable to afford the premiums and it was estimated that a substantial proportion of architectural practices with fewer than five staff are currently uninsured.

There was a general dissatisfaction at the level of premiums and some consultants with virtually a clear claims record have had to meet swingeing premium increases.

Some who responded to the survey believed that clients' insistence of high levels of PI insurance cover, for example £5M for each and every claim, were making premiums too costly.

Of those surveyed, 74% considered they didn't get value for their money from PI insurance.

Nearly all institutions argued for the adoption of the proposal in the report *Building Users Insurance Against Latent Defects (BUILD)*. This proposal recommends that clients should insure risks which they cannot afford to carry against material damage. Ideally this type of insurance would involve insurers waiving their subrogation rights against consultants and contractors

responsible for the material damage. Unfortunately insurers are decidedly cool about the suggestion of them deleting their subrogation rights. They argue that it would result in premiums being fixed at an unrealistically high level.

### Law reform

Construction professionals have unlimited liability. In practice they obtain limited PI cover which is unlikely to be sufficient to meet the largest of claims to which they may be exposed.

Suggestions were made for capping liability. It was argued that it is unreasonable for work which involves a very modest fee to carry risks of claims of enormous proportions should there be any negligence. Views expressed included a maximum liability to be fixed for each commission commensurate with the level of fee. The result of such a procedure being adopted would be to reduce PI premium levels which in turn should make the consultants' fees more competitive. Capped liability with mandatory PI insurance would restore trust, avoid protracted litigation and achieve timely redress. It is possible to limit liability in the terms of engagement. Unfortunately such a limitation may be unenforceable in the light of *The Unfair Contract Terms Act 1977*.

The problems of joint liability were examined. A plaintiff who suffers loss where more than one defendant is involved may recover 100% from any defendant. The defendant who is obliged to pay may be responsible for only 25% of the plaintiff's loss. He is left to recover the balance from the other defendants. This leads to actions being brought against those with the deepest pockets or the most attractive insurance cover irrespective of culpability for the plaintiff's losses.

Finally on law reform it was suggested that a common liability period should be introduced which would extinguish the right of action ten years from the date of completion or effective occupation.

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considerable pride in its success as its former chief executive; turnover was under £1M in 1981 and approximately £6.5M in 1988/89, by which time it had become possible to appoint a full time chief executive. If the concept of chartered surveyors can be sold in preference to individual specialisations, it will significantly help the image of individual surveyors.

I believe that the word professional describes the way somebody does something and not what they do. I also maintain that there is at least as much practical difference between an accountant, an auditor and a tax advisor in my own profession as there is between a number of the surveying specialisations.

What does the average member require from the institution? It is known that a large majority of the membership do not get more involved than to write a cheque for their annual subscription and, to that extent, they use the RICS just as a meal ticket.

A limited research project is just about to be undertaken which will give an idea of some of the answers to this question but there are, of course, a number of activities which are fundamental. These include the maintenance and control of membership standards, both on entrance and throughout members careers, and the continuing development of the image of the institution and chartered surveyors with people like government and the punters themselves. It could be argued that other services are optional extras.

My own view is that the institution is on the right lines and should continue to develop and extend services rather than reduce them to this basic minimum. I also believe that the general quality of services provided by the institution for its members is quite outstanding.

I am now moving on to become director of Cruse Bereavement Care, the national charity which offers all kinds of support to bereaved people throughout the United Kingdom.

## RICS announces improved small business scheme

RICS Insurance Services Limited have announced details of significant improvements to their small business scheme. Originally the scheme only applied to sole practitioners, but last year it was expanded to cover a maximum of two people. Now the maximum permitted gross income for eligibility to use the scheme has been increased from £25 000 to £50 000 in each of the previous three years.

Cover cannot be given under the scheme:-

- Where there have been claims

paid or where there are outstanding incidents which might lead to a claim.

- Where there are any project management (ie appointment of other parties to the contract) and/or property development services; or development work and/or some works of an architectural nature.

- Where there is any overseas work.

The scheme now offers a choice between £100 000 or £250 000 indemnity for any one claim subject to a minimum uninsured

excess of £250 any one claim, or, where fees are between £25 000 and £50 000, £500 each and every claim. If works of an architectural nature are accepted by insurers the minimum uninsured excess is £750 each and every claim.

Full details of the scheme, including premiums (which can be as low as £50 for run-off cover) are available from RICS Insurance Services Limited, Plantation House, 31-35 Fenchurch Street, London EC3M 3DX, telephone 01 481 1445, or from the Standards and Practice Department at the RICS.

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The recommendations of the study team looking into the construction industry concluded the following:

- Amend in English Law the *Limitations Act 1980* and the provisions introduced into the 1980 act by the *Latent Damage Act 1986* and in Scotland the *Prescriptive and Limitation (Scotland) Act 1973*.

The amendment to introduce a limitation (prescriptive in Scotland) period of ten years from the date of practical completion or effective occupation for commencing negligent actions in tort or breach of contract actions whether or not the contract is under seal.

- Under present litigation, limitation periods can be extended where there has been deliberate concealment. The proposal includes redefining deliberate concealment which has been the subject of a number of legal cases. Deliberate concealment would be so defined that ordinary construction processes would fall outside the definition.

- The study team recommended that serious consideration be given to amending the law concerning joint liability in commercial transactions not involving personal injury. Damages awarded against a

defendant should be equivalent to that part of the plaintiff's loss which could fairly be attributable to the defendant's default.

- Client and consultant associations should *inter alia*; commission and keep under review clients guides, commission combined conditions of engagement, devise standard collateral warranties extending current professional liability only to intermediate third parties; review the better alignment of consultants' conditions of engagement and the standard conditions of contract.

- Establish a 'short procedure' arbitration for disputes of less than £50 000.

- Consider the feasibility and advantage of imposing mandatory PI insurance on sole practitioners and all practices.

- Examine the option of practising as a limited liability company as an effective operational mode for consultants.

It will be interesting to see how many of the recommendations are adopted or whether they fall on stony ground.

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### OBITUARY

Gordon Lionel Coates, chairman of the London North West Branch in 1951-52, died on 17 April at the age of 82.

Gordon Coates received his training as a surveyor with E C Harris & Partners and Young & Brown, qualifying in the quantity surveyors division in 1931. In 1933 he joined Gardiner & Theobald, becoming a partner in 1936 and a senior partner in 1950 on the retirement of John M Theobald (president of the institution in 1936-37). In 1975 he retired to become a consultant to his firm.

A man of much personality and charm, Gordon Coates made a great contribution not only to the development and prestige of his firm but also to the standing of quantity surveyors in all branches of the construction industry. He was president of The Surveyors' Club in 1958 and Master of the Worshipful Company of Masons in 1963; he was also a keen golfer, being captain of the Chartered Surveyors' Golfing Society in 1967.

Gordon Coates will be long remembered and sadly missed by his many friends and not least by his partners and staff who worked with him.