COMMUNIQUÉ

Newsletter of the
New Zealand Architects Cooperative Society Ltd
February 2004

Welcome To COMMUNIQUÉ and New Year greetings to all Members

This first issue of Communiqué for 2004 is full of information of interest to members. We report on our initiatives in promoting a Home Owners Warranty scheme and Proportionate Liability for the Construction industry to Government; Alan Purdie reminds members about some basic issues for practice; Colin Orchiston reports on the outcome of the first Weathertight Homes Adjudication decision; and a Market Conditions Clause for inclusion in Conditions of Engagement is offered, through the generosity of the partners of Warren and Mahoney.

Home Owners Warranty Scheme And Proportionate Liability For Construction Industry – NZACS Initiates Profession's Approach To Government

For many years the Directors of NZACS have been concerned regarding the effect the doctrine of Joint and Several Liability has had on the outcome of claims involving architects. Time and again, as the only party to the claim remaining, and holding P I Insurance cover, the architect ends up 'carrying the can' where the majority of fault often lies elsewhere.

With submissions being called on the Building Bill, your Directors, together with our Insurance Consultants Aon, took the initiative and opportunity to put together a proposal which promoted to Government the proposition that they introduce a Home Owners Warranty scheme and Proportionate Liability for the construction Industry.

This case was put together in conjunction with the NZIA and AERB, as it was Gordon Moller, as President of NZIA, and Richard Harris the then Chairman of AERB, who, having been appropriately briefed, presented the proposition to Hon Leanne Dalziel. It was considered more appropriate that the profession presented the case rather that NZACS which has insurance interests.

The problem as outlined to then Minister was:

- The retention of joint and several liability will continue to provide the means – and even the incentive – for individuals and businesses in the industry to evade responsibility for defective work.
- Under a joint and several liability regime it is impossible fro a building practitioner to adequately assess their exposure to risk.
- Because of this, insurance providers who are still in the market have introduced exclusions for such things as damage caused by water ingress, leaving the consumer exposed, and premiums have increased dramatically.
- Maintaining the regime of Joint and several liability will reduce consumer protection and continue to increase costs.

The solution offered in the proposal to the Minister was:

- The introduction of a regime of proportionate liability to provide building practitioners with the means to calculate exposure to risk.
- The concurrent introduction of a compulsory Home Owner Warranty scheme to provide guaranteed redress for consumers.
- The proposed amendments to the Building Act include provisions to identify and define the responsibilities of various parties in the construction process. This provides a sound platform for the apportionment of liability.
- A compulsory Home Warranty scheme could be funded by a levy paid at the time of uplifting a Building Consent.
- A comprehensive programme of consumer education is crucial to the success of any attempt by Government to increase protection, and would support this proposal.

The presentation was well received by the Minister. However, it is unlikely that any provision will be made within the Building Bill, but rather a new piece of legislation will be needed. That legislation will have to come at a later date.

So, partial success at this time and the need now is to obtain support from the construction industry, and Territorial Authorities through the Local Government New Zealand.

Getting The Basics Right

In this article Editor Alan Purdie writes concerning two basic issues which can easily be overlooked as they can be considered to be just that, basic. How often have we heard the statement 'if you do the basics right then the rest will follow?' Well it is true and it doesn't hurt to restate the basics now and again, as a gentle reminder.

Fees – Adjusting for P I Insurance Costs

As we all know the cost of Professional Indemnity Insurance has increased in the past two years. I wonder how many members have adjusted their fees to take account of these increases. What adjustment have you made to recoup these increases? It may only take a very small percentage increase in fee structure to recover this important overhead cost, but it should be done, otherwise cost recovery will fall behind.

Another cost related to Professional Indemnity Insurance that should be borne in mind when setting fees is the cost of your P I Insurance excess. How may members factor into their fees the cost of their excess? If your firm, say, makes two claim notifications a year, what provision have you taken to provide for those costs which may be associated with these, together with provision for the excess?

Often claims are met solely from within the member's excess as they are relatively small. However, you only need a couple of those and several thousand dollars is paid out. Therefore provision for the insurance excess and related costs needs to be built in to any fee calculation.

Basic you say, but how many of you have made adjustments to your fees for these factors for 2004.

CAD Help or Hindrance?

Recently I spotted an article that discussed the practical implications CAD has had on practice, following a survey of some 40 firms. There appeared to be some timely advice arising from the survey. Basic again, but basics can be overlooked from time to time.

While productivity has no doubt increased through computerisation, this does not necessarily mean that all phases of the architectural process have been given the due consideration required. With many commissions going to the lowest fee bidder who can produce the fastest, perhaps the most fundamental step – the design phase – is being compromised. It is suggested that it is difficult for the design phase to keep pace with the speed of productivity in documentation, so design does affect other stages.

The construction documentation stage can pose the greatest risk for error, because there is a tendency to "cut and paste" when assembling documents. Computerisation has amplified the problem by allowing designers to think they can use standard details that CAD provides. Just because the drawings look good, that doesn't necessarily mean they are accurate.

Desktop and laptop designing can present the problem of working in a scaleless environment. Unlike hand drawing, architects rarely see the entire layout until it is printed. What can happen is designers can zoom in and out of their virtual sheet, and sometimes lose track of both scale and layout.

The survey found that printing out drawings and redlining were necessary to ensure the same integrity as hand drawing. With the construction drawings being rather random, because architects never saw the whole drawing, it was necessary to do the plan, plot it, redline it, and then go back to the computer and draw it.

While no one taking part in the survey wanted to return to the T square days, there was consensus that the limitations of CAD and other design/presentation software needed to be considered when architects were learning to use them.

Basic, yes, but it seemed pretty good risk management advice to me and perhaps a timely reminder to members.

The Outcomes of the First Weathertight Homes Adjudication

No doubt you will have read the media reports about the concern felt by Territorial Authorities over the outcome of the first Weathertight Homes adjudication. The general impression was that the TA's felt that they were forced to accept more liability than they should have.

The facts of the case are unremarkable: it covers the usual popped nails, substitution of stucco for Hardiflex as drawn and cracked stucco attributed to incorrect plaster mix, poor curing, inadequate reinforcing and movement joints, and only two plaster coats being applied. However, the comprehensiveness of the adjudicator's reasons make it a useful document, as all the relevant information sources and legal precedents are canvassed. Accordingly, it is likely to serve as a reference point for all similar disputes - in particular those which may be dealt with by mediators appointed by the Weathertight Homes Resolution Service - even though it will have no standing as a precedent for court proceedings.

Unfortunately, the determination left the Council with complete liability on the basis of failure to adequately supervise, and because the contractors were no longer in existence and/or were insolvent. Those seeking this case as a precedent will probably miss the point that it is very specific on the facts, and that the Council's share of the damages mostly arose from their joint and several liability.

Of course, such an outcome is very comparable to the risks architects face: all too often poor workmanship, or failure to follow details or specifications, or failure of the contractor to supervise adequately, involve the architect in meeting some (or all) of the damages through the doctrine of joint and several liability.

The determination is unequivocal in confirming that the duties of a council inspector are limited to verifying compliance with the Building Consent, are not equivalent to those of a clerk of works, and hence regulating the plaster mix and the adequacy of the stucco curing process was not within their control. However, it goes on to say that the council had no defence available on the basis that their fees and resources meant that they depended on checking construction after capable tradesmen had undertaken the work.

We can draw some inferences from this observation:

- Firstly, the extent of the council's liability was directly related to the tasks it was called upon to do, and the adequacy of their performance of them.
- Secondly, the council accepted the risk of relying on the tradesmens' skills;
- Thirdly, they accepted the risk of not attending to the site to observe performance-critical activities;
- Fourthly, having accepted the checking task, the lack of technical knowledge, adequate fees, or resources did not diminish their responsibility for it.

All these elements are equally applicable to an architect's role during construction, and need to be addressed if risk exposure is to be minimised. Of course the scope of the architect's role is somewhat larger, because it is established by the performance of the entire contract obligations, not just compliance with the Building Consent.

They are also analogous to the design and documentation tasks:

- The content, extent, and limitations of the architect's tasks and responsibilities must be defined at the outset.
- Clear and specific documentation is required: there can be no automatic assumption that those carrying out the work are competent or willing to "fill in the gaps" or to "do their best".
- Performance-critical details and specifications must be documented, and not left to the contractor's discretion.
- Inadequate design fees, inadequate technical competency, and insufficient resources to properly document the work do not diminish the obligation to provide the necessary information.

This determination did produce one item to bring a smile to your insurers: it was held that making good the defective plasterwork did not require its complete replacement with a cavity system in accordance with current thinking, as that would constitute betterment. Time will tell whether that rational approach will transcend the emotional leaky buildings hype.

Market Conditions Clause - Conditions of Engagement – Suggested Additional Clause

With the building industry running hot over the past year, and the trend expected to continue into 2004, it has been and continues to be difficult for architects to accurately assess costs and delivery performance of the construction industry with any certainty at all.

Christchurch firm Warren and Mahoney now include a Market Conditions clause in their Conditions of Engagement, which they have generously agreed NZACS can publish to its members for their use. Your Directors are most appreciative of the offer made by Barry Dacombe and his fellow directors.

The clause is as follows:

Market Conditions

The building and construction industry in New Zealand is currently over committed and experiencing uncertainty in both the cost and delivery of construction projects.

While (Name of firm) is positively and constructively committed to seeking effective solutions, and advising clients on appropriate courses of action to minimize or mitigate risk in this area, it must also minimize its own exposure to over commitment of its resources and unbudgeted costs in delivery of its professional services.

While this uncertainty in the industry remains (Name of firm) will not accept any liability for loss or damages arising or for the cost of any rework made necessary to achieve project budgets, nor will it accept liability to meet programming requirements where these have changed due to circumstances beyond (Name of firm's) control, when resources are not available to do so.

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We welcome contributions from readers, on how they manage risk.