

You've made one tiny mistake **Rachel Barnes, November 2008**

I am constantly warning consultants against taking on absolute obligations, or indeed any obligation more onerous than to exercise the reasonable skill and care expected of their profession.

The point was well illustrated by a recent case in the Court of Appeal (Platform Funding Limited v Bank of Scotland). A firm of surveyors received standard instructions to value a property for the purpose of a loan. The surveyor carried out the survey, prepared a report in the usual way, and a loan was made secured by a mortgage on the property. The borrower, however, defaulted and the property was sold by the lenders for less than the sum they had advanced. The lenders sued the surveyors for the unrecovered balance.

The case against the surveyor was not that it had failed to carry out the valuation with reasonable skill and care or that it had been negligent in any other way. The simple fact was that the surveyor had surveyed the wrong property. It had been to the right street, but the houses were not numbered. It had got in touch with the borrower, who had directed it to and shown it around a house on the road, but unknown to the surveyor it was not the one that it had been instructed to survey. The one that it was supposed to be surveying was, in fact, only half built.

Whether or not the surveyor could be blamed for this situation is, for present purposes, beside the point, because no allegation was made that it had been negligent. The case was quite simple – the surveyor had undertaken to survey a particular property and had not done so; it was therefore in breach of contract. The question for the court was simply this – was the obligation to undertake the survey an absolute obligation? If it was, there would be no defence. Under English contractual law, if you undertake an unqualified obligation, that usually means that you have to perform it.

On this question – of whether the obligation was absolute – the Court of Appeal, consisting of three judges, was divided. All three agreed that the valuation itself was required to be carried out subject to the obligation to exercise reasonable skill and care, that this was the normal obligation for a professional person and that clear words or circumstances would be necessary in order to conclude that there was a stricter obligation. However, the majority distinguished between the actual obligation to do the survey and the manner in which the survey was done, and held that the obligation to do the survey was an absolute obligation. The surveyor having failed to survey the right property was therefore found liable. The third judge, however, held that the obligation to exercise reasonable skill and care applied to everything that the surveyor did, which included locating the correct property.

The circumstances of this case were, of course, unusual, although similar situations have been before the courts. However, the general point that arises from these cases is that the professionals in question, by accepting (though probably without realising it) an absolute obligation, were thereby accepting a risk which no one would think should have fallen on them, unless they had actually been negligent in failing to prevent that risk from eventuating.

It is sometimes argued that, in a consultant's contract of engagement, compliance with the brief from the client should be an absolute obligation, or at least stricter than the obligation to exercise reasonable skill and care. Under the standard terms and conditions published last year by one professional body, compliance with the brief is to be performed "insofar as is reasonably practicable". The qualifying words would not have helped the surveyors in the case that I have described: it is hard to see that they could plausibly have argued that locating the correct property was not reasonably practicable.

For consultants, there is in fact no good reason why compliance with the brief should not be subject to the normal standard of reasonable skill and care that applies, or should apply, to all their other obligations. In some contracts, the brief may be set out in a long and complex document, stipulating the attainment of specific objectives. Clearly no consultant should be held liable for failure to comply

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London: Garrick House · 27-32 King Street · Covent Garden · London · WC2E 8JB · T: +44 (0)20 7240 3474

Bristol: Venturers House · King Street · Bristol · BS1 4PB · T: 0117 915 4021

Dublin: 92/93 St Stephen's Green · Dublin 2 · Republic of Ireland · T: +00 353 (0)1 428 3450

with such a brief, save through want of reasonable skill and care. Where however the brief is entirely straightforward, only in unusual circumstances would the consultant not be negligent in failing altogether to carry out the brief. In short, the client should have no concern about the normal standard of reasonable skill and care applying to actual performance of the brief. Where unusual circumstances do arise, reasonable clients will accept that it is not the consultant who should be the victim of those circumstances.

For further information, please contact:

E: [Rachel Barnes](#)

T: +44 (0) 20 7240 3474

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