Mosse were cited with approval by Hobhouse J. in *Iron Trades Mutual Insurance Company Limited & Others v. Companhia de Seguros Imperio* [31.7.90, unreported], the Defendant having unsuccessfully sought to persuade him that the relevant principles were those set out in "The Kanchengunga".

It seems unlikely that cases will turn on the distinction between the nature and origin of the right of avoidance and contractual remedies because even in relation to contractual remedies, Lord Goff "The Kanchengunga" stated as follows:-

> "It all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he dones not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it."

It is though important to bear in mind that the existence of an "unequivocal representation" is not an invariable prerequisite for there to be an affirmation of a contract by an insurer. If the insurer delays too long in seeking to avoid the contract, he will be deemed to have affirmed the contact. The period of delay necessary for such a deemed affirmation to arise will of course be a question of fact in each case and time will not begin to run against an insurer until he had full knowledge of all the relevant facts and has had a reasonable time in which to make up his mind as to whether or not to avoid the contract. However, once time has begun to run against the insurer, he must ensure that the decision whether or not to avoid is taken reasonably promptly as otherwise the right to avoid could be lost.

FITNESS FOR PURPOSE IN CONSTRUCTION

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In the construction industry and professions, the difference between reasonable skill and care and fitness for purpose is often misunderstood; the potential impact on insurance cover of these obligations is a source of problems in the nogotiation and agreement of construction contracts and collateral warranties. The starting point of any discussion of these issues has to be an understanding of the legal meaning of reasonable skill and care and fitness for purpose.

REASONABLE SKILL AND CARE

A contractual obligation to carry out works or services with reasonable skill and care creates a performance obligation which is analogous to the standard of care in negligence:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." *Blyth -v- Birmingham Waterworks Co* [1856] 11 Ex 781.

Blyth is of course a test for the behaviour of the general public and not for people who hold themselves out as having particular skills such an Engineers. In *Bolam -v- Friern Hospital Management Committee* [1957] 1 WLR 582; [1957] 2 All ER 18 (approved in the House of Lords in (*Whitehouse -v- Jordan* [1981] 1 All ER 267; [1981] 1 WLR 246) the court established a test to accommodate the particular skills of a professional man.

> "Where you get a situation which involves the use of some specialist skill or competence, then the test of whether there has been negligence or not is not the test of the man on top of a Clapham omnibus because he has not got this special skill. A man may not possess the highest expert skill at the risk of being found negligent.
>
> It is well established law that it is sufficient to be exercising the ordinary skill of an ordinary competent man exercising that particular art."

Although that was a medical negligence case, it provides the fundamental test of negligence of professional people in the construction field. The broad test of the standard of care is what was to be expected of a competent Engineer or Architect at the material time (i.e. at the time he carried out the work) - it follows that, at least in English law, the test to be applied is the one at the time that the design was carried out and not the state of knowledge at the time when the litigation comes to court many years later. This particular proposition has become known as the state of the art defence. For example, in *Perry -v- Tendring District Council and Others [1985] 30 BLR 118; [1985] 3 Con LR 74,* there was an issue as to long term soil heave (the expansion of soil after the removal of trees, for example). In that case, Judge Newey, QC, came to the view, having heard expert evidence.

> "On the totality of the expert evidence I must, however reluctantly, conclude that

at the material time a competent Engineer would not have known of long term heave."

However, a more draconian attitude was adopted by the House of Lords in *IBA -v- EMI and BICC [1980] 14 BLR 1*. Following the collapse of a very tall cylindrical TV mast in Yorkshire, one of the Defendants submitted to the court that the design and building of the cylindrical mast was work which was "both at and beyond the frontier of professional knowledge at the time" but nevertheless, the House of Lords held them negligent. Viscount Dilhorne said:

"No doubt all this was true, and bearing in mind the consequences that might ensue if such a mast collapsed - fortunately no-one was killed or injured at Emley Moor, though part of the mast fell across a road and it might have fallen on a farmhouse - it was in my opinion encumbent on [the Designer] to exercise a very high degree of care".

There are conflicting judicial decisions on the issue as to whether a professional man who specialises within his profession has a higher duty than a non-specialist. In *Wimpey Construction UK Ltd -v- Poole, [1984] 2 Lloyd's Rep. 499; (1984) 27 BLR 58,* a consultant held himself out as having especially high skills and was indeed retained on that basis but the court rejected the argument that the test in such circumstances should be that of a man exercising or professing to have especially high professional skills. On the other hand, in a medical negligence case, *Ashcroft -v- Mersey Regional Health Authority [1983] 2 All ER 245,* the court found that the more skilled a person is, the more is the care which is to be expected of him but that the test should be applied without gloss either way.

Inevitably, the test for reasonable skill and care, being that which a reasonably competent person would or would not have done at the relevant time, is a matter of the application by a court of the evidence given by experts retained by the parties. The question arises whether the court are obliged to follow that expert evidence or whether they can reject it as being, for example, an unacceptable practice within a profession. In a medical negligence case, *Sidaway -v- Governors of Bethlem Royal Hospital [1985] 2 WLR 480; [1985] 1 All ER 643,* Lord Templeman said:

"Where the practice of the medical profession is divided or does not include express mention, it will be for the court to determine whether the harm suffered is an example of a general danger inherent in the nature of the operation, and if so whether the explanation afforded to the patient was sufficient to alert the patient to the general dangers of which the harm suffered is an example."

In like manner, evidence given to a court of a common practice of solicitors was rejected by the court in *Ladenbau -v- Crawley & De Reya [1978] 1 WLR 266:* the court held that a firm of solicitors was negligent for failing to make a Commons Registration Search, in circumstances where at the time such a search was not the common practice of solicitors. It will not, therefore, necessarily be sufficient to defend a claim in negligence simply to show that was the common practice of a particular profession at the time, particularly in circumstances where there was a risk of or actual physical injury to persons.

In *Greaves -v- Baynham Meikle [1974] 1 WLR 1261*, a suggestion was made that the obligation of a designer might extend beyond reasonable skill and care to fitness for purpose. In this case, *Greaves* were design and built contractors who undertook to construct a new factory warehouse and offices for Alexander Duckham Limited. The warehouse was to be used for the storage of barrels of oil. Greaves entered into a contract with Baynham Meikle to design the structure of the warehouse. It was accepted that the floors of the warehouse had to take the weight of forklift trucks carrying barrels of oil. After completion and occupation, cracks began to appear in the floors of the warehouse and it was established that the failure of the floors was due to vibration caused by the forklift trucks. The issues before the court turned on whether Baynham Meikle were in breach of their obligation to carry out their design works with reasonable skill and care or whether or not they were in breach of an implied term of their contract that their design should be fit for its purpose (namely the movement of loaded forklift trucks). In the Court of Appeal, it is fairly clear that the term that was implied in this case was that of reasonable skill and care and not fitness for purpose. The court found that on the facts there was a term implied *as a matter of fact* (not as a matter of law) that Baynham Meikle's design should be fit for use by forklift trucks - this is not the same as there being a general implication in to all designers' contract of an obligation as to fitness for purpose.

Any doubts that remained after the *Greaves* decision were dispelled much more recently by the Court of Appeal in *George Hawkins -v- Chrysler (UK) Limited and Burn Associates (1986) 38 BLR 36* . The Court of Appeal held that although a party contracting for both the design and supply of a product will usually be under an implied contractual duty to ensure that it is reasonably fit for the purpose for which it is intended, where the contracting party is a professional man providing advice or designs alone (i.e. without supplying any product), no warranty will normally be implied beyond a term that reasonable skill and care will be taken in giving the advice or preparing the design. There was nothing, the court said, on the facts to require the implication of any term other than a duty to take reasonable skill and care in preparing the design.

The conditions of appointment for professional people commonly used in the United Kingdom provide expressly for the standard of care to be adopted by the professional person. For example.

> "The Consulting Engineer shall exercise all reasonable skill, care and diligence in the discharge of the duties agreed to be performed by him ....." (ACE Conditions of Engagement).
>
> "The architect will exercise reasonable skill and care in conformity with the normal standards of the architect's profession." (RIBA Architect's appointment).
>
> "The Consultant shall exercise all the skill, care and diligence in the discharge of the services to be expected of an appropriately qualified and competent consultant experienced in carrying out services for a project of a similar scope, purpose and size to the Project and having regard to the dates and periods stated in the Priced Programme." (British Property Federation: Conditions of Engagement for Consultant's Work).

FITNESS FOR PURPOSE

The discussion above really deals with the legal obligations of a professional man. Is the position of the contractor or sub-contractor, who is also designing, any different? The first part of the dichotomy between reasonable skill and care and fitness for purpose is illustrated by the old case of a dentist *Samuels -v- Davis* [1943] KB 526; [1943] 2 All ER 3. Here, a dentist, who is a professional man, undertook for payment to make a denture for a patient: the Court of Appeal held that there was an implied term of the contract that the denture will be reasonably fit for its intended purpose. In that case Du Parcq stated:

"If someone goes to a professional man ... and says "will you make me something which will fit a particular part of my body?" and the professional gentleman says "yes" without qualification, he is then warranting that when he has made the article, it will fit the part of the body in question... If a dentist takes out a tooth or a surgeon removes an appendix, he is bound to take reasonable care and to show such skill as may be expected from a qualified practitioner. The case is entirely different where a chattel is ultimately to be delivered."

Those words were cited with approval by Lord Scarman in the *IBA* case referred to above.

Clearly, a contract could expressly deal with the standard of performance of a designing contractor and those express terms will usually determine the extent of the contractor's legal obligation. However, the contract may not be conclusive in its words or, indeed, it may be silent. It is therefore necessary to look at the law in this area in a little more detail.

There will usually be a term implied by a law that a contractor will carry out his work with reasonable skill and care (sometimes referred to as an obligation to carry out the work in a good and workmanlike manner). The standard of that performance is the same as reasonable skill and care in negligence.

The contractor also warrants that the materials he supplies for the works will be of merchantable quality, that is to say good of their kind. This warranty is an absolute warranty and extends to latent defects: it will not help the contractor to show that he has exercised reasonable skill and care in the selection of those materials *(Young & Marten Ltd -v- McManus Childs)* [1969] 1AC 454 [1968] 2 All ER 1169; [1968] 3 WLR 630 In like manner, there will be an implied warranty as to fitness for purpose of those materials except where the contractor was told what materials to use, in which case, as he did not select them and the building owner did not rely on his selection, the warranty as to fitness for purpose will not be implied; however, the warranty of merchantable quality will still usually be implied: *Young & Marten.*

In *Viking Grain Storage Ltd -v- T H White Installations Ltd & Another* [1985] 33 BLR 103; [1985] 3 Con LR 52 the dispute concerned the design and construction of a large grain drying and storage installation. One of the questions that arose in the case was should a term of reasonable fitness for purpose be implied or was it that in matters of design, specification and supervision of the work, the obligations of TH White Installations Ltd was, as they contended, limited to the exercise of reasonable care and skill? In this case, His Honour Judge John Davies QC, Official Referee, came to the view that a term as to fitness for purpose should be implied: the purpose of the contract was obvious and it was equally obvious that *Viking* needed a granary that would be reasonably fit to handle 10,000 tonnes by one man operation.

Viking relied on *TH White's* skill and judgement, as they had none of their own. The purpose of engaging *TH White* was their expertise in the field of designing and constructing granaries. The term as to fitness for purpose was therefore implied in this case.

In *Norta Wallpapers (Ireland) -v- Sisk & Sons (Dublin)* [1978] IR 114, the Supreme Court of Ireland held that where a roof structure, which had been supplied and erected

by a specialist sub-contractor, subsequently leaked and was unsuitable for its purpose, the fact that the main contractor was given no choice but to use the specialist sub-contractor, his design and price, constituted circumstances which meant that there was no reliance by the Employer on the Main Contractor and, accordingly there was no fitness for purpose obligation on the Main Contractor in respect of the specialist sub-contractor's failure.

Taking these cases together it seems clear that, subject to the precise terms of the contract which could affect the position, where a contractor is not only constructing but also designing, there will be a term implied as to fitness for purpose in relation to the design. It is for this reason that the JCT Design and Build Contract, With Contractor's Design, contains the following provision:

"2.5.1 In so far as the design of the Works is comprised in [the contract], the Contractor shall have in respect of any defect or insufficiency in such design the like liability to the Employer, whether under statute or otherwise, as would an architect, or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who acting independently under a separate contract with the Employer, had supplied such design for or in connection with works to be carried out and completed by a building contractor not being the supplier of the design."

In other words, the contractor's liability is to be the same as that of an Architect (not supplying the construction works) - reasonable skill and care. This is of course essentially an exclusion clause seeking to limit the contractor's liability to less than that which would normally be implied by operation of law, namely, fitness for purpose.

It follows from all of this that the position of, say, an Architect supplying the design only and a design and build contractor, supplying the design and construction, are different in their legal effect.

SUPPLY OF GOODS AND SERVICES ACT 1982

The common law rules have in part been replaced (as to goods) and in part supplemented (as to services) by a statutory code, the Supply of Goods and Services Act, 1982 which governs all contracts made under English law after the 4th January 1983. This part of this paper is limited to the design aspect of that Act (which also contains provisions as to the supply of materials). Section 13 of the Act deals with a contract for services (i.e. this could include design). It provides that there shall be an

implied terms that the contractor will carry out the services with reasonable skill and care. However, it is important to note that Section13 does not exclude the common law rules in so far as those rules impose any stricter duty than the Act. It follows that where a term as to fitness for purpose would be implied at common law, Section 13 does not cut down that common law implication of that term.

THE INTERNATIONAL CONTRACT: FIDIC-FOURTH EDITION

Conditions 7.2, 8.1 and 8.2 are important in the context of design under FIDIC by the Contractor. Condition 7.2 provides mechanics for the approval of drawings, maintenance manuals and the like where the Contract "expressly provides for that part of the Permanent Works" to be designed by the Contractor. Please note that it is vitally important that where the Contractor is to carry out such design, the extent of it is fully set out in the contract documents.

Condition 8.1 imposes an obligation on the Contractor to design "with due care and diligence" any design that he has an obligation to carry out. This is probably a reasonable skill and care obligation. On the other hand, Condition 8.2 requires the Contractor to "... be fully responsible" for the design of any part of the Permanent Works that he carries out, irrespective of any approval by the Engineer. Does "fully responsible" includes fitness for purpose? Do these two express Conditions (8.1 and 8.2) exlude the common law implication of a fitness for purpose term? It seems more likely, on balance than not, that a term as to fitness for purpose could be implied as a matter of law on the wording of the contract. Certainly, if English law applies, the statutory provisions in the Supply of Goods and Services Act will not preclude such an implication.

Condition 59.3 provides for limited (but stated) design by nominated sub-contractors. There is no express limitation as to reasonable skill and care - this design could easily be a fitness for purpose obligation. Whether or not that design carries with it a fitness for purpose obligation, there is provision that the sub-contract must contain an indemnity for the benefit of the Contractor from the sub-contractor in relation to the design. There is no provision for the sub-contractor to owe separate contractual duties to the Employer by some form of direct warranty agreement (such as that known as NSC/2 with the JCT80 Form of Contract). In other words, the Employer in relation to this nominated sub-contractor design is entirely dependent, in the event of breach, on a chain of contracts through the contractor to the sub-contractor.

Here, Condition 8(2) provides that the Contractor is not responsible for design (except as is expressly provided for in the contract). Where the Contractor is responsible for the design of any part of the Permanent Works, he is to exercise "all reasonable skill, care and diligence." Again, the question arises whether these words are sufficient to exclude the implication of a term as to fitness for purpose - although the intention may well be to limit the design obligation of reasonable skill and care, the wording is not entirely clear in that respect. What is likely is that an express obligation as to fitness for purpose may well over-ride the provisions of Condition 8 (2). The effect of a performance specification is also a matter that may give rise to an issue as to whether the design obligation is limited to reasonable skill and care. The wording is not appropriate to remove the responsibility of the contractor to make good loss or damage to the works where it arises from his own design (see Condition 20 (3)).

Conditions 58(3) provides for work of design to be carried out by nominated sub-contractors in certain conditions. There is no express limitation as to reasonable skill and care and if the requirement stated in the contract does not so limit the design obligation, then it is submitted that it is likely to be fitness for purpose - that is not only an obligation from the nominated sub-contractor to the contractor but also from the contractor to the Employer.

IMPACT ON THE INSURANCE POSITION

The usual form of professional indemnity cover is to provide an indemnity to the insured in respect of any sum which the insured may become legally liable to pay as damages for breach of professional duty as a direct result of any negligent act, error or omission. The words "negligent act, error or ommision" are usually taken to provide cover in respect of a claim arising under a contract (i.e. breach of an express obligation as to reasonable skill and care) as well as a claim in negligence as a tort. However, where there is no negligence but there is breach of a fitness for purpose obligation in a contract, such a policy will not provide cover to the insured.

Furthermore, there is in a policy a list of matters in respect of which the insurer is not to be liable under the policy. These will include the excess, a claim brought about by dishonesty, fraud or criminal act, a claim brought outside a specified geographical area, libel, slander, and personal injuries caused to a third party unless they arise out of a breach of professional duty. One typical exclusion clause which can give rise to difficulty in the context of fitness for purpose is in the following type:

> "Any claim arising out of a specific liability assumed under a contract which increases the Insured's standard of care or measure of liability above that normally assumed under the Insured's usual contractual or implied conditions of engagement or service."

There are policies in existence, particularly for design and build contractors, where the operative clause appears to limit cover expressly to "negligence", for example:

> "We... agree to indemnify the Assured for any sum or sums which the Assured may become legally liable to pay ... as a direct result of negligence on the part of the Assured in the conduct and execution of the professional activities and duties as herein defined."

The word "negligence" has a particular meaning in law and that meaning is limited to claims in tort. If the word "negligence" were to have that meaning in this operative clause, then the consequences would be serious indeed because the insured would have no cover unless the claim arose in negligence as a tort as opposed to under the Contract. Although it is conceivable that a Judge construing this type of policy wording would interpret it liberally to include a breach of duty under a contract to take reasonable skill and care, it is a risk that the insured might be well advised to avoid. Indeed, in a recent case on the meaning of the word "negligence" in the Latent Damage Act, 1986, the word "negligance" in that statute was held to mean negligence as a tort - in other words, the Act was held not to apply to a contractual obligation to take reasonable skill and care. It may therefore be sensible for design and build contractors to try to avoid such policy wording or, if it cannot be avoided, then to have the word "negligence" defined for the purposes of the policy so as to include at least breach of any common law duty to take reasonable care or exercise reasonable skill and/or breach of any obligation whether arising from express or implied terms of a contract or a statute or otherwise to take reasonable care or exercise reasonable skill.

It follows from all of this that a professional man, an Architect or Engineer for example, can keep his liabilities insured under his professional indemnity policy so long as he avoids expressly or impliedly an obligation in his engagements for fitness for purpose. On the other hand it is more difficult for a design and build contractor to avoid express or implied fitness for purpose terms, particularly in the present economic climate where the scope for negotation on terms is non-existent or, at best, limited; the design and build contractor may, therefore, have a divergence between his obligations and his insurance cover in respect of design. There is a strong rumour, no more, that one underwriter is taking on these fitness for purpose risks for a design and build contractor. If this is true, is it a trend for all insurers?