

How is design liability changing under RIAI, Public Works Suite and FIDIC 2017?

Why is it such a concern and
why does it matter?

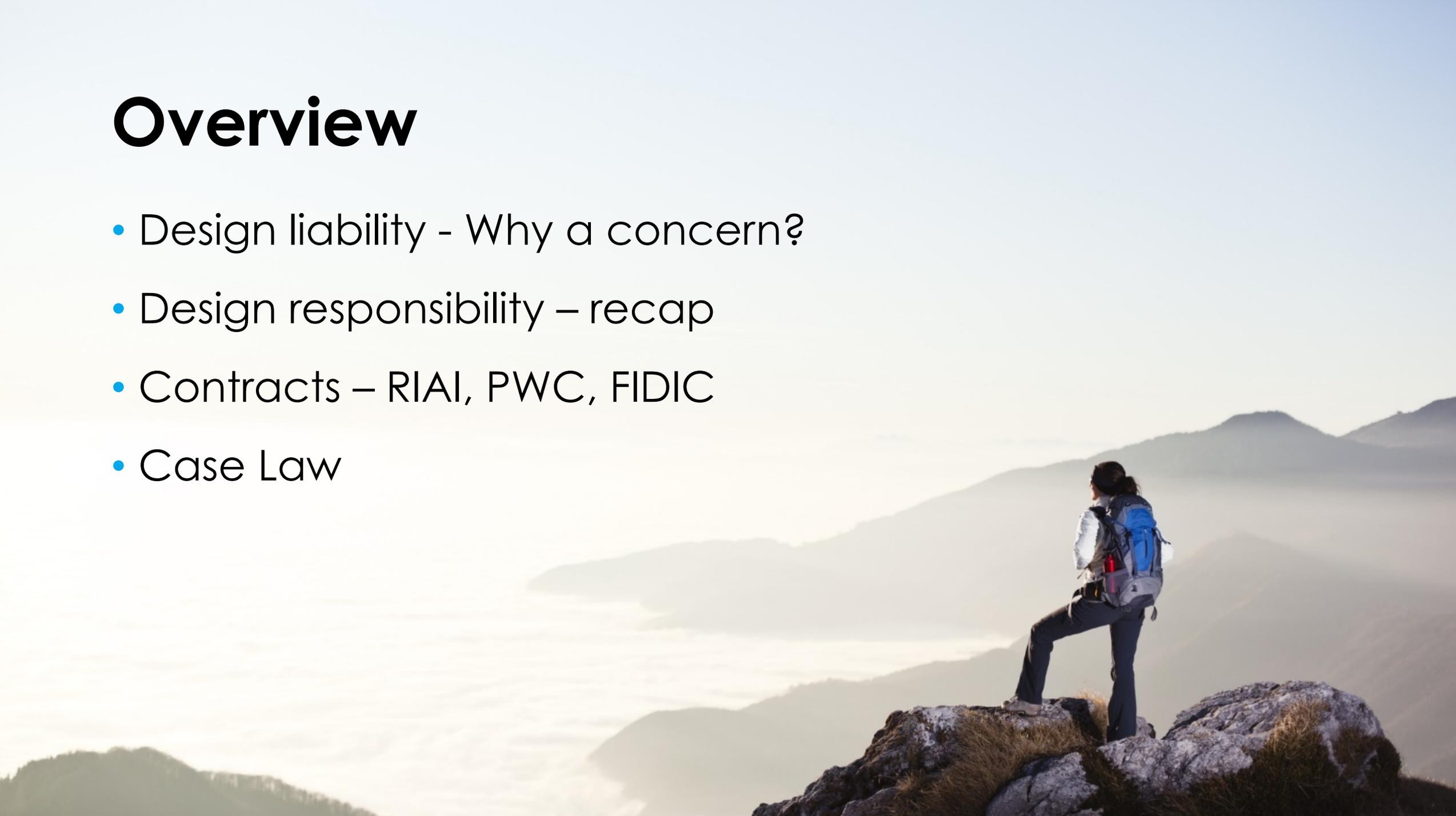
Finola McCarthy
4 December, 2018



RONAN
DALY
JERMYN

Overview

- Design liability - Why a concern?
- Design responsibility – recap
- Contracts – RIAI, PWC, FIDIC
- Case Law

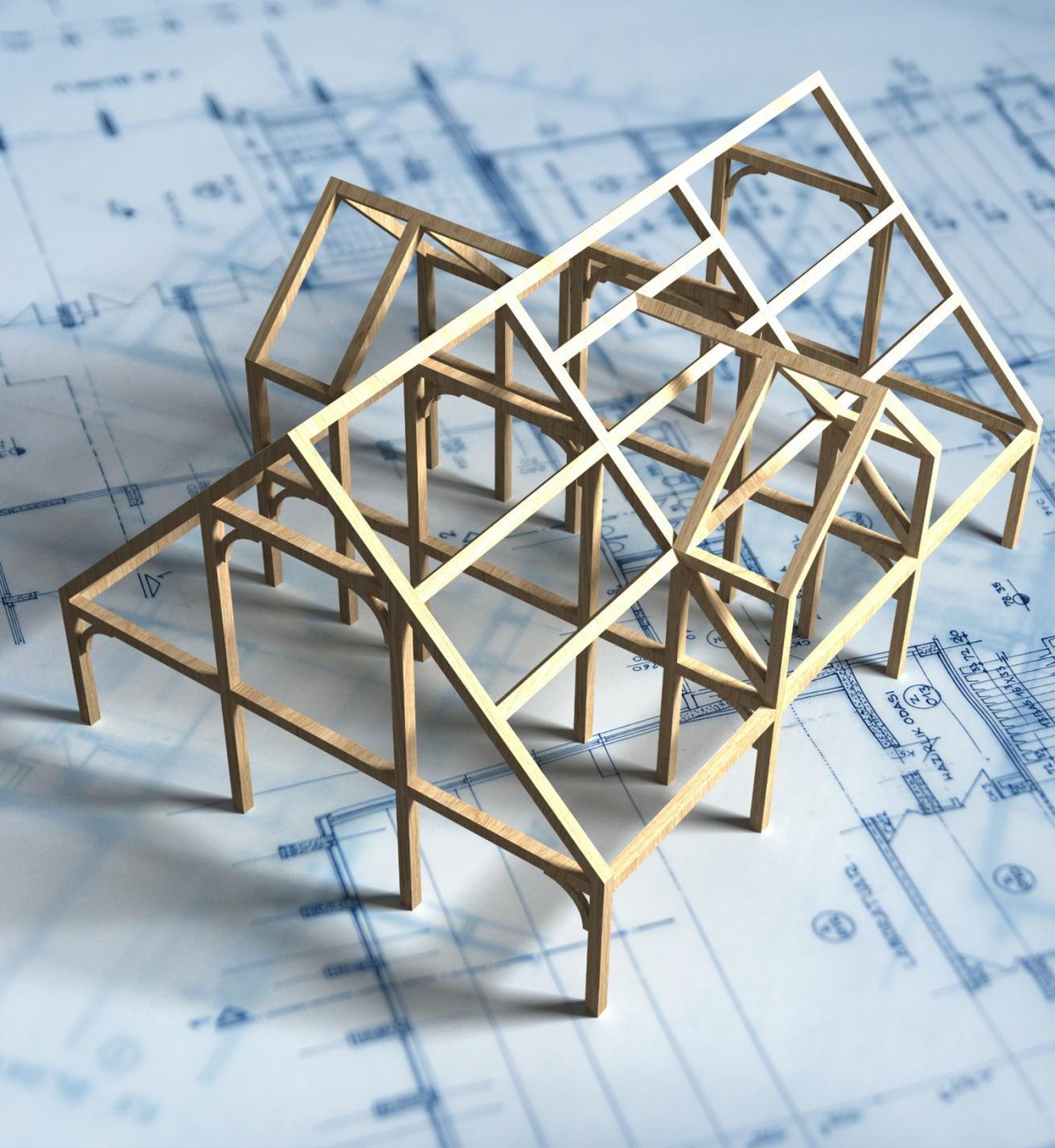




DESIGN LIABILITY

Who is responsible for design?

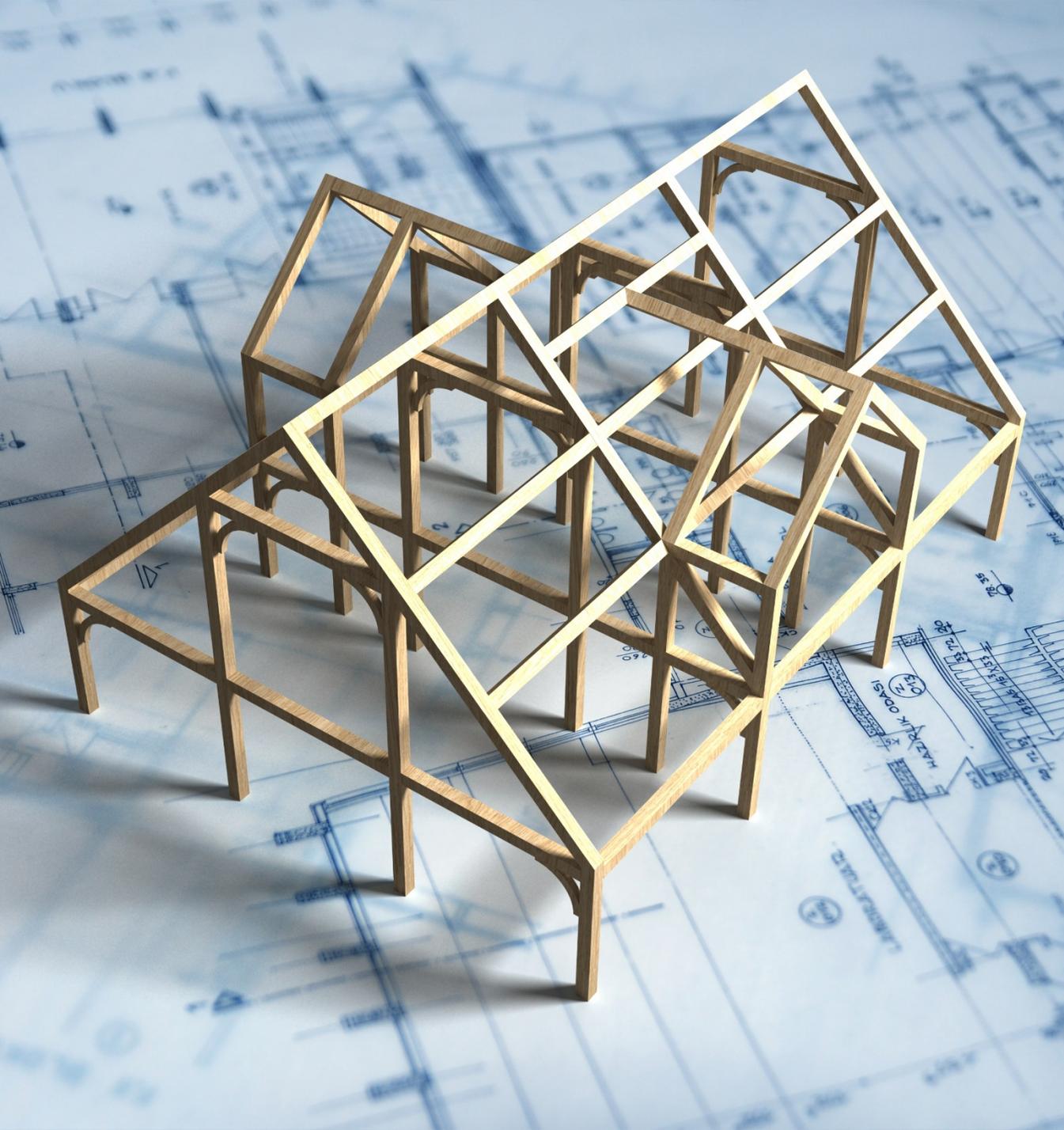
- **Traditional project:**
 - Employer/Employer's design team fully design
 - Specialist elements of works: sub-contractor design
- **Design & Build project:**
 - Contractor – single point of responsibility



DESIGN RESPONSIBILITY - RECAP

What is the standard?

- Reasonable skill and care
 - Measures the standard of performance – liable if negligent
- Fit for purpose
 - obligation to achieve a result – strict liability, no need to prove negligence
- Implied terms
 - Sale of Goods Act



Why does it matter?

- Blurred lines of responsibility
- Professional Indemnity insurance
 - Failure to exercise reasonable skill and care
 - May not respond to fitness for purpose risk
- Transfer risk to others
 - Design team v contractor

RIAI

Employer's design

cl 25 - contractor not responsible for design

- provided by Employer
- prepared by nominated sub-contractors

Amendments to impose design responsibility

- articles of agreement,
- cl 2 - design and standard of care
- cl 16 – nominated sub-contractors
- cl 22 - PI insurance
- cl 25 - delete
- additional clauses





Public Works contract

- Designed by Employer
- Designed by Contractor

Public Works contract



CLAUSES	DESIGNED BY THE EMPLOYER	DESIGNED BY THE CONTRACTOR
3.1(6)	loss/damage due to Employer design - Employer's risk	
3.7	Contractor PI insurance	Contractor PI insurance.
4.8.4	If Contractor's proposals change Contractor is liable for that design	
5.1	Contractor liable for Specialists design	Contractor liable for Specialists design
8.1(1)	Ensure Works executed & completed in accordance with Contract requirements & in a proper & workmanlike manner & using good practice	Ensure Works designed, executed & completed in accordance with Contract requirements & in a proper & workmanlike manner & using good practice
8.1(4)	All Works Items selected or designed by the Contractor are fit for their intended purpose	Completed Works are fit for their intended purpose

FIDIC 2017

- Yellow Book – Plant Design Build
- Silver Book – EPC (Turnkey)
- Red Book - Construction
- 2017 Second Edition Aims: increase **clarity, transparency and certainty** and address issues raised by users

FIDIC 2017- What has changed?

Cl. 4.1 (Yellow and Silver books); Cl 4.1(e) (Red book)	→	Fit for purpose obligation re Sections, Parts, Major Plant
Cl 17.4	→	Indemnity against not being fit for purpose
Cl 1.15 Yellow and Silver; Cl 1.14 Red	→	Indemnity capped
Cl 1.15 Yellow and Silver	→	Designers qualifications clarified
Cl 1.15 Yellow and Silver	→	Design review process more detailed
Cl 19.2.3	→	Professional indemnity Insurance obligation

Design Liability - Why a concern?

MT Højgaard A/S v E.On Climate & Renewables UK Robin Rigg East Ltd and another [2017] UKSC 59

- construction of offshore wind farm
- defects in turbine foundations – turbines were to have a 20 year life span
- claim against MT for failure to comply with the specific fitness for purpose obligation under the contract (the turbine foundations were to have a life span of 20 years).
- MT argued that the strict fitness for purpose obligation should not apply, as its primary contractual obligations were to act in accordance with good industry practice, comply with the J101 and to exercise reasonable skill and care
- TCC: MT liable



Design Liability - Why a concern?

MT Højgaard A/S v E.On continued

- Court of Appeal: no 'fitness for purpose' obligation within the construction contract.
- Supreme Court: 'fitness for purpose' obligation contained within a schedule to a construction contract was to be given its natural effect and that it was not inconsistent with the other terms of the contract. The 20 years lifespan requirement was additional to and not inconsistent with the contractor's other obligations including compliance with the J101
- where there are two terms that require different standards, *"rather than concluding that they are inconsistent, the correct analysis...is that the more rigorous or demanding of the two standards or requirements must prevail, as the less rigorous can properly be treated as a minimum requirement"*.



SSE Generation Limited (SSE) v Hochtief Solutions

AG [2018] CSIH 26

- Tunnel collapse at a hydroelectric plant
- Design liability - contractor exercised reasonable skill and care
- But, liable for failure to implement design – caused the collapse
 - design had obliged the Contractor to apply steel rib support to any uncovered erodible rock

Costain Limited v Charles Haswell & Partners Limited [2009] EWHC 3140 (TCC)

Consultant's Agreement

"The Consultant warrants that:

- *7.2 In the provision of the Services the Consultant shall exercise all reasonable professional skill, care and diligence.*
- *7.3 ...*
- *7.4 Any part of the works designed pursuant to this Agreement if constructed in accordance with such design, shall meet the requirements described in the Specification or reasonably to be inferred from the Tender Documents or the Contract or the written requirements of Costain and designed in accordance with good up to date engineering practice and with all applicable laws, by laws, codes or mandatory regulations and in all respects with the requirements of the Contract."*

Costain Limited v Charles Haswell & Partners Limited

Judgement:

“Haswell's obligation under Clause 7.4 of the Consultancy Agreement is one of strict liability to, in effect, ensure that, if any part of the works is constructed in accordance with Haswell's design, that part shall meet the requirements described in the Specification including the requirements in relation to permitted settlement tolerances.”





Questions

Finola McCarthy
E. Finola.McCarthy@rdj.ie
T. +353 21 4802771



RONAN
DALY
JERMYN