



COMMUNIQUÉ

*Newsletter of the New Zealand Architects Cooperative Society Ltd
May 2002*

WELCOME TO COMMUNIQUÉ

COMMUNIQUÉ ON THE INTERNET

Welcome to the first issue of Communiqué sent to Members via E-mail. Your Directors trust this electronic means of communication will provide easy access and Members will appreciate being able to read Communiqué from their screens and then either download it for future reference, copying it off for passing around the office, or, better still, e-mailing it around the office.

NZACS is in the business of Risk Management, with Communiqué being a key tool in passing on vital information and tips to assist Members in managing their risk. It is therefore very important that staff have access to this information too.

It is not just for *"the Boss."*

THE NZACS WEBSITE

Did you realise that **NZACS** has a website? If you haven't checked it out at www.nzacs.co.nz yet, then you should. All the significant articles from previous issues of Communiqué are there categorised in the same series as the **NZIA** Practice Notes. There are also descriptions of who we are and what we do, together with standard forms and letters useful if you need to notify a claim.

To access the text of past articles, and other parts of the *"Members Only"* section of the website, you will need to enter your member number as the login, and **"NZACS"** as the password.

Your member number will be in the format **AC_ _ _ _** and can be found on the top right of your annual subscription invoice, which (*depending on your office*) is probably filed in the *"Subscription"* section of your **NZACS** Manual.

So please check it out.

CLAIM STATISTICS

Colin Orchiston has undertaken some fairly extensive work in analysing the claims made against Members. The following is his report on what he has found and the conclusions that can be drawn from his work

For analysis purposes the claims are divided into some 35 sections.

Broadly they resolve into those failures that are primarily under the technical control of the architect, performance failures of other consultants, performance failures by contractors or suppliers, those caused by difficult clients (*including fee disputes*), and a catch all of miscellaneous causes.

Very broadly, the sources of claims are similar now to what they were five years ago i.e.:

- *One third sourced from the failures by the architect.*
- *One third sourced from failures by consultants/contractors/suppliers.*
- *And one third from all other sources.*

However, a more detailed look reveals some interesting trends, even after allowing for possible variation in the inevitably somewhat subjective bias when allocating a broad classification.

There has been a dramatic drop in the failures attributable to poor detailing or inadequate contract administration by architects; however, this gain has been somewhat offset by a large increase in claims attributable to inadequate or ambiguous documentation.

This could perhaps be a tangible reflection of assertions that we are being asked to do ever more documentation for inadequate and ever reducing fees.

The fees issue is again highlighted by the very significant increase in claims resulting from fee disputes, partial services, and difficult clients.

If the sources and numbers of claims were a reflection of the costs thus incurred, life would be simple!

Unfortunately, there is very little correlation between the number of claims and the resulting costs, or the sizes of projects or firms, and the cost of claims; except that larger firms do more - and generally larger - work, and are thus more often at risk, and more often face potentially larger claims.

However, those firms frequently have extensive systems and in-house experience and expertise, while we frequently see smaller firms involved in claims that may not have arisen if they had had similar resources. Accordingly, only very broad generalisations can be extracted from comparing sources of claims with their costs to the **NZACS** Insurers.

One aspect is glaringly obvious: *partial services cost us all very dearly, and the costs are disproportionate to the actual number of claims.*

Typically, many claims arise because:

- The scope of professional services to be undertaken was not made clear at the outset;

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- the architect (*not retained for contract observation*) is called upon for partial site observation or some further services (*perhaps signing off a Practical Completion Certificate required for financing or sale and purchase agreements,*) and is then held to have assumed contract observation responsibilities;
 - clients are cutting costs in all directions and we bear some of the spin-off from the resulting hassles which are further exacerbated by the client's frustrations at the resultant costs;
 - documentation compiled for Building Consent application only (*or even Resource Consent only*) is used for construction in the absence of further detailing: when the contractor's detailing or substitution of materials proves unsatisfactory, the architect is held to account;
 - the specifications and/or drawings are not "*perfect*", and the builder's failures thus become "*design faults*";
 - the client and /or builder makes changes to the contracted works which come adrift;
 - unsatisfactory selection of or contract conditions with the builder.

Obviously, the costs of defending claims, which subsequently prove to be a construction fault, are significant, and members should bear this in mind during contract documentation and observation.

A failure in contractor performance inevitably leads to a claim that the "*architect failed to supervise*", and - quite apart from the insurer's costs - defending that claim can be very stressful and onerous for the practice.

It will probably come as no surprise that defending claims caused by difficult or vexatious clients - possibly involving a "*try-on*" - represent a regrettably large proportion of our costs. Often these costs are mostly in legal defence, because such clients continue to be difficult and/or irrational, pursuing their cause irrespective of facts and logic.

One such claim, recently settled, involved a battle over some four years, with the client's position being merit less in almost every respect, despite their continuing to brief their lawyer who seemed unable - unwilling - to get them to face the facts. This claim was settled for a token face - saving (*for the claimant*) payment of \$500 to make it go away after the collective legal fees (*theirs and ours*) had probably climbed to at least \$25,000.

However, the news is not all bad: most notified claims amount to nothing, and the Claims Committee may resolve many others by a phone chat or "*ghost-written*" letter. Early and thorough background information from, and co-operation of the member involved is often the key to such resolution.

No harm is done by notifying a claim, and we would far prefer a notified claim that came to nothing to one which has accumulated "*critical mass*" before we get to know about it.

We are not at all upset that the **80/20** rule applies to Professional Indemnity insurance as equally as many other situations: **20%** of the claims take **80%** of our efforts and consume **80%** of the dollar costs.

Make sure you are not represented in the 20% - be in the majority.

THE UNINSURED COST OF PROFESSIONAL NEGLIGENCE ALLEGATIONS

Graham Strez provides some very sound advice, from his considerable experience, in dealing with claims and those architects involved, coping with the additional uninsured costs; personal, professional and financial, that can arise when a negligence claim is being defended.

Professional Indemnity Insurance will indemnify or reimburse an architect for the cost of their legal liability to third parties that result from the architect's negligent acts or omissions, subject to the extent of the cover and excess. Additionally, the legal costs incurred with the Insurer's approval associated with the defence of an allegation are recoverable also.

The hidden uninsurable costs of allegations of professional negligence must be anticipated, for they can be considerable.

The policy terms require the insured architect to render all reasonable assistance to the insurer at all times. The reason for this is obvious. It is the insured architect who has all the knowledge and information necessary for the Insurer to assess the nature of the claim, its quantum and defence strategy. Providing this assistance is at the insured architect's expense.

Failure to provide proper assistance may constitute a breach of contract and invalidate this cover.

The most costly toll is the personal one which the architect will experience: to themselves, their practice, their staff and their family relationships.

A claim is firstly a challenge to the architect's professional reputation. It places the architect in an adversarial role. Professional reputations are hard earned and jealously defended. *They are also uninsurable.*

Defence of a claim will involve the architect in research of the job file and diary records, continuing enquiry of office staff involved with the project, perhaps even former staff employed elsewhere, and also consultants, and contractor/subcontractors.

As the defence strategy evolves, there will be a requirement to brief a defence lawyer representing the Architect's interests, and possibly an expert witness to advise the Insurer and the legal counsel.

As the litigation process develops, and the listing and exchange of discoverable documents is completed, the architect's risk exposure is more precisely identified and quantified.

Following this, there may be an exchange of expert evidence and further challenges to the architect's professional competence and judgement.

These matters typically taint the architect's relationship with staff, business partners and their families. These emotional pressures can be insidious and cancerous. The damage inflicted may be irreparable. Alternatively, healing may require immense courage and compassion from these innocent parties. Support of the Claims Committee is an important component of this professional reconstruction.

In cases where the architect's legal liability exceeds their insurance cover, the balance will be to the architect's account.

It may therefore be necessary for the architect to retain separate legal counsel in matters relating to the uninsured risk.

This background should be kept in mind when assessing the initial terms for professional service, and the risk of accepting the commission. A low fee bid is no defence for inadequate professional service. Never compromise your professional standards, particularly for property-developer clients who will on-sell their building or apartments to others during or *following* construction. *Your tortious liability is "unlimited".*

Re-read this homily and take a five minute break to consider your present good fortune.

BUILDING WEATHER - TIGHTNESS

Weather-tightness, or lack of it, is a major cause of claims, so members should heed carefully this advice from Graham Strez

A recent BIA and industry sponsored seminar on building envelope weather-tightness was addressed by two researchers from Vancouver. They related their experience with cladding failures in both low rise and high rise construction, and compared failures on a regional basis.

The low rise studies related to condominiums with exterior sealed claddings in typically stucco or EIPS. In nearly all cases, the cause of water damage was external water entry, and not entrapment of construction moisture or uncontrolled internally generated moisture.

These residential buildings were often of complex geometry, with innumerable junctions between wall surfaces, balconies, roofs, bay windows and the like. Typically there was an absence of, or poorly constructed, construction control joints, sill trays, head and jamb flashings, drainage of sill trays, balustrade cappings, saddle flashings, inadequate step downs at balconies, lack of eaves or weather drips.

These typical observations are similar to those frequently seen by the Claims Committee - timber framed construction, cantilevered timber balconies, (*using KD timber or H1 timber*), stucco cladding or fibre cement cladding each with a proprietary plaster coating system and surface-sealed aluminium joinery: poor site control and quality assurance.

The Vancouver experience strongly supports the view that it is inappropriate to rely solely on exterior weather seals alone, without incorporating secondary mechanical drainage systems for ingressed water. Detailing should anticipate construction tolerances, poor workmanship and the consequences upon the building structure if unnoticed water entry occurs. Anecdotal evidence from seminar participants was an endorsement of the Vancouver situation.

A territorial authority building inspector cited the poor quality of informative construction detailing, and/or the complete absence of informative detailing as being a significant contributor to building weathering failure. Architects appeared more concerned with interior detailing than effective weathering details. Lack of interest, pride, understanding and technical skill were all features, regrettably, of many of today's building industry workmen.

A further observation was the quick turnover developer who on-sold prior to construction or construction completion and then ceased trading. The resultant exposure of building participants to tort liability, which is unlimited in quantum and extended in time, are features well known to the architectural profession. The biggest claim payout by **NZACS** Insurers relates to such matters.

IN BRIEF

New Lead Insurer

The Society advises Members that there has been a change in the Group's lead insurer. As from 1 April **2002 Lumley General Insurance (NZ) Ltd** has taken over the lead position from St Paul International Insurance Company Ltd, the latter having recently decided to cease its underwriting activities in New Zealand.

In accordance with the provisions of the ***Insurance Companies (Ratings & inspections) Act 1994***, the claims paying ability rating for the Insurer is "**A**" under the Standard & Poor's (Australia) Pty Ltd rating scale, a "**strong**" category rating in the secure range of the scale.

Sub-Consultants Professional Indemnity Insurance - Reminder

Members are reminded to check to ensure that any sub-consultants they engage have adequate Professional Indemnity Insurance cover.

NZACS Helps Out

As Members know **NZACS** is co-operative in nature. On some occasion's architects, who are not Members, approach the Claims Directors for some assistance and this is usually given.

At the same time a gentle suggestion is made that, having had the assistance and now knowing how **NZACS** operates for the benefit of the profession, their joining the Group for their future insurance needs would be an excellent idea.

Warning When Using The B1 Contract

For any Members using the B1 contract you are very strongly advised not to get "sucked in" to being involved in contract administration /observation. *Don't act as an agent of the client.*

NZ Certified Builders - Home Protection Guarantee - Beware

The NZ Certified Builders are offering a commission to architects for signing up clients to their Home Protection Guarantee Scheme.

Such an action would cast doubt on the independence and impartiality of the architect bringing the architect in to conflict with the Code of Practice and Professional Conduct.

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