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PRACTICE ADVISORY – July 2013

Bond-holders' requests for "Duty of Care" Letters.

The task team is again receiving enquiries regarding requests for professional consultants to sign letters confirming a "duty of care" in favour of banks and other financial institutions which provide financing for building projects.

The Institute strongly advises against our members signing such documents and it is recommended that they reacquaint themselves with document [1.233 of the SAIA Practice Manual](#) together with the following practice note (formerly published by the CIA in 2008):

The following quotation throws some light on the potential delictual liability of architects to third parties, such as finance providers:

"On occasion, our courts ... have followed the English law and made use of the so-called "duty of care" doctrine. According to this approach it is first asked whether the defendant owed the plaintiff a duty of care (the "duty issue"), followed by the question whether there was a breach of this duty (the "negligence issue"). If both questions are answered in the affirmative, negligence is said to be present.

*For the determination of whether there was a duty of care, the criterion used is to ask whether the reasonable man in the position of the defendant would have foreseen that his conduct may cause damage to the plaintiff. To answer the second question, that is whether there was a breach of the duty to take care, consideration is given as to whether the wrongdoer exercised the care which the reasonable man would have exercised in order to prevent damage. In other words, would the reasonable man in contrast to the wrongdoer have prevented the damage? **It should be noted that the duty of care is not a general duty; it is a duty only towards certain people or classes of people and not a duty towards every person. Unless the plaintiff can prove that he is someone who was owed the duty of care, he has no action: a duty of care is owed only to the so-called foreseeable plaintiff***

(NEETHLING, J., et al.: The Law of Delict South Africa: Butterworth 1990; p.126-127 – emphasis added).

From this it is clear that the usual onus on the bank or financial institution to demonstrate that an architect owed it a duty of care (which it may not always be successful in arguing) becomes quite unnecessary if the architect has previously signed a letter of "duty of care" conceding this point. The CIA accordingly recommends that its members exercise caution in agreeing to these requests.

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