

A False Friend
Rachel Barnes, September 2008

In a recent article (13 June 2008, page 70) Tony Bingham enthusiastically welcomed the RICS standard and short forms of contracts for appointing consultants, and the clarity of the tick-box approach as a means of identifying what quantity surveyors and others are supposed to do. However, there are matters in the conditions to the standard form that could be cause for concern to consultants.

The standard form requires the consultant to exercise a higher duty of skill and care than that imposed on them by the common law, and in contrast to the ACE and the RIBA standard forms. This will make it more likely that a consultant will be found to be in breach of that duty. It also contains several strict obligations, some of which are qualified by reference to the requisite standard of care, for example the obligation to comply with the client's brief. The effect of this is unclear: does it mean consultants are liable only if they have been negligent, as defined by that higher duty of care. If so, why include the strict obligation? Will insurers take the view that these terms are outside a negligence-only professional indemnity (PI) insurance policy, based on the common law duty of care?

It is also possible that a consultant, in complying with the brief, could have entered into a warranty for fitness for purpose, which would be outside PI insurance. These are dangerous liabilities for a consultant to assume.

The obligations in relation to third party agreements also cause concern. The consultant is under an obligation not to put the client in breach of any term in the building contract or third party agreements, which are widely defined. This is not dependent on the consultant having been given copies of these agreements before the appointment is signed, so that it can consider what liabilities might result if it does put the client in breach and the effect that such obligations could have on its services or fee. However, where it has been given them before it signs up, the consultant will be relieved of this obligation if it is prevented from complying for reasons outside his control. This may not cover all the circumstances that could stop it from complying. For example, it does not cover cases in which compliance is possible, but only by greatly increasing levels of resources, for which a sufficient provision has not been made in the fees.

If the consultant is given the agreements after the date it signs the appointment, it is only relieved of its obligation if the term "*exposes the consultant to any liability in excess of that which is reasonably foreseeable by the consultant at the date of the appointment*". This could be difficult for the consultant to demonstrate.

An experienced consultant would be aware of the main provisions in standard building contracts and the agreements clients make with funders, purchasers and tenants and so on, and therefore could be said to have "*foreseen*" all the consequences if the client were in breach. This condition could also imply that the consultant has to account for all these eventualities within its services and its fee, whether they exist in practice or not.

As seems to be the fashion at present, there is a statement that the client does not warrant the accuracy of any information that it provides except for its brief and any specialist reports and surveys. That is of little comfort to the consultant, however, because this warranty will only apply to the latter "*if it is reasonable for the consultant to rely on them in performing the services*".

A consultant should exercise some independent judgment when considering any information with which it is provided, but this would be encompassed within its usual duty of care in any event. This condition makes it an objective test and creates an uncertainty as to the information on which the consultant can rely, or how far he should question it the information.

The safest course of action would be for the consultant to obtain all the information on which it is going to need to rely, but this would not be possible in the case of information that the client or others only can provide. It could result in the client paying twice for the same information.

Consultants are therefore going to have to consider the liability implications of adopting the conditions in this new standard form without amendment.

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