

## **Rights to consultant's documents**

Consultants are more frequently being required in their appointments to deliver up their drawings and documents to the client – on suspension and/or on termination, for whatever cause.

Such clauses need to be considered carefully as they could give the client rights to documents which they would not have unless they brought a claim or to documents to which they would not normally be entitled because they are privileged.

Requests for consultants' documents can also be made based on the licence to use the consultants' documents, and so it is necessary to consider these provisions as well.

### **1 *Obligations to deliver documents***

An obligation to hand over documents to a client or indeed a third party in the appointment will be treated as any other contractual obligation – it will be construed in accordance with its terms and if the consultant does not comply with the obligation he has undertaken he will be in breach of contract. It is also possible that the courts will enforce such an obligation, for example by ordering specific performance, ie making an order that the consultant hand over the documents he has agreed to give to the client. Third parties will not usually be able to enforce such a term as they are not a party to the contract unless they have been given specific rights to do so, either under the Contracts (Rights of Third Parties) Act 1999 or through collateral warranties.

Consultants therefore need to consider both the extent of the obligation and the circumstances in which it is to arise.

A typical clause is as follows:

*'Following any termination of the Consultant's engagement howsoever arising the Consultant shall deliver to the Employer or any person nominated by him copies, in such form as he may reasonably require, of all Documents, and other documents including (inter alia) negatives and CAD disks (whether in the course of preparation or completed), which the Consultant holds in relation to the Development together with the originals.'*

In this appointment 'Documents' covered everything produced by the consultant, including internal memoranda, calculations, draft documents etc.

So if the obligation is to deliver copies of every single document produced by the consultant, as it is under this clause, that is what the consultant will have to hand over, regardless of whether any of the documents would have been delivered to the client or his consultants/contractors in order for the project to be carried out.

It will be immaterial whether the client needs them, would only have been entitled to them if there was a claim, or if they were otherwise privileged. Everything, therefore, depends on the description of the documents to be handed over or the definition of 'documents' or 'materials'. This must therefore be checked carefully and restricted to those documents etc which are delivered to the client or others as required by the performance of the consultant's services and to enable others to have the information they need regarding the consultant's services to perform their own.

If the originals are required the consultant must ensure he is not prohibited from taking copies or he will not have the documents he needs for his own records and in the event of any claim.

If the object of the clause is to make sure the client has what he needs for the health and safety file, then the obligation should be confined to this.

If there is some uncertainty about the extent of the clause or the definition, the consultant should in the first instance only provide the originals or copies of those documents he has already delivered as a result of the performance of the services and then seek legal advice as to whether he can resist providing any further documents, and particularly whether he has grounds for resisting handing over documents that would otherwise be privileged and thus potentially seriously prejudice his position.

## 2 ***Licences to copy and use documents***

A typical clause in an appointment is as follows:

*The copyright in all drawings, reports, specifications, bills of quantities, calculations and other documents and information prepared by or on behalf of the Consulting Engineer in connection with the Project for delivery to the Client shall remain vested in the Consulting Engineer but the Client shall have a licence to copy and use such drawings and other documents and information for any purpose related to the Project including, but without limitation the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, refurbishment and repair of the Project ... The Consulting Engineer shall not be liable for the use by any person of any such*

*drawings or other documents or information for any purpose other than that for which the same were prepared by or on behalf of the Consulting Engineer.'*

The purpose of a licence is to allow the client (or others) to copy the consultant's documents (or adapt or otherwise exploit them). Without such a licence the client will be infringing the consultant's copyright and could lay himself open to an action for damages or other remedies. However, the consultant does not generally grant a completely open licence so that the client can copy and use the documents for any purpose whatsoever. Care is usually taken to define and limit the scope of the copying and therefore the use to which the consultant's documents can be put. In the clause above the licence is given in respect of the project only and there are described the various activities for which the client might need to use the documents.

Licences can of course be much more specific. For example, a licence to copy and use a report may be restricted to the client and for a particular purpose only.

This is all a licence is doing: defining the extent to which a document can be copied and used without infringing the consultant's copyright in that document.

It is not giving the client a right to have the documents described. What the client actually receives by the way of deliverables is either set out in the services or implied by the services to be performed or, more unusually, covered by an express clause such as the one described in the previous section. The licence quoted above makes this clear by referring to the documents prepared for '*delivery to the Client*' but that is not essential.

A demand from a client for all the documents described in a licence should be resisted – a licence does not give the client such a right.

Where copyright in the consultant's documents is to vest in the client, all the rights in relation to the copying and use of the documents also pass to the client and the consultant will need a licence to use his own documents if he is not to infringe the client's copyright. The question of in which documents the client is to have copyright will again depend on the definition of '*the documents*' and therefore this too will need careful consideration.

#### 4 ***The ownership of documents***

The physical ownership of the piece of paper or electronic data containing copyright material is again something that can be dealt with in appointments. Generally, if the consultant passes a copy of a drawing or electronic data to a client, the ownership of that particular drawing and data will pass to the client, but that is all that is passed. What rights the client has in relation to copying and using the piece of paper or data is governed by the express or implied licence

from the consultant and so physical ownership does not add anything significant to the client's rights.

Sometimes physical ownership does not pass outright – for example where a consultant has a lien on documents which he can seek to exercise if he is not paid. However, this is not as effective a remedy for a consultant as the right to revoke the licence to copy and use his documents in the event of non-payment.

For further information regarding consultants' documents or professional appointments contact Rachel Barnes at [r.barnes@beale-law.com](mailto:r.barnes@beale-law.com) or 020 7420 8702.

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