

Standard Conditions of Appointment for an Architect 2010

In 2007, the Royal Institute of British Architects published new standard conditions of appointment. These caused considerable concern.

This year, the RIBA has produced a new set, and it is good to report that they are a considerable improvement. Indeed, with a few reservations, they come close to providing a basis for the appointment of professional consultants which is fair and reflects their common law responsibilities.

This note considers the *'Standard Conditions'*.

The basic obligation on the Architect is now, as it should always be, a straightforward duty to exercise reasonable skill, care and diligence in accordance with the normal standards of the Architect's profession. Gone are the potentially onerous further obligations that sat so uncomfortably beside this basic obligation. No longer is there a contractual obligation to comply with the Client's brief, or to perform the services in accordance with project procedures, or provide *'adequate'* resources, or maintain *'effective'* review procedures.

This does not, of course, mean that the Architect does not have to do any of these things. The question though will always be – has the Architect exercised the proper degree of skill and care? Any consultant exercising reasonable skill and care will obviously endeavour to comply with the client's brief, as he understands it. To make such a matter the subject of a special obligation is, at best, unnecessary; more likely, it would be imposing a more onerous duty.

Many of the problems with the 2007 Conditions have been addressed and corrected. There are sensibly worded duties to inform and collaborate, although one could quibble about the definition of *'collaborate'*. The Architect is still entitled to rely on the information that the Client has to provide. This caused some concern in 2007, but it does not seem to me that this relieves the Architect of any obligation to exercise its own judgment about the information when appropriate (for example, if the information is plainly suspect).

The cap on the Architect's liability is now the amount of professional indemnity cover that the Architect agrees to maintain whether on a per claim or aggregate basis. This does not have to be the same as the amount of cover that the Architect does in fact have: the amount should reflect the particular risks for that project and in any event the Architect would be well advised to agree to maintain a lower amount than this, so as to have something left over in the event of other parties having claims arising out of the same incident. The Conditions, however, do not refer specifically to actions in negligence which could mean such claims are not limited. There is still a net contribution clause but the list of people whose responsibility is to be considered with the Architect's has been reduced.

These Conditions restore the general right to both parties (not just the client) to terminate by giving reasonable notice, stating the reasons for doing so, and a right to suspend and then terminate, on reasonable notice, if matters are not put right. The problem under the 2007 Conditions of how long the Architect has to wait for matters to be put right before being able to terminate has not been resolved in these new Conditions. Rather surprisingly, there is no express right for the Architect to terminate the appointment due to breach on the part of the Client. Would the Architect have the common law right to treat the contract as terminated by a repudiatory breach, in which event the Architect would be entitled to damages? (Termination by notice under the Conditions only entitles the Architect to certain costs.) This would depend on whether the termination provisions are interpreted as being exclusive, ie as setting out the only ways of terminating. The Conditions no longer contain a general provision expressly preserving common law rights (though that does not necessarily mean that they do not apply).

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The possibility of the Architect being required to give warranties or third party rights or to agree to a novation is addressed, and the CIC Collateral Warranty and the CIC Novation Agreement are listed in the schedules, but other forms can apply. It appears to be anticipated that the Architect will give collateral warranties or third party rights to all funders, purchasers and first tenants as they are not defined, and there is no provision for the actual recipients to be detailed in the Project Data. This could be dangerous as Architect may well want to limit the number of collateral warranties or third party rights they give, not least because otherwise these could take them outside their professional indemnity insurance.

The payment provisions have some areas of difficulty. Although percentage fees can be agreed, there is nowhere to specify the relevant percentage nor how it applies and how the parties settle up at the end of the day it not clear. Payment on termination or suspension, unlike under the SFA/99, seems to give the Architect no more than the last payment due and some costs, except for a curious provision about payment if a tender is not made or accepted. The last payment could be due at some time considerably earlier than the suspension or termination itself. There are also provisions allowing the fee to be adjusted but nothing to say how and when the adjusted fee is to be paid.

The most controversial aspect of the Conditions could well be the exclusion of all rights of set-off, coupled with restrictions on what payments the Client can withhold. It is controversial not least because the overall effect is unclear. The Construction Act in effect excludes rights of set-off where the payer has failed to serve a notice of withholding payment. However, these Conditions attempt to go further and state that the Client cannot withhold any amount due to the Architect unless the amount has been agreed with the Architect or has been decided by a tribunal as not being due to the Architect. It appears therefore that the Client must get a decision from a tribunal before withholding any payment (unless the withholding has been agreed to by the Architect). What about amounts that may be 'due' but which the Client wishes to withhold on the ground of negligent work? A court may well interpret this clause liberally, from the Client's point of view.

The Client should, in any event, serve a notice stating what it proposes to pay. Only if it fails to do this will the amount in the Architect's invoice be treated as the amount 'due'. I doubt, therefore, whether these provisions would necessarily oblige a Client to pay (even pro tem) any amount that it does not consider to be due.

As to the Services Schedule, there is still some uncertainty as to whether any 'activities' to be performed in respect of any Roles taken on by the Architect are to form part of his Services, and although the 'activities' of others who are to perform any of the other Roles are specified, this Agreement cannot of course impose obligations on those others. It is also not clear why design services are in a separate part of the Schedule and how these relate to what has gone before.

It is fitting to finish on a celebratory note. The RIBA have returned to the language of obligation and entitlement, abandoning the 'normative' style (with everything in the present tense) that was one of the worst aspects of the 2007 Conditions. This makes all the Conditions clearer and read more naturally.

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