

Not much agreement here
Rachel Barnes, December 2007

Ian Yule has already damned with faint praise (and some outright criticism) the RIBA agreement for the appointment of an architect, from an employer's perspective. Unfortunately, RIBA members are unlikely to feel inclined to leap to its defence, although their concerns will reflect the viewpoint of a consultant.

The agreement contains a satisfactory statement of the duty of reasonable skill, care and diligence, which should apply to any consultant's appointment. Surprisingly, though, it then sets out a series of duties that potentially impose more onerous and even stricter duties of the kind that should be avoided.

The agreement does say that the duty of care is to be exercised in discharging the (stricter) duties that follow. So does this mean that these apparently stricter duties should be understood as being subject to the duty of care? Maybe, but I think such an interpretation will be difficult to sustain. If these duties are not intended to add anything to the normal exercise of reasonable skill and care, why put them in?

The contractual duty of a professional consultant should be to exercise reasonable skill and care in performing services. That statement of the consultant's duty has never enabled a consultant to escape liability in a way that could reasonably be regarded as unfair to the client. It is unnecessary and inappropriate to impose an express duty requiring the consultant to comply with the client's brief or any timescale or cost limit; and, insofar as it may be creating strict or fitness for purpose obligations, it is also dangerous to a consultant's interests.

Clearly, a sensible client will ensure that consultants are aware of its requirements, including any cost or time constraints. If the consultant can be shown to have failed to comply with any such requirements the question to be answered in order to determine the consultant's liability should be: was this failure because of the consultant not exercising reasonable skill and care? If the answer is no, the consultant should not be held liable. It is troubling that the RIBA agreement, at best, muddies the waters on such a critical point.

Ian criticises the duty to comply with the brief on the basis that it is not strict enough (but, it should be noted, he is presumably not concerned that it may in fact be subject to the duty of care). This may suggest that there is an unbridgeable gulf between my approach to the agreement and his. However, I do accept some of his other concerns.

It does not seem reasonable to exclude the right of set-off in all circumstances (even where a valid notice of withholding has been given). I can also understand why some employers do not like 'net contribution' clauses. As an employer, I too would be concerned about the consultant being entitled to rely automatically on any information about the site obtained from me (without apparently having to exercise any independent judgment of its own). But this could have been provided in a different way.

I do, however, think that employers should be prepared to accept an overall cap on liability, as long as the amount is reasonable for the project in question, and many are.

The RIBA has adopted a normative linguistic style, in the present tense. But a contract is about legal obligations and legal entitlements, and the language should reflect this. It is not simply a statement of what one does. Writing it in that way not only seems odd but may create confusion. We read that the client issues instructions to resolve the matter, or holds the contractor responsible for management and operational methods and for health and safety on site, or appoints Other Persons to perform such work or services. One cannot help wondering whether clauses like this are in fact only intended to define a role, rather than create a contractual obligation for breach of which the client could be liable to pay damages to the consultant.

It has to be said, albeit with regret, that with the production of this agreement the RIBA has gone rather off the rails.

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