Welcome to the first edition of Beale & Company’s Newsletter for Architects. There has been a palpable return of confidence in the outlook for the construction sector and we wish all our readers a successful year ahead.

In this first newsletter we give you short and informative snapshots of key legal considerations to have in mind when negotiating your appointments and carrying out your architectural services. We also give our take on developments and opportunities for the architectural profession generally, including those arising from the RIBA Plan of Work, BIM, operating in international markets, and winning government contracts.

Please use the links below to click on the individual articles.

We welcome your feedback on this newsletter and also your suggestions on any future topics you might like us to cover.

Tom Pemberton, Partner

- RIBA Plan of Work 2013
- BIM
- Architects’ certificates: reliance and liability issues
- Garrick House Network Seminar: Update on cases concerning limitation of liability and net contribution
- International Markets
- “Lessons from the Museum of Liverpool”
- Improving Architects’ Access to Public Procurement
- A selection of Beale & Company highlights

RIBA Plan of Work 2013

The RIBA Plan of Work 2013 was published last May. It replaces the traditional A–L work stages with eight new numbered stages (0-7), and eight task bars.

Six months on, a survey carried out by the Architects’ Journal revealed that more than a third of architects surveyed have adopted the new plan and nearly a third have been asked to use the plan for competitions and bids, showing a significant take-up by clients.

The plan is the first of its kind to embrace BIM fully. It emphasises the importance of establishing the project team at an early stage and encourages the development of a technology strategy at the outset of a project. This can then be set out in a Project Execution Plan to be shared by the team and to enable interoperability issues to be addressed before the design phases commence, thereby enabling efficiencies to be realised in the design and construction process.

The plan also brings greater clarity to the specific tasks and outputs required at each work stage. This will assist in the allocation of resources and structuring of fees.
As the plan is increasingly adopted by the construction industry in order to keep up with developing technologies, professionals should update their standard appointments to ensure opportunities are not missed.

**BIM**

Building Information Modelling (‘BIM’) is being heavily promoted by the UK government, which aims to use “fully collaborative 3D BIM” on all centrally procured public sector projects by 2016. BIM is also central to the government’s Construction 2025 Strategy, which aims to reduce the cost of construction and the whole life cost of assets by 33% by 2025. Anecdotal evidence from projects where BIM is being used does indicate that it can help deliver this goal; e.g. the use of BIM for the government trial project at Cookham Wood prison has helped to deliver cost savings of 20% according to the case study on this project published by the Cabinet Office.

The use of BIM is likely to impact on the design process, which will become increasingly collaborative and see greater integration of the various different designs prepared on a project. The new RIBA Plan of Work has been prepared very much with BIM in mind. Architects with experience of using BIM and of working in a truly collaborative environment will therefore have a significant advantage over their competitors.

However, architects should take care as to how the use of BIM is reflected in their appointments. For example, it is important that the responsibility of the members of the design team for the production of any models, and the extent to which those models can be relied upon, is clearly set out. To assist in this regard the CIC BIM Protocol, drafted by John Henderson and Andrew Croft of Beale & Company, was published in March 2013.

The UK government is also aiming to use the Government Soft Landings initiative (“GSL”) on all centrally procured public sector projects by 2016. GSL aims to align the design process with the client’s operational requirements. This is to be achieved by having a “GSL champion” involved in the project on behalf of the client and by setting clear targets at the start of the project as to what the client wants from the project following completion. Following completion, there will be an ‘after care’ period of up to three years, during which the design team will provide performance reviews as to whether the project is meeting the targets. The legal/commercial implications of GSL are still being considered but care will need to be taken as to how it is approached contractually so as to ensure that it does not result in consultants assuming fitness for purpose obligations (which are typically excluded from PI insurance).

Please contact Andrew Croft (a.croft@beale-law.com) if you would like more information about BIM or GSL, or Jonathan Roscoe (j.roscoe@beale-law.com) if you would like a copy of Sheena Sood’s recent article for Building on the legal and contractual implications of GSL (“Soft Landings: Extra cushions”) to be emailed to you.

“Architects should take care as to how the use of BIM is reflected in their appointments.”
Architects’ certificates: reliance and liability issues

The recent case of Hunt and others v Optima (Cambridges) Limited and Strutt & Parker has highlighted the risks arising from the issue of certificates to third parties such as purchasers, tenants and funders. The leaseholders of a development had relied upon incorrect statements in certificates issued by the architect. The certificates were held to amount to contractual warranties, and the architect was held to be liable to the leaseholders both on the basis of negligent misstatement and breach of contract.

This judgment is has been the subject of an appeal (with the Court of Appeal’s judgment awaited at the time of issue of this Newsletter) and may be overturned. Whatever the outcome of the appeal, this case emphasises the need for the nature and wording of any certificate to be carefully considered before it is issued.

We are currently advising a number of architects on issues arising out of the provision of certificates. Please contact us if you would like advice on certificate wording or other issues arising from the above summary.

Garrick House Network Seminar on 4 December 2013: Update on cases concerning limitation of liability and net contribution

In association with the Garrick House Network, we recently held a seminar on issues to be considered when negotiating professional services contracts. At the seminar Anneliese Day QC (of 4 New Square) and Tom Pemberton and Sheena Sood (both Partners at Beale & Company) spoke about recent cases concerning limitation of liability and provided practical drafting tips for consultants negotiating professional services contracts, together with guidance for the management of legal risk under such contracts.

The drafting lessons to be drawn from a number of cases were considered, including Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd [2013] EWHC 1191 (in which Anneliese Day QC appeared for the successful defendant) and Sabic UK Petrochemicals Ltd v Punj Lloyd Ltd [2013] EWHC 2916 (TCC). While in Elvanite the caps on liability were held to be effective, in Sabic they were held to be subject to very substantial exceptions (including the Employer’s losses following termination and recoveries under performance bonds) not covered by the caps. Fortunately for the defendant in the Sabic case, nothing turned on this point as their liability was well within the cap in any event.

However, the Sabic judgment highlights that the courts can be expected to interpret clauses excluding or limiting a party’s ability as narrowly as possible, following the rule that such clauses should be construed against those relying on them. Accordingly, when drafting exclusion or limitation clauses, contract draftsmen should ensure they specifically refer to all the liabilities that are intended to be covered by such clauses, including any losses arising following termination, or under bonds, guarantees, collateral warranties and other ancillary contracts, if it is intended that the clauses should include liabilities arising under such instruments.

The case of West and another v Ian Finlay & Associates (A Firm) [2013] EWHC 868 (TCC) provided useful guidance on the court’s approach to interpreting net contribution clauses. In this case, it was held that the scope of the net contribution clause, which referred to “other consultants, contractors and specialists”, did not include the main contractor on the basis that the
reference to “contractors” was only to the direct suppliers that the client proposed to use to procure items outside the main building contract. This highlights the need to ensure that such clauses clearly identify the other parties to which they refer including the main contractor where so agreed.

**International Markets**

Drawing from our significant international experience, we set out below some general considerations for architects operating overseas. Each jurisdiction has its own laws and practices and specific advice should be taken on any given appointment.

**Differences in legal systems**

It is crucial to understand the legal implications of working in the jurisdictions in which you are operating. To give the example of the UAE, a strongly growing market which is targeted by many construction professionals:

(a) the UAE’s legal system is based on a civil code, which means that there is no system of legal reporting and no binding precedent, leading to uncertainty;

(b) under the decennial liability rules consultants have strict liability for any defects that can threaten the stability of a structure or the safety of its inhabitants. A consultant would therefore not be able to rely on a defence that it has exercised reasonable skill and care (so decennial liability would therefore not normally be covered by a typical UK professional indemnity insurance policy); and

(c) terms of appointment can often be onerous, with clients frequently requiring absolute obligations and fitness for purpose warranties, which again typically cannot be insured.

You should notify your professional indemnity insurers when you are considering working in an overseas jurisdiction so that they can advise you on the choice of appropriate PI insurance products and wording.

**Compliance with UK laws while operating abroad**

Even while operating abroad, UK companies are required to comply with certain UK laws such as the Bribery Act 2010, which requires a high level of monitoring and can be a challenge in countries where gifts and facilitation payments are the norm.

**“Lessons from the Museum of Liverpool”**

The case of *The Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Limited and others* has highlighted the need for architects to ensure that the scope of their design responsibility and services is clearly defined and understood.

AEW was held liable for damages of £1.1M caused by major technical faults in the steps, seats and terraces to the exterior of the museum. AEW contended that they were not responsible for the design of these significant architectural features, but instead that responsibility lay with the contractor.
The judge, Mr Justice Akenhead, found that AEW’s understanding “was simply wrong”.

AEW’s original role was as the Contract Administrator. It later became the lead architect, undertaking both the lead and coordination role and an inspection role. The Judge commented that the co-ordination role was “an important one”, and one which he found AEW was “extremely poor” at performing.

Architects should ensure that that their responsibilities (and those of the contractor and the other consultants) are clearly identified in their appointments and understood, and that all parties have an understanding of how the architects’ services integrate at a project wide level with those of all other parties concerned.

Improving Architects’ Access to Public Procurement

The Government has published the outcome of its consultation on making public sector procurement more accessible to SMEs. This should make it easier for architects to win Government contracts. It also published a guidance note entitled “Small businesses: GREAT ambition” which contains a summary of its commitments to help small businesses grow.

The Government will introduce legislation to:

- streamline the procurement process by abolishing Pre-Qualification Questionnaires (PQQ) for low-value contracts;
- mandate the use of a standard core PQQ for high-value contracts and ensure small business needs are taken into account in the design of procurement processes;
- make contract opportunities easier to find by making them all accessible on a single online portal; and
- make sure small firms are treated fairly by mandating prompt payment terms all the way down the supply chain.

In the “Small businesses: GREAT ambition” guidance note, the Government has made the following additional commitments:

- 25% of central government exposure to go to SMEs by 2015 along with major changes to open up the rest of the public sector;
- the introduction of a new rating service called “Spotlight” that would allow bidders to rate public bodies on their procurement credentials and for public bodies to rate their suppliers;
- the launch of a new service, Solutions Exchange, to help public sector organisations to go to the market to ask for ideas and solutions to problems before a formal procurement; and
Beale & Company news

Last year we unveiled a more modern look for the firm with a re-brand of our logo and website. As well as modernising our image it also signified our commitment to developing with our clients and our own further growth. In 2013 Will Buckby was promoted to Partner reflecting the success of our international construction practice, we promoted three to Associate in our Dublin office and we offered solicitor positions to trainees in London and Bristol. 2014 will see further changes for the firm as our Covent Garden office will be re-locating to new offices in the City of London.

We have made significant investment in our international team and presence over the last few years which has led to us working on many high profile development projects and international arbitrations across the year in jurisdictions including Africa, Europe and the Middle East. We received recognition of our achievements from British Expertise who have shortlisted us for the ‘Outstanding International Business Award (SME) 2014’.

With thanks for your support last year, we wish all our clients and friends a happy and successful 2014 and look forward to working with you.

Beale & Company were proud to sponsor the AJ Women in Architecture Awards 2014 that took place earlier this month. Congratulation to the winners!

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