Association of Project Safety Forms of Appointment

The Association of Project Safety (“APS”) recently published three new forms of appointment to reflect the CDM Regulations 2015, which came into force on 5 April 2015.

These forms are for the appointment of:
- a principal designer;
- an adviser to the principal designer; or
- a “CDM Adviser” to the client.

Broadly speaking, two types of liability can arise in relation to the CDM Regulations 2015: criminal liability which cannot be limited or excluded and contractual liability under an appointment which includes obligations in relation to the CDM Regulations 2015, which can be limited or excluded.

The APS forms of appointment contain some useful protection for a consultant in respect of any contractual liability arising out of the CDM Regulations 2015. However, we perceive a number of issues arising out of the APS forms, including in relation to the limit of liability, the potential strict obligations of the principal designer and the approach to sub-consulting the principal designer role.

Some useful protection

The APS forms include a number of the provisions regarding liability which one would expect to see in a standard consultancy appointment, such as a limit of liability, a net contribution clause and a contractual limitation period which (subject to our comments below) should provide useful protection for the consultant.

In addition, the APS forms deal with some specific risks arising from the CDM Regulations 2015. For example, one concern arising under the CDM Regulations 2015 is the risk of the consultant being responsible for acts of third parties, in particular other designers or the principal contractor. The APS forms include the following provisions to manage these risks:
designers appointed by the client must be contractually required to comply with their obligations under the CDM Regulations 2015 and to co-operate with other designers and the principal designer (clause 4);

+ the principal contractor must be contractually required to liaise with the principal designer, to share information with the principal designer and to provide information promptly for the Health and Safety File (clause 2(h)); and

+ the principal designer and the adviser to the principal designer appointments state that the principal designer is not liable for contributions to the Health and Safety File from any designers or contractors, save as arises from the principal designer’s services (clause 6c)).

These provisions should help to mitigate some of the risks arising under the CDM Regulations 2015. However, these provisions will not prevent the consultant from being liable for the acts of those third parties under the CDM Regulations 2015 themselves (as opposed to the APS form of appointment) to the extent that they impose duties on the principal designer.

The APS forms also provide for the consultant to notify the client if any conflict arises in relation to the performance of the consultant’s obligations. In this event, the client and the consultant are to meet and agree an appropriate form of action. Under the APS appointments of a principal designer and adviser to the principal designer, if the conflict is between the requirements of a principal designer under the CDM Regulations 2015 (“the Requirements”) and the Services, the Requirements prevail. This provides a useful mechanism through which the consultant can highlight any concerns it may have that the obligations under the appointment may result in it breaching the CDM Regulations 2015, albeit that it is unclear what the position will be if the client and the consultant are unable to agree “an appropriate form of action”.

**Limit of Liability**

In the APS forms, liability for various matters, such as breach of implied terms, misrepresentation and breach of a common law duty (including negligence) is excluded, except as expressly provided in the appointments or required by law (clause 6(a)) save in respect of death or personal injury caused by negligence. The APS forms then limit liability “in contract for any breach or breaches” to a specified amount (clause 6(b)).
There are risks associated with excluding and limiting liability in this way, rather than simply limiting all liability to a specified amount (as is the standard approach). It appears that the APS forms attempt to exclude all liability for negligence at common law (except for death or personal injury). Whilst the consultant is likely to be in breach of the appointment if it is negligent and could therefore be liable contractually, there is a risk that a court would refuse to enforce these limits/exclusions under UCTA 1977 or UCCR 1999 on the basis that excluding all liability at common law for negligence (except for death or personal injury) is unreasonable. This may mean that the consultant’s liability for negligence at common law is unlimited. Similarly, it is unusual that all liability for breach of any implied term is excluded. This goes further than a standard entire agreement clause and, as with excluding liability for negligence at common law, excluding liability for all implied terms may be considered to be unreasonable and unenforceable. A straightforward limit of liability would therefore be preferable.

We should also highlight that the financial limit of liability in the APS forms is not expressly stated to be an aggregate limit of liability clause, which appears to be the intention. Given that any ambiguity in a limit of liability may be given interpretation least favourable for the party trying to rely upon the limit, the drafting would need to be expanded if it is intended to be an aggregate limit.

**Services**

As you would expect in a standard agreement, the APS forms require the consultant to exercise reasonable skill and care in carrying out his duties under the appointment. However, this duty is not expressed to be an overriding standard of care. This is a concern given that some of the duties of a principal designer under the CDM Regulations 2015 are not expressly qualified (see the FAQs we published here) and therefore liability could arise under these forms of appointments even if the consultant has not been negligent.

Further, the appointments as principal designer and adviser to the principal designer repeat the wording of the CDM Regulations 2015 in the Schedules of Services, including the duties to “ensure all designers comply with their duties” (Reg 11(4)) and to “ensure all persons working in relation to the pre-construction phase co-operate with the client, the principal designer and each other” (Reg 11(5)). Whilst the Schedule of Services is likely to be tailored for each appointment, if those in the APS forms are used this will increase the risk of strict liability arising.
In addition, the APS forms of appointment for principal designer and adviser to principal designer also require the consultant to "discharge the Requirements". The effect of this obligation is unclear, but it is likely that in order to discharge the requirements of the CDM Regulations 2015 the consultant would need to comply with the duties of a principal designer under the same, including Regulations 11(4) and 11(5) (see above). Accordingly, in our view there is a risk that a consultant appointed under the APS forms for either principal designer or adviser to the principal designer will be strictly liable for any breach of these duties. Such strict liability may not be covered by the consultant’s professional indemnity insurance.

**Sub-Contracting the PD Role**

Another concern arising out of the APS forms and in particular the appointment as adviser to principal designer is that the effect of the APS form does not appear to be to appoint “an adviser”. Rather the APS form essentially appoints a sub-consultant who is required to fulfil the principal designer’s role, in that, as commented above:

+ the “adviser” is required to discharge the requirements of a principal designer under the regulations and not simply “advise” the principal designer in relation to those requirements (as is stated in the appointment of a CDM adviser to the client); and
+ the Schedule of Services repeat the duties of a principal designer under the CDM Regulations 2015, rather than setting out the extent of any advice to be provided to the principal designer.

In our view, this approach is inconsistent with the spirit of the CDM Regulations 2015 and there will be a number of risks associated with such an approach. For example, notwithstanding that it has appointed an “adviser” to “discharge” the requirements of its role, the principal designer will retain statutory responsibility under the CDM Regulations 2015 (and therefore criminal liability). In addition, whilst the adviser is required to discharge with the requirements of a principal designer under the CDM Regulations 2015, it is not required to have regard to the principal designer’s form of appointment with the client. There is therefore a risk that if an act or omission by the adviser causes the principal designer to breach its appointment, the principal designer will not necessarily be entitled to pursue the adviser, although if the APS forms are used to appoint both the principal designer and the adviser to the principal designer the obligations will be very similar under both appointments.
There are also risks for the adviser arising from the APS approach. Given that the adviser's obligations are very similar to those under the APS principal designer appointment, the adviser may also be strictly liable for any breach of the principal designer's duties by the adviser (see above).

Similarly, whilst the form of appointment states that the CDM Adviser is required to “advise” the client on the requirements placed on the client under the CDM Regulations 2015, the Schedule of Services sets out the adviser’s services by reference to some of the client’s duties under Regulation 8 of the CDM Regulations 2015. The precise “advice” required from the Adviser under the appointment of a CDM Adviser to the client is not specified. This should be clearly set out in any such appointment.

Conclusion

Whilst the APS forms contain some useful provisions and take into account some risks arising under the CDM Regulations 2015, they should be considered very carefully before being used by a consultant. In our view there is a real risk of strict liabilities arising from the APS forms, which may not be covered by professional indemnity insurance. Moreover, the APS appointment for an adviser to the principal designer appears to fully pass the statutory role of principal designer to the “adviser” (without necessarily passing on all contractual liability under the principal designer’s appointment). This is not consistent with the intention of the Regulations and following the appointment of such an adviser the principal designer will nevertheless retain statutory liability arising out of that role. It is also important that the scope of any “CDM Adviser” or adviser to the principal designer is clearly set out in any appointment and does more than simply refer to the duties under the CDM Regulations 2015.

June 2015

For further information please contact:

Sheena Sood
Partner
T: +44 (0) 20 7469 0402
E: s.sood@beale-law.com

Andrew Croft
Solicitor
T: +44 (0) 20 7469 0412
E: a.croft@beale-law.com