Onerous terms must be resisted

Guest editors Will Buckby and Madeleine Kelly of Beale & Company Solicitors LLP report that increasingly onerous conditions are being imposed on consultants, some which may not be covered by professional indemnity insurance. Consultants must be prepared to ‘walk away’ when conditions attempt to impose risks that cannot be properly managed, they urge.

Whilst all eyes are focussed on Brexit and the implications of a ‘deal’ or ‘no-deal’ outcome, over the last year or so, the construction and insurance markets have been encountering new and difficult challenges, which are having a significant impact on professionals.

Is it getting tougher?
Consultants are facing increasingly tougher contractual terms in their professional appointments, which require increasing attention when reviewing and negotiating contracts. In particular, employers’ solicitors are imposing increasingly onerous terms; what is more worrying is that at times these terms are not typically covered by professional indemnity insurance policies. At the same time, the insurance market (notably since the end of Q4 of 2018) is hardening; amongst other things the scope of professional indemnity insurance cover is narrowing, there are less insurers willing to underwrite such cover and premiums are on the rise.

Will the hardening of both markets lead to difficult times ahead for consultants?

Onerous contractual terms
Historically professional indemnity insurance has been at the heart of determining the terms of consultants’ appointments. Contractual terms and particularly standard forms have been shaped by the cover available (eg the consultant’s duty to exercise reasonable skill and care is akin to the cover available under most policies). And this is clearly in everyone’s interests – in the event of a significant or ‘dooms day’ claim which is not covered by insurance, given that consultants have limited assets (their assets are their people), the claimant is unlikely to recover more than a few pence in the pound if the consultant becomes insolvent.

However, this approach appears to have been forgotten by some. Employers (or their lawyers) are more frequently insisting on contracting on the basis of their own bespoke appointments that quite often contain extremely onerous obligations, which take consultants outside the remit of their insurance coverage.

In particular, we were surprised to witness (on a major infrastructure project) an employer’s solicitor brazenly admitting that they were fully aware that the consultant in question would not be covered by its professional indemnity insurance policy for fitness for purpose obligations and, despite this, they expected the consultant to sign-up to these obligations. Quite short sighted – you may rightly say.

This approach by employers’ solicitors has become more and more prevalent over recent years. Regularly, we see appointments sent to consultants that are riddled with, amongst others, strict (or absolute) and fitness for purpose obligations; and obligations to comply with third party agreements (which in turn are likely to be riddled with the same onerous terms). In addition to provisions which put consultants outside their insurance, we also see clients struggle to negotiate the inclusion of aggregate caps on liability (drafted caps are subject to carve-outs for compliance with statutory requirements, uninsurable losses, gross negligence (a concept not defined in English law) etc) and net contribution clauses. With more onerous terms an appropriate cap on liability becomes more important.

Recent case law demonstrates the importance of having key terms in professional appointments,
Some significant rulings in recent years include: *MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd [2017] UKSC 59* (where the Supreme Court found that contracts can contain parallel duties such as to exercise reasonable skill and care that to ensure the design is fit for purpose); *Perimmon Homes Ltd v Ove Arup [2017] EWCA Civ 373* (regarding the enforceability of limitation and exclusion clauses); *British Overseas Bank Nominees Ltd v Stewart Milne Group Ltd [2018] CSOH 125* and *Swansea Stadium Management Company Ltd v City & County of Swansea [2018] EWHC 2192 (TCC)* (both regarding limitation clauses in collateral warranties).

In particular, *MT Højgaard* is a wake-up call to consultants, to not only limit liability to a financial cap, but to also ensure that obligations are no greater than the common law professional duty to exercise reasonable skill and care (for which professional indemnity insurance will cover).

In addition to exercising vigilance in reviewing contracts, consultants will need to be more bullish in their approach to negotiating appointments with clients as the contractual landscape gets tougher.

### Hardening insurance landscape

Notwithstanding a challenging contractual landscape, as noted, the insurance market is also changing its approach to the construction industry. There are a number of factors here.

The industry has seen several Lloyd’s syndicates and specialist insurers exit the professional indemnity insurance market over the last couple of years; and those insurers who continue to write professional indemnity insurance are restricting their coverage for certain types of claims, eg for cladding and other deleterious materials. This is primarily due to large losses in respect of construction related claims. High profile catastrophic events, such as the Mandarin Oriental fire and the Grenfell Tower tragedy have decimated insurers’ reserves in the construction space.

This has led to increased premiums and decreased scope in cover for issues including, amongst others, fire services and cladding. The reduction in capacity in the market means insurance rates become less competitive; premiums increase; the drafting of policy terms narrow; and excesses increase.

Such changes in direction will need to be managed and reflected in appointments. Given the increase in premiums, consultants will need to consider how they viably pass these costs on to employers. In addition, consultants will need to carefully manage their claims notification procedures as insurers seek to mitigate loss by imposing onerous conditions on how claims are notified.

### What should consultants do to manage the risks arising out of these tougher market conditions?

All contractual terms must be carefully reviewed and onerous terms must be negotiated out of appointments. Consultants should still ensure that the appointment does not contain obligations that are not covered by their professional indemnity insurance policy (ie obligations no greater than reasonable skill and care). They should also ensure that all appointments contain a robust aggregate cap on liability no higher than a consultant’s professional indemnity insurance limit of indemnity.

Unless the procurement procedure does not permit negotiations, such as the ‘restricted procedure’ under the Public Contract Regulations, negotiations are commonplace and a typical part of the process of getting into contract. Negotiations can be time consuming but are vital to ensure an appointment with the correct risk profile for a particular project.

Consultants should also consider very carefully what risk management measures are put in place if the appointment is onerous and contains unacceptable risk; and if those provisions or risks cannot be managed they should be prepared to ‘walk away’.

In conjunction with this, it is imperative that professionals understand their insurance requirements and ensure consistency between their appointment terms and insurance policy terms. The professional indemnity insurance policy should still be the ‘bedrock’ of any appointment, despite attempts from employers and their lawyers to change this.

Finally, employers and in particular their legal advisors need to be reminded that it certainly is not in their interest to agree to provisions which take the consultant outside its professional indemnity insurance policy. In the event of a significant claim not covered by insurance, it is quite possible that this would lead to the insolvency of the consultant, meaning that the employer would only recover a ‘few pence in the pound’. This dialogue needs to be had more often. CL