A Little Give and Take
Rachel Barnes, July 2006

The Construction Industry Council's consultants' agreement is aimed at a particular market – experienced clients working with experienced consultants on major projects – and does not replace standard forms published by, for example, the RIBA and the ACE.

This partly answers Ann Minogue's concern that there are now a large number of forms for professional engagements. However, there is still some force in Ann's point and nobody seriously expects lawyers to be put out of business. The CIC agreement is put forward as a compromise between the interests and concerns of consultants and their clients. If it achieves this, almost by definition it will have detractors on both sides.

Those who welcome such a compromise should be encouraged by Ann's relatively mild criticisms on behalf of employers (apart from her concern about the cap on liability) and by the claims of John Hughes-D'Aeth, one of the contract's authors, that consultants are calling him a saviour.

Ann is concerned that the obligation to have due regard to the brief may not be sufficiently robust. One of the reasons why consultants could not accept the British Property Federation agreement was because it contained a strict obligation to comply with the brief and other strict obligations, some of which could have included warranties for fitness for purpose.

Does the CIC agreement avoid this problem? Perhaps not entirely. It provides for example, that the consultant shall exercise skill of a standard to see that services are performed in accordance with the brief. The 'standard' is defined as the reasonable skill and care to be expected of a consultant experienced in providing similar services on projects of a similar size, scope and complexity (this is similar to the BPF standard).

Remember that the CIC agreement is a package. It will not appeal to everyone. Some consultants will be concerned that the copyright licence is not subject to payment of fees. If the client goes bust, the consultant may lose millions in unpaid fees while having no way of preventing its designs being used.

On the other hand, there is no need to have an express contractual obligation to comply with statutory requirements. I have some sympathy for Ann's point about the client warranting the accuracy of specialist reports but this relates only to those provided by the client and is set in the context of whether it is reasonable for the consultant to rely on them. This should prompt a discussion between the client and the consultant as to the proper weight to be given to these reports.

What about the cap on liability which Ann says is the main issue? John thinks, as do I, that caps are increasingly common and many clients will accept them as reasonable. Ann thinks not. Who is right? In the end, one's own experience must be the guide.

Of course, clients would pick up the difference between the cap and the actual losses, as Ann says. Do they not carry the risk of losses anyway? They can never be sure that losses that they suffer on the project will be recoverable from a consultant. We are talking about one particular risk – the risk of losses over and above a reasonable limit that would otherwise be legally recoverable from the consultant, although being legally recoverable does not mean that they would be so recovered. Who is best placed to bear this risk? On large commercial projects, the answer, to my mind, is obvious.
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