



BEALE&CO

CONSTRUCTION ENGINEERING & INFRASTRUCTURE

Contractual Considerations in 2021 – a New Landscape?

Will Buckby and Robert Read – Wednesday 20 January 2021

Introduction



Will Buckby
Partner, Contracts and Project Advisory
T: +44 (0) 20 7469 0411
E: w.buckby@beale-law.com



Robert Read
Associate, Contracts and Project Advisory
T: +44 (0) 20 7469 0422
E: r.read@beale-law.com

Agenda

1. Overview of current contractual climate
2. Key contractual considerations
 - a. Duty of care
 - b. An increasingly complex contractual framework
 - c. Payment and variations
 - d. Professional indemnity insurance
 - e. Limitations of liability
 - f. Fire safety
 - g. Brexit, Covid-19, prolongation and force majeure
 - h. Novation
3. Practical risk mitigation suggestions
4. Conclusion



1. Overview of current contractual climate

Overview of current contractual climate



1. The purpose of this webinar is to review the current contractual climate and consider what steps need to be taken as a result
2. What a year 2020 has been! – hardening insurance market, Covid and Brexit
3. Harsher appointment terms – more onerous terms not typically covered by PI insurance

2. Key Contractual Considerations in Appointments

Duty of care

- + Negligence based professional indemnity insurance policies
- + Inclusion of overriding standard of care essential
- + Where there are different standards (e.g. a standard of care clause and a separate fitness for purpose obligation), the higher standard will prevail (**MT Højgaard A/S -v- E.ON [2017], Blackpool BC v VolkerFitzpatrick [2021]**)
- + Clients are increasingly insisting on fitness for purpose obligations (e.g. HS2)
- + Clients are increasingly looking to broaden scope of deleterious materials obligations



An increasingly complex contractual framework



1. In appointment, incorporation of:
 1. Brief
 2. Budget and cost plans; and
 3. Third party agreements
2. Compliance with building contract
3. BIM Protocol
4. Client policies and procedures
5. Sub-consulting

Payment and variations

1. Onerous payment obligations which are on the rise (such as long payment periods)
2. Payment provisions which are not Construction Act compliant: **Rochford Construction v Kilhan Construction [2020]**– increased risk that Scheme will apply
3. Conditions precedent and other administratively demanding provisions
4. Clients are increasingly including provisions allowing them to omit services without the consultant being entitled to loss of profit (**Van Oord v Dragados [2020] CSOH 87**)



Professional indemnity insurance - background

- + Current hard market
- + Brief history and reasons for hard market
- + Reduced capacity
- + Consequences for professional services
- + No end in sight!



Difficult renewals

- + Much more detail / interrogation during renewals
- + Widespread exclusions
- + Lower limits of indemnity / in the aggregate
- + (And if you don't have reduced cover now you will at next renewal)
- + Increased premiums!



Example wordings

ACM and Combustibility Exclusion – External & Internal

We will not indemnify **You** against anything arising directly or indirectly from or relating to:

1. any cladding system or cladding materials consisting in whole or in part of Aluminium Composite Material; and / or
2. the combustibility or fire safety requirements of any cladding, glazing, doors, external wall system and/or internal wall system of any building or structure; and / or
3. the combustibility or fire safety requirements of any component or material used in the manufacture, assembly or construction of any cladding, glazing, doors, external wall system and/or internal wall system of any building or structure.

For the purposes of this exclusion, Aluminium Composite Material shall mean a type of panel that consists of two aluminium sheets bonded to a non-aluminium core.

Example wordings

The following clause forms part of the 'Exclusions' Section to this **Policy**.

The **Policy** excludes and the **Insurer** shall not be liable to the **Insured** for any **Claim** or **Circumstance** based on any loss, damage, or any other liability including **Defence Costs and Expenses** directly or indirectly arising out of, or in any way connected with the combustibility or fire protection performance of all façade materials including but not limited to external cladding to include associated core, filler, signage and insulation.

All other **Policy** terms, conditions, limitations and exclusions remain unaltered.

Practical questions



- + Ensure appointment consistent with professional indemnity policy
- + Consider exclusions are reflected in appointment
- + Resist unreasonably high levels of insurance even where they are consistent with your current policy
- + Ensure that any such obligation is subject to insurance being available at commercially reasonable rates and terms

- + Check sub-consultancy agreements

Fire safety



1. Possible limitations/exclusions in respect of fire safety, ACMs and combustible materials include:
 - a. Complete exclusion
 - b. Cover on an aggregate basis
 - c. Cover for repair costs only
 - d. A high excess
 - e. Fire safety exclusion where there has been a breach of the Building Regulations
 - f. Fire safety exclusion in relation to specific elements of a building
2. For new appointments
3. For existing appointments
4. Form EWS1 – see webinar External Wall Fire Safety and Form EWS1 (2 December 2020)

Limitations of liability

- + Financial caps – employers are increasingly seeking to undermine the desired protection of an aggregate limit of liability, by seeking:
 - increasingly wide carve-outs
 - financial cap on an each and every claim basis
 - exclusion from cap of liability under collateral warranties
 - unreasonably high levels of cap
 - to not include sub-caps necessary to bring the obligation in line with the consultant's policy
- + Others, e.g.:
 - net contribution clause
 - indirect and consequential loss exclusion



Prolongation Brexit, Covid-19 and force majeure



1. Delay projects/provision of services
 - a. Brexit – customs checks and controls at border, end of freedom of movement of workers
 - b. Covid 19 – social distancing (CLC site operating procedures – version 7), availability of resources
2. In the event of prolongation, you will be entitled to:
 - a. additional fees
 - b. an extension of time in relation to any time related obligations (such as compliance with programme)
3. Consider adding a right for the consultant to suspend or terminate
4. Force majeure?
5. Construction Law “Prolongation and Fair Recourse for Consultants”

Key contractual considerations – novation

1. Ab initio novation is now standard
2. CIC Novation Agreement - Ab initio (first edition)
3. Be wary of contractors increasingly looking to avoid being on the hook for fees outstanding to consultants at the point of novation



3. Risk Management Measures

Practical risk mitigation suggestions

1. Read your contract terms
2. Get your contracts reviewed
3. Ensure that appropriate peer review / work supervision is taking place within your practice
4. Be prepared to walk away from work where on a cost-benefit analysis the risk under the contract outweighs the benefit of the work
5. Ensure that your appointments mirror your professional indemnity insurance policy
6. If you have had fire safety exclusions/limitations imposed on you at your recent PI insurance renewal, we can work with you to review your position under your existing and new appointments – please do ask
7. Don't leave your contract in the drawer

Professional indemnity insurance – risk management

Beale & Co have been working with a number of clients and have developed a package of legal risk management services to assist you to respond to narrowing PI cover, manage risk and protect your business in response to the limitations in cover. In particular, Beale & Co can provide:

- An overview of your current PI cover, including limitations in cover for fire safety etc
- A legal risk audit of completed and current projects from which fire safety liabilities may arise
- Advice on steps to take where cover is no longer as wide as agreed in contractual documentation
- Standard terms of business to accompany your proposals and tenders
- Advice on negotiation strategy in a tough construction market
- Standard clauses for inclusion in appointments and contracts to ensure consistency with PI insurance
- Training on the hardening insurance and contractual market
- Claims trends

4. Conclusion

Conclusion – What a year!

1. The contractual and insurance markets have hardened – a challenging time for consultants!
2. Brexit, Covid-19 and fire safety exclusions are key risks moving forward
3. Do consult Beale & Co and your brokers to assist





Webinars – “Construction Winter Webinar Series”

- + 25 November (recorded) - **Software as a Service – Consultants as Technology Providers and the Legal Ramifications**
- + 2 December 2020 - **External Wall Fire Safety and Form EWS1**
- + 16 December 2020 – **Prolongation and Variations in Consultant’s Appointments**
- + 13 January 2021 – **Where will the Golden Thread lead – the Draft Building Safety Bill**
- + 20 January 2021 - **Contractual Considerations in 2021 – a New Landscape**

- + **Construction Spring Webinar Series – TBC**
- + webinars@beale-law.com
- + marketing@beale-law.com

Introduction



Will Buckby
Partner, Contracts and Project Advisory
T: +44 (0) 20 7469 0411
E: w.buckby@beale-law.com



Robert Read
Associate, Contracts and Project Advisory
T: +44 (0) 20 7469 0422
E: r.read@beale-law.com