December 2005
Issue 05

Construction matters

Let's have a single consultancy agreement?

How about a single agreement for all the consultants, regardless of discipline, and no collateral warranties?

On the 25 May 2005 the British Property Federation published a new consultancy agreement. The aim was bold — to combine core clauses, common to all consultants (e.g. duty of care) with optional clauses and schedules of services which reflected the consultants' different roles. The thinking behind all this is sensible. First, it might allow us to wave goodbye to the confusing range of RIBA, RICS and ACE appointments. Second, lawyers might be less keen to propose 'bespoke' forms.

Is the BPF agreement good or bad? Lawyers are divided. Consultant lawyers cry 'foul'. Developer lawyers commend the form's concision and clarity.

The agreement is short; 16 clauses set out on 10 pages. The Contracts (Rights of Third Parties) Act 1999 is preferred to the collateral warranty. Consultants criticise (a) the absence of a cap on liability and a net contribution (other than in the third party rights), (b) the duty of care clause and (c) the limited circumstances in which a consultant can seek additional remuneration. Many other clauses — e.g. professional indemnity insurance, copyright, employer obligations and termination are commonplace.

Clause 2.1 (duty of care) requires the consultant to use the '*reasonable skill, care and diligence to be expected of an appropriately qualified consultant in the discipline to which the Services relate...*' — more than the common law requirement but not unusual. No more listing of proscribed materials - clause 2.2 demands selection of materials in accordance with the 'Ove Arup Manual'.

Some commentators condemn the third party and novation clause (clause 5). The employer provides the consultant with relevant third party agreements (i.e. agreements for lease or development agreements) or extracts from them. Schedule 4 sets out the rights, which funders and first purchasers/tenants may enjoy. The consultant is liable for the reasonable costs of reinstatement (purchaser/tenant) but subject to a net contribution clause. The funder does better. He recovers consequential loss as well. For those not prepared to adopt third party rights, clause 5.6 allows BPF format collateral warranties. For 'design and build' schemes, Schedule 5 contains a model novation agreement, condemned by some commentators as anti consultant.

Consultants may dislike the payment clauses — clause 10 (payment) and clause 11 (additional services). The consultant receives a lump sum. A number of circumstances permit adjustment. The employer adjusts the payments if the proportion of fees does not match the services provided. Schedule 3 (Part 3) lists six additional services. These do not include work done in the event of disruption or prolongation or in preparing alternative designs.

The employer can assign his interest under the agreement without consent but the consultant must have consent (clause 13). The thinking behind clause 14 may be new to some. If the consultant believes (prior to completion of Work Stage 2) that any design should be carried out by the contractor or a sub-contractor he will submit his written proposals for the employer to consider. Where such work is carried out by the contractor or a sub-contractor the consultant remains liable for its integration with the works as a whole. The consultant does not check the detailed design of any proprietary product.

The Appendix contains 'model' schedules of services for traditional, design and build procurement — (a) architect; (b) structural engineer; (c) building services engineer; (d) quantity surveyor and (e) planning supervisor.

To suggest the form is seriously flawed is absurd, just eye-catching hyperbole. It will work successfully across a range of projects. Of course, there will be the usual commercial negotiations with individual consultants prior to any agreement being signed, but that's life.

HUGH JAMES

Ensuring Expert Quality

In June 2005 the Civil Justice Council published a chunky document of 22 pages or 5809 words, entitled *Protocol for the instruction of experts to give evidence in civil claims*. The Protocol was to come into effect on the 5th September 2005. The Academy of Experts and the Expert Witness Institute have produced a Code of Practice. The stated aim of the Protocol is to provide guidance both to experts and to the lawyers instructing them. Non-compliance with the Protocol may have cost implications (paragraph 3.4).

What is the Protocol's structure?

- Introduction and Aims of the Protocol (Parts 1 and 2)
- Application (Part 3)
- Expert Duties (Part 4)
- The Need for Experts (Part 6)
- Appointment of Experts (Part 7)
- Instructions (Part 8)
- Acceptance of Instructions (Part 9)
- Asking the Court for Directions (Part 11)
- Contents of Expert Reports (Part 13)
- Amendment of Reports (Part 15)
- Single Joint Experts (Part 17)
- Discussions between Experts (Part 18)

Paragraph 7 provides a useful check list for lawyer and expert.

Does the proposed expert have:

- the appropriate expertise and experience;
- familiarity with the general duties of an expert;
- the capacity to produce a report, deal with questions and have discussions with other experts within a reasonable time and at a cost proportionate to the matters in issue;
- a description of the work required;
- capacity to attend the trial, if attendance is required; and
- no potential conflict of interest.

Lawyer and expert should also agree the terms of the appointment, including: (a) services; (b) time for delivery of the report; and (c) the basis of the expert's charges, including travelling expenses and disbursements, cancellation charges, any fees for attending court, time for making the payment and the identity of the paying party. In addition, solicitors should inform experts regularly about deadlines and promptly send them copies of all relevant court orders and directions.

Lawyers should give:

- clear instructions, including necessary contact details;
- case papers;
- an outline programme for the completion and delivery of each stage of the expert's work;
- Court dates already allocated.

Where experts do not receive clear instructions they should request clarification.

Cases are often won and lost on the content of the expert reports (paragraph 13).

- Experts should maintain professional objectivity and impartiality at all times;
- Lawyers should ensure that experts understand the requirements in PD 35, paragraph 2 concerning experts' reports;
- Experts' reports must contain statements that the expert understands his duty to the court and has complied and will continue to comply with that duty;
- Reports must be verified by a statement of truth, the wording of which is mandatory and cannot be modified;
- Expert qualifications, including special training relevant to the subject matter, should be identified;
- Important for the construction industry where tests are routinely carried out:

(a) The methodology should be identified;

(b) The persons who carried out the tests should be named and their qualifications, experience and supervision noted.

The Protocol is applied common sense but does not mean the practicing expert can survive long without a copy. Get one!

HUGH JAMES

Hugh James Solicitors
Hodge House
114–116 St Mary Street
Cardiff CF10 1DY

029 2022 4871
www.hughjames.com

Christmas Competition

Win a bottle of champagne to toast the New Year. Answer the following question to be entered into the prize draw...

Q Which song eulogised a route to the after life?

Answers by E mail to **paul.newman@hughjames.com** by 19 December 2005.