MANAGING RISK & LIMITING LIABILITY IN PROFESSIONAL APPOINTMENTS

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What I will cover:-

- Introduction to BTO
- Contractual Interpretation
- Fitness for Purpose Obligations/Duties of Care
- Prescription
- Caps on Liability
- Exclusions of Liability
- Net Contribution Clauses

BTO – What do we do?

Contract Advice:-

- Advising on procurement strategy and contract options;
- Drafting, negotiating and assembly of:
  - Construction Contracts;
  - Sub-Contracts;
  - Collateral Warranties;
  - Guarantees and Bonds
- Reviewing contracts and advising on practical and operational aspects of terms and conditions.

BTO – What do we do?

Contentious Construction Support

- Opinion work:-
  - Advice on contractual interpretation;
  - Advice on operational aspects of contracts;
  - Advice on extension of time and loss and/or expense claims;
  - Final account negotiations, defects and construction failures

- Advising and representing clients in:-
  - Litigation;
  - Adjudication;
  - Arbitration;
  - Mediation

BTO – What do we do?

- Regular news and legal updates.
- We provide seminars and training sessions – across all areas of business - not just construction.
- We are always happy to here from you – please feel free to get in touch, Peter Clelland (pcl@bto.co.uk – 0131 222 2939)

Risk in Construction Contracts

- There are lots of risks inherent in construction contracts.
- Someone will always be liable to pay if/when things go wrong.
- You need to be well aware of your rights and obligations.
- The Employer will want to transfer as much risk on to the Consultant as possible.

Contractual Interpretation

- Essential to know the contents of your contract.
- Make sure you are not taken by surprise down the road.
- Should aim to take on appointments which are clear and free of ambiguity.
- The way in which the courts interpret contracts have changed in recent years.

How the Courts Interpret Contracts

- *Investor's Compensation Scheme* – House of Lords (1998).
- Contracts interpreted in context according to commercial common sense.
- Recent change in approach.
- *Arnold v Britton* – Supreme Court (2015).
- Courts will only interfere when the wording in the contract is unclear.
- Courts now less willing to re-write contracts and won't bail you out of a bad deal.

Standards of Care

- Should be found in every construction contract.
- Level and quality of service being provide by the consultant professional.
- Fitness for purpose obligation.
- Duty of Care.

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Fitness for Purpose Obligation

- A guarantee that the project will be suitable for its intended use at Practical Completion.
- Rare and risky for consultants.
- Represents a very high standard for consultants.
- Matters outwith your control can leave you in breach of a Fitness for Purpose clause.
- Often not covered by Professional Indemnity Insurance policies.

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Duties of Care

- Much more common.
- Can be express or implied by law.
- Should be expressly written into an Appointment if there is a formal written agreement.

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Duty of Care – Example (i)

- Duty of Skill & Care.
- Clause 21.2 – NEC4 Professional Services Appointment:-
- "*the Consultant's obligation is to use the skill and care normally used by professionals providing services similar to the services*"
- This is normal, acceptable wording in an Appointment

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Duty of Care – Example (ii)

- Duty of Skill, Care and Diligence.
- *"The Consultant **warrants** that it has exercised and will continue to exercise **all** the due skill, care **and diligence** to be expected from a properly qualified and competent Consultant experienced in providing the Services on projects similar in nature, size and complexity to the Project."*
- Higher standard than normal.
- **"And diligence"** = extra emphasis on doing the work without delay.
- Should also note the warranty and no reference to "reasonable" skill and care.
- More acceptable than Fitness for Purpose but worth pushing back on.

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Express Duties of Care

- Overarching duty of care clause – applies to provision of services as a whole.
- Duty of care should be repeated and expressly applied in certain parts of the Agreement.
- E.g. Prohibited/Deleterious Materials clause. Consultant not to use materials subject to duty of care.
- Helps consultant to avoid liability if contaminated materials used accidentally.

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Implied Duties of Care

- Where there is no duty of care agreed in writing the law will imply one for you.
- Supply of Goods and Services Act 1982.
- Generally the law implies a Duty of Skill and Care.
- However, if the employer, has (1) been sufficiently clear about his requirements and (2) his reliance on the consultant's judgment then the law may imply a Fitness for Purpose obligation.
- Always better to have a written, express duty of care.

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Duty of Care v Fitness for Purpose – Case Examples

- *MT Højgaard A/S v E.ON Climate and Renewables UK* – Supreme Court (2017)
- MTH built turbines – contract required them to be fit for 20 years use.
- MTH followed industry standard practice which should have meant turbines lasted 20 years – subject to certain failure rate. Problems with the turbines were report 1 year after completion.
- Held that it was not a defence to have followed the industry standard.
- Contract required turbines to last for 20 years and, as a matter of fact, they had not.
- MTH held liable for repair costs.

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Duty of Care v Fitness for Purpose – Case Examples

- *SSE Generation Limited V Hochtief Solutions AG* – Court of Session (2016)
- Hochtief built a tunnel at Glendoe Hydroelectric Scheme.
- Tunnel collapsed shortly after completion and SSE pursued Hochtief for repair costs.
- Hochtief argued that they had used the reasonable skill of care required of them under their contract with SSE.
- Court of Session ruled in Hochtief's favour.
- Hochtief not liable for repair costs.
- Situations very similar but Hochtief had a duty of care whereas MTH had a Fitness for Purpose obligation.

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Prescription

- Limitation on how long you remain liable for a claim.
- Time limit in law for making a claim. The clock starts when the innocent party becomes aware of their loss. Relevant date is the first time the loss became apparent.
- General rule is set by statute – Prescription and Limitation (Scotland) Act 1973.
- Any claim not made within 5 years is extinguished.
- The rule is different in England – 6 or 12 year period applies.

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Prescription in Contract

- Parties will often set an alternative Prescriptive period in a written Appointment Agreement.
- *"No action or proceedings under or pursuant to this Agreement shall be commenced by either party after the expiry of 12 years from the date of practical completion of the Project."*
- Commercially standard and acceptable clause.
- Important to be aware of prescriptive period.
- Prescription is a knockout blow to a claim.

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Misconceptions about Prescription

- Prescription can be tricky and easy to miss dates in practice.
- Advising the other side of a problem **does not** stop the clock.
- The other side acknowledging liability **does not** stop the clock.
- The clock will only stop when proceedings are raised.

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Prescription – Case Example

- *Morrison v ICL Plastics* - Supreme Court (2014)
- Stockline Plastics Factory explosion in Glasgow in 2004. M owned neighbouring property damaged in blast.
- Inquiries took several years to establish that the explosion was caused by negligence. This meant M did not raise claim until 2013.
- M was held to be out of time – it did not matter that he wasn't sure about who was liable. He only had 5 years from the time the damage occurred to make the claim.
- Good example of the strength of a prescription defence – ICL Plastics obviously liable otherwise but were able to mount a complete, successful defence.

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Caps on Liability

- Most commonly set with reference to level of Professional Indemnity Insurance maintained by the consultant.
- Example clause:-
- *"Notwithstanding anything to the contrary contained in this Agreement the total liability of the Consultants under or in connection with this Agreement whether in contract or in delict or in negligence or for breach of statutory duty or otherwise (other than in respect of fraud, personal injury or death) shall not exceed FIVE MILLION POUNDS (£5,000,000.00) STERLING for each and every claim."*

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Caps on Liability - Exceptions

- *"other than in respect of fraud, personal injury or death"*
- Professional Indemnity Insurance will often not cover fraudulent or dishonest behaviour.
- Illegal under statue of the exclude death or personal injury – section 16 of the Unfair Contract Terms Act 1977.
- Employers may push for further exceptions to a cap. As a consultant, you want as much covered as possible.

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Caps on Liability – Basis of Cap

- *"for each and every claim"*
- Can rely on the whole cap for every claim that is made.
- *"in the aggregate"*
- Means you get one cap to use against all claims which occur. So, for example, a £1 million claim with a £5 million aggregate cap = £4 million left to use against any future claims.
- Make sure that the basis reflects your PI cover. Aggregate basis is preferable for consultants.
- Employers will rather an each and every claim cap.

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Caps on Liability – Based on Fee

- Caps sometimes set with reference to the Consultant's fee rather that PII cover.
- Major projects = a proportion of the Consultant's fee.
- Smaller projects = a multiple of the Consultant's fee.
- Can be expressed as a percentage or a lump sum
- Lump sum is preferable – provides greater certainty at early stage.

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Unenforceable Caps on Liability

- *Ampleforth Abbey Trust v Turner & Townsend* – England & Wales High Court (2012).
- Liability capped at the Consultants fee or £1 million – whichever was lower.
- Consultant paid £111,000 in fees.
- Consultant also required to maintain £10 million in Professional Indemnity cover.
- Cap held to be unenforceable under the Unfair Contract Terms Act. Reference made to the striking discrepancy between the PI cover and the cap.

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Unenforceable Caps post *Arnold v Britton*

- *Ampleforth Abbey Trust* was decided 3 years before the courts changed their approach to contractual interpretation.
- *Persimmon Homes Limited & Others v Ove Arup & Partners* – England & Wales Court of Appeal (2017)
- A clause excluding claims for asbestos included claims caused by consultant's negligence.
- Both parties had similar bargaining power and legal advice. Entitled to allocate risk as they saw fit in the commercial context.
- Probable that, if that logic were applied in *Ampleforth Abbey Trust*, then the cap would have been enforceable.
- Nevertheless it is necessary to bear in mind that caps have been held unenforceable in court.

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Exclusions of Liability

- Parties to an Appointment can agree to exclude liability for certain matters.
- Typically, it will be matters not covered under the Consultant's PI Insurance, such as:-
- Pollution/Contamination
- Asbestos
- Terrorism
- Consequential Loss (e.g. in SBCC contract – loss of use or profit flowing from a building being unavailable)
- Force Majeure Events (e.g. war or freak weather)
- Likelihood of getting something excluded depends on how important it is to the work being carried out.

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Exclusions of Liability – What Cannot be Excluded?

- As touched on, you cannot exclude liability for death or personal injury under the Unfair Contract Terms Act.
- Breaches of consumer protections legislation also cannot be excluded; e.g.
- Unfair Contract Terms Act 1977
- Consumer Credit Act 1974
- Consumer Rights Act 2015

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Net Contribution Clause

- Used when there is more than 1 Professional working on a site.
- What if more than 1 professional is responsible for the same damage?
- Generally, the party suffering loss can sue any 1 of the relevant professionals for all of the damage.
- Party sued for 100% can then sue other professionals for share of the loss – not ideal, inconvenient to go to court and bad for cashflow.

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Net Contribution Clause – Example

- *"The Consultant's liability under this Agreement shall be limited to the proportion of the Beneficiary's losses which it would be just and equitable to require the Consultant to pay having regard to the extent of the Consultant's responsibility for the same, on the assumption that any other consultants, contractors or sub-contractors engaged in connection with the Development has provided contractual undertakings to the Client as regards the performance of their services in connection with the Development in accordance with the terms of their respective appointment, contract or sub-contract and that there are no limitations of liability as between the consultant, contractor or sub-contractor and the Client."*

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Net Contribution Clause

- Limits a Consultant's liability to the extent which would be apportioned by a court.
- Responsible for 40% of the damage = liable for 40% of the loss.
- Stops the Employer from targeting specific Consultants.
- Protects Consultant against the insolvency of other members of the professional team.

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Net Contribution Clause

- Employers and especially funders are never keen to accept Net Contribution Clauses.
- More likely to be accepted on smaller projects.
- More likely to be accepted if Consultant's role is more discrete.
- Can be a useful negotiating tool in helping to agree a higher cap.

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Employer's Considerations

- What will an Employer be thinking about?
- **How likely is it that this proposed limit will stop me recovering my losses?** They want to be as sure as they can that they won't be disadvantaged if a consultant gets it wrong.
- **Will the consultant's liability be enough to make them perform their obligations properly?** They don't want for you to be able to think "well, this job isn't that important because we're not in trouble if it goes wrong".
- **Financial strength?** Your ability to pay them can influence how your liability will be set. There's no point in having draconian provisions if it will bankrupt the consultant long before it reaches that point.

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Consultant's Considerations

- What should a Consultant be thinking about?
- **Is this liability worth it for the fee I'm being paid?** We worked on a case recently where an Employer wanted our client, a Sub-Contractor, to take on completely unlimited liability in what was a fairly small appointment. The end result being that our client declined the appointment. You have to have an eye on your bottom line.
- **Are you protected from insolvency?** Could your level of liability leave you unable to trade? This is particularly crucial if you're running a partnership – as the partners may wind up personally liable.

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Conclusions

- Ensure that you are aware of all the terms of your contract before you agree to it.
- Look to avoid Fitness for Purpose obligations and have an express Duty of Care wherever possible.
- Be cognisant of prescriptive periods as it can be a knockout blow to a claim.
- Look to negotiate a cap – most likely in line with your Professional Indemnity cover.
- Exclude liability for anything not covered by your Professional Indemnity insurance.
- Seek to negotiate a Net Contribution Clause when involved in a project with multiple consultants.

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