
Liability Briefing

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Novation of consultants' appointments on design and build

It is not unusual for a consultant to work on a project for an employer up to a certain stage, and then transfer to working for a design and build contractor taken on by the employer. The consultants' appointment is 'novated' from the employer to the contractor. A curious practice, some think. When the arrangement was first introduced, it was argued that the employer wanted to be reassured that the contractor had a good consultant on board – and so required that the contractor take on his man.

Many consultants are refusing to accept commissions on this basis, and many contractors have concerns as well. The interests of the employer and the contractor in the project are different, and many consultants feel that to switch allegiances part way through the job is not feasible if they are properly to take account of their client's interests. It may well not be a satisfactory arrangement from the client's or contractor's point of view either. But sometimes consultants do succumb to commercial pressures and engage in this exchange of client, or novation. (It should not be forgotten that if novation and the form of novation agreement are not agreed at the time of the consultant's initial appointment, there is no legal obligation to agree at a later stage.)

If consultants do consider being novated in this way, they should only agree to do so if the services to be undertaken for the employer and the contractor are clear and appropriate in each case, and if the legal documentation imposes acceptable obligations and liabilities and no more. Further, it is recommended that consultants:

- ***avoid putting themselves in a position where there might be a conflict of interests;***
- ***only accept contract documentation which records what has happened – the reality of the situation – rather than creates a legal fiction (explained below).***

Documentation

The documentation used when the appointment of a consultant engaged by an employer is transferred to a design and build contractor takes one of two forms. Both are generally called novation agreements but their legal effect is very different. The first (sometimes described as a 'switch') is not a novation in the traditional sense. The agreement recognises the reality of the situation – that the consultant worked for the employer at the outset and then from a certain stage worked for the contractor. The second (a 'novation *ab initio*', or from the outset) is based on the traditional form of novation, but creates the fiction that the consultant worked for the contractor from the outset. These two forms are considered below.

Switch

In what way are the interests of an employer and a design and build contractor different? Surely they both want to see the project completed on time, within budget and without defects? Certainly, but the employer's interest is as building owner or developer, and the contractor is concerned with constructing the project. They will have different requirements of their consultants, at different times.

The sensible way to record the arrangement on paper would be for the consultant to enter into one appointment with the employer (with appropriate services) and another appointment (which might be on similar terms, but again with appropriate services) for the work to be done for the contractor. This is sometimes done in bespoke forms of appointment. More commonly, one form of appointment is used, together with a contract to which the employer, consultant and contractor are all parties.

CIC Novation Agreement

The CIC Novation Agreement is of the first kind (a 'switch') and records the realities of the situation: namely that the consultant has worked for the employer pre-novation. The consultant remains liable to the employer in respect of the work done for him. Post-novation, the consultant agrees to work for the contractor and will be liable to him. The contractor agrees to step into the shoes of the employer and henceforth act as the client.

Under the construction contract the contractor will accept responsibility for design, and this will generally include an element of design done pre-novation (ie at a time when the consultant was working for the employer). The contractor may want a remedy against the consultant who did the design work to cover him in the event that he suffers loss due to an error in that design. The consultant therefore gives a warranty to the contractor in respect of services undertaken pre-novation. He warrants to the contractor that, insofar as the contractor is responsible under the main contract for pre-novation services undertaken by the consultant, such services have been performed *for the employer* in accordance with the terms of the appointment. If he has been in breach of the duty owed to the employer, and the contractor suffers loss as a result, the contractor may therefore sue him.

An important caveat is included in the CIC Agreement: ‘save that the Consultant shall not be absolved from liability to the Contractor for such loss merely by virtue of the fact that the loss has not been suffered by the Employer.’ The Consultant cannot therefore raise the ‘no loss’ argument, thus allaying a concern that has been expressed about the possible effect of the Scottish case of *Blyth & Blyth Ltd v Carillion Construction Ltd*.

Care needs to be taken regarding the services, so that the services to be performed by the consultant for the employer are properly recorded, and those to be performed for the contractor are similarly properly recorded. If the consultant is, say, inspecting workmanship on behalf of the contractor his obligations will be slightly different from those he would have if he was inspecting on behalf of the employer – he will not issue certificates, for example. There is a schedule attached to the CIC Agreement where the changes in the services (and fees, if any) can be recorded.

If the consultant agrees to give the employer a warranty for work done post-novation, an appropriate form (a Supplemental Agreement) can be found on CIC’s website, at www.cic.org.uk (liability and contracts).

Novation *ab initio*

As explained, novation *ab initio* is based on the traditional form of novation. Novation in the traditional sense occurs when, for example, the original employer transfers his interest in the project to another employer. The new employer, E2, steps into the shoes of the original employer, E1, and is treated as if he was always a party to the contract, in place of E1. So, post-novation, so far as the consultant, C, is concerned he can treat E2 as if he had always been the other contracting party. C must agree to accept the performance of E1’s obligations by E2, so there has to be a new contract, but generally the interests and concerns of E2 can be assumed to be the same as those of E1. An example is where the interest of the original employer is transferred to an associated company.

This is very different from the appointment being transferred from an employer *to a contractor*. However, it has become common practice for a novation agreement based on the traditional form to be used when the consultant’s appointment is novated from an employer to a contractor. Thus the fiction is created that the consultant’s client has always been the contractor – *ab initio* (from the outset). It is use of these terms which is the easiest way to identify this type of arrangement. An example of an *ab initio* novation agreement is that published by the City of London Law Society (CILLS).

Does this make any sense in reality? No. How can the consultant agree to the legal fiction that he has always worked for the contractor? Nowadays, projects are procured in many different ways, but at the outset the consultant may not have known that the procurement route would be design and build, ie that the contractor employed to build the project would also be responsible for design. The consultant may have been advising the employer on the choice of tenderers, and once tenders were in, on the details of the successful tender. In any event, pre-novation the consultant was working to the requirements of the employer and he should have had his interests in mind.

Other provisions which create problems

Problems can be created by a number of other provisions which are frequently found *in either type* of novation agreement. A consultant could find himself liable to the contractor for losses arising from services he performed for the employer pre-novation and for which he would not be (and is not) liable to the employer. Such provisions should clearly be avoided.

Examples of such provisions are:

1. Either an undertaking or warranty that the consultant owed a duty of care *to the contractor* from the outset or a direct warranty (eg 'the consultant warrants to the contractor that he has exercised reasonable skill, care and diligence in the performance of his duties under the appointment'). As commented above, this is not a warranty in the usual form, which is that, 'the consultant warrants that he has exercised reasonable skill and care in the performance of his duties *to the employer* under the appointment'. The difference is important. To reflect reality, the consultant should warrant the obligations that he owed to the employer pre-novation, he should not retrospectively create new obligations to the contractor.
2. An acknowledgment or undertaking that the contractor has *relied* on the information and advice provided by the consultant to the employer – despite the fact that the information and advice was provided with the employer's interests in mind. In accepting this, the consultant would be accepting a tortious obligation to the contractor in respect of work done whilst his client was the employer.
3. An acknowledgement or undertaking that any losses suffered by the contractor arising out of the services provided by the consultant for the employer *were within the contemplation* of the consultant at the date that the consultant first entered into a contract with the employer – even though at that stage the consultant may have no idea who the contractor will be. Again, in accepting this the consultant would be making himself vulnerable to claims for losses over and above those for which he would be liable to his client.

The CIC Novation Agreement costs £14 plus VAT and can be obtained from CIC (www.cicshop.co.uk).

This *Liability Briefing* is for general guidance only and legal advice should be sought to cover any particular situation.

This *Liability Briefing* is available at www.cic.org.uk/liability.

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