



## SAMPLE NET CONTRIBUTION CLAUSES

Net contribution clauses have been included in consultants' conditions of engagement and collateral warranties for some years. They are included in the standard terms of engagement published by the RIBA, RIAS and ACE (for example), and in the standard forms of collateral warranty published by the CIC. The sample clauses that follow may be used by consultants in bespoke appointments or other standard forms that do not already include net contribution clauses.

It is important to note that the definitions need to be checked and amended as appropriate. Consultants may need to take legal advice as to how they should be incorporated in any particular appointment or collateral warranty.

The three sample clauses that follow are for use:

- for warranties generally;
- for appointments generally;
- for appointments by a design/build contractor.

### What is a net contribution clause?

A net contribution clause aims to limit the proportion of any loss or damage payable to the consultants' 'fair share' (or such share as would be just and equitable for them to pay, making certain assumptions).

If a building project goes wrong and loss is incurred, it is not uncommon for this to be the fault of various parties, who are 'jointly liable'. Any of these parties can be sued by the party suffering loss, and each will be 100% liable for the damages, whatever their share of blame. If more than one party is sued, the parties can claim contribution from each other under the Civil Liability (Contribution) Act 1978 and ask the court to apportion the loss.

*For example, say that a client finds defects in a new building, which he alleges are the responsibility of the contractor (as a result of bad workmanship) and the consultants (for failing to adequately inspect the workmanship). If found responsible, both will be 100% liable for the cost of remedying the defects. Typically, under the 1978 Act, liability might be apportioned between the contractor and consultants 75%:25%. If the contractor has gone out of business, the consultants will be liable for 100% of the loss, and be unable to obtain a contribution. Further, if the party suffering the loss is a purchaser rather than the client, and the consultant has given a warranty to the purchaser and the contractor has not, again the consultant might not be able to obtain a contribution.*

The intention of the net contribution clause therefore is that the consultant will only be liable for his proportion (the 25%, in the example above) whether or not a

contribution can be obtained from the contractor, and whether or not the contractor has given a warranty (where the consultants have given one). These are the assumptions referred to above.

## **Joint insurance**

The sample clauses have been drafted to take account of the House of Lords decision in *Co-operative Retail Services Ltd v Taylor Young Partnership & Others*. See in particular the reference to 'joint insurance and co-insurance' in paragraph (ii).

Under the 1978 Act, a contribution can only be claimed if the party from whom it is sought is liable *to the same claimant for the same damage*. In the *Co-op* case, the consultants sought a contribution from the contractor (who was liable to the client under a JCT building contract) and the subcontractor (who was liable to the client under a direct warranty to the client).

The facts of the case were that the works were badly damaged by fire, and for the purposes of the case the consultants, contractor and subcontractor were all assumed to have been negligent in respect of the fire damage. However, the client, contractor and subcontractor were all covered by a joint insurance policy – and co-insureds can not be sued by each other for losses for which they are covered under the policy. The House of Lords determined that the effect of the relevant clauses in the JCT contracts and subcontracts was to exclude any liability on the part of the contractor and subcontractor to the client for losses covered by that policy. As the contractor and subcontractor could not be held liable to the client for the damage, the consultants could not make a claim against them for contribution.

The House of Lords suggested that this result might have been foreseen, as they were standard insurance clauses in the JCT contracts, and the answer was for the consultants also to be named under the All Risks insurance policy. However, it appears that the insurance market is not prepared to extend joint names policies to cover consultants because All Risks insurers do not wish to underwrite risks that should be covered by professional indemnity insurance. It is for this reason that the net contribution clauses have been revised. An additional 'assumption' is added, namely that there are no relevant joint insurance or co-insurance provisions, nor exclusions of liability between any of the relevant parties.

*The clauses are reproduced with the kind agreement of the Association of Consulting Engineers and their solicitors, Beale & Company.*

*CIC Liability Panel  
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**See also CIC's *Liability Briefing* 'Net contribution clauses' dated December 2004 at <http://www.cic.org.uk/liability>**

## **Net contribution clause for warranties generally**

Without prejudice to any other exclusion or limitation of liability, damages, loss, expense or costs the liability of [the Consultant] if any for any loss or damage ('the loss and damage') under this Agreement shall not exceed such sum as it would be just and equitable for [the Consultant] to pay having regard to the extent of his responsibility for the loss or damage and on the assumptions that:

- (i) all other consultants, contractors, sub-contractors, project managers and advisers engaged in connection with [the Project] have provided contractual undertakings on terms no less onerous than those set out in Clause [ ] to [the Funder/Purchaser/Tenant] in respect of the carrying out of their obligations in connection with [the Project]; and
- (ii) there are no exclusions of or limitations of liability nor joint insurance or co-insurance provisions between [the Funder/Purchaser/Tenant] and any other party referred to in this clause and any such other party who is responsible to any extent for the loss and damage is contractually liable to [the Funder/Purchaser/Tenant] for the loss and damage; and
- (iii) all the parties referred to in this clause have paid to [the Funder/Purchaser/Tenant] such proportion of the loss and damage which it would be just and equitable for them to pay having regard to the extent of their responsibility for the loss and damage.

*Note: The definitions need to be checked and amended as appropriate; legal advice may be needed on how the clause should be incorporated in any particular collateral warranty.*

## **Net contribution clause for appointments generally**

Without prejudice to any other exclusion or limitation of liability, damages, loss, expense or costs the liability of [the Consultant] if any for any loss or damage ('the loss and damage') under this Agreement shall not exceed such sum as it would be just and equitable for [the Consultant] to pay having regard to the extent of his responsibility for the loss or damage and on the assumptions that:

- (i) all other consultants, contractors, sub-contractors, project managers and advisers engaged in connection with [the Project] have provided contractual undertakings on terms no less onerous than those set out in Clause [ ] to [the Client] in respect of the carrying out of their obligations in connection with [the Project];
- (ii) there are no exclusions of or limitations of liability nor joint insurance or co-insurance provisions between [the Client] and any other party referred to in this clause and any such other party who is responsible to any extent for the loss and damage is contractually liable to [the Client] for the loss and damage; and
- (iii) all the parties referred to in this clause have paid to [the Client] such proportion of the loss and damage which it would be just and equitable for them to pay having regard to the extent of their responsibility for the loss and damage.

*Note: The definitions need to be checked and amended as appropriate; legal advice may be needed on how the clause should be incorporated in any particular appointment.*

**Net contribution clause  
for appointments of consultants  
by a design/build contractor**

Without prejudice to any other exclusion or limitation of liability, damages, loss, expense or costs the liability of [the Consultant] if any for any loss or damage ('the loss and damage') under this Agreement shall not exceed such sum as it would be just and equitable for [the Consultant] to pay having regard to the extent of his responsibility for the loss or damage and on the assumptions that:

- (i) all other consultants, contractors, sub-contractors, project managers and advisers engaged in connection with [the Project] have provided contractual undertakings on terms no less onerous than those set out in Clause [ ] to [the Contractor] in respect of the carrying out of their obligations in connection with [the Project];
- (ii) there are no exclusions of or limitations of liability nor joint insurance or co-insurance provisions between [the Contractor] and any other party referred to in this clause and any such other party who is responsible to any extent for the loss and damage is contractually liable to [the Contractor] for the loss and damage; and
- (iii) all the other parties referred to in this clause have paid to [the Contractor] such proportion of the loss and damage which it would be just and equitable for them to pay having regard to the extent of their responsibility for the loss and damage.

*Note: The definitions need to be checked and amended as appropriate; legal advice may be needed on how the clause should be incorporated in any particular appointment. In this draft 'the Contractor' is the Consultant's Contractor client.*

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