
Liability Briefing

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Standard forms of consultant collateral warranty compared

Standard forms of collateral warranty to be given by consultants to funders and purchasers/tenants on traditionally procured projects have been published by both the CIC (in 2003) and BPF (2005). This *Liability Briefly* compares the provisions in these forms.

The CIC forms are

- (i) CIC/ConsWa/F for use where a warranty is to be given by a consultant to a funder (first edition 2003); and
- (ii) CIC/ConsWa/P&T to be given to a purchaser/tenant of the whole or part of a commercial or industrial development (first edition 2003);

and the equivalent BPF forms are

- (i) CoWa/F for use where a warranty is to be to a company providing finance for a proposed development (4th edition 2005)) and
- (ii) CoWa/P&T for use where a warranty is to be given to a purchaser or tenant of a proposed development (3rd edition 2005).

The CIC warranties are based on those published by the BPF in 1992/93, and which were agreed by the ACE, RIAS, RICS and RIBA (described as the 'old BPF forms'), updated to take account of changes in the law since then.

The current BPF warranties are based on the third party rights schedule included in the BPF Consultancy Agreement published in 2005. When published as stand alone warranties, the necessary consequential amendments have not been made. Clause 1 provides that the expressions defined in the underlying appointment shall have the same meanings when used in the warranty. This is appropriate if the BPF Consultancy Agreement is used, but not otherwise. If any other form of appointment is used, the definitions should be checked carefully, and consequential amendments made as appropriate.

The CIC warranties

The balance of risk between consultants and funders or purchasers/tenants is, in general terms, the same as under the old PBF forms. Points to note are:

Cost of repairs – The damages recoverable by a purchaser/tenant are limited to the reasonable cost of repairs.

Net contribution – The others whom it is assumed have also provided contractual undertakings (warranties) are described generically and the list is very wide, being all ‘all other consultants and advisers, contractors and subcontractors involved in the [project]’. The wording of the clause has also been amended to take into account the decision in the *Co-operative Retail Services* case.

No greater liability – The consultant is entitled to rely on any exclusion of liability in the appointment, in addition to any limitation of liability. This takes account of the fact that, for example, the consultant’s appointment may exclude liability for claims arising out of terrorism or asbestos, due to limitations on insurance cover available. The consultant is also expressly entitled to raise the equivalent rights in defence of liability as it would have against the client under the appointment.

Deleterious materials – The clause refers to the publication *Good Practice in Selection of Construction Materials* (Ove Arup & Partners). The obligation is confined to the specification of materials and is subject to other instructions that may have been received from the client under the appointment.

Licence – The licence is subject to the fees being paid (or tendered), save that the licence in respect of the documents needed for the health and safety file is not subject to the payment of fees.

Insurance – The obligation to maintain professional indemnity insurance refers to aggregate cover available for pollution and contamination, asbestos and date recognition.

Assignment – Assignment of the purchaser/tenant warranty is limited to twice only and the funder’s warranty to another funder only.

Limitation – The time for bringing claims is not to be greater than a specific number of years (which is to be inserted) from practical completion or, if that is not achieved, from the date the consultant finishes its services. The warranties can be signed under hand as well as executed as a deed.

Third party rights – The rights given to third parties by the Contracts (Rights of Third Parties) Act are excluded, as is usual in collateral warranties.

The BPF warranties

These are similar in many ways, but differ in a number of important respects:

Cost of repairs – The purchaser/tenant warranty provides that the damages recoverable are limited to the cost of repairs, as did the old PBF warranties, but also provides for an additional sum to be stipulated for other losses. Liability for such further losses is not made expressly subject to the net contribution and equivalent

rights clauses; it could therefore be argued that it is not intended to be, resulting in a serious qualification to those clauses.

Net contribution – The net contribution clause has been revised from that in the old BPF warranties. Those whom it is assumed have provided warranties are described as the *Project Team*. What this term means will depend upon the definition (if any) in the underlying appointment (Clause 1). It is used in the BPF Consultancy Appointment, but the definition covers consultants only (in contrast with that in the CIC warranties). It may not therefore be wide enough to cover all those who are liable with the consultant. Moreover, if any other form of appointment is used, there is a danger that the term will not be used at all. The net contribution clause is not stated to be without prejudice to other limitations (eg limitations in the appointment incorporated into the warranty by Clause 2(c)).

No greater liability – The equivalent rights clause is very similar to that in the CIC warranties, save that it refers to limitation only, which might not include outright exclusion.

Deleterious materials – The clause also refers to the Ove Arup publication in the context of specification. There is a further provision which requires the consultant to use skill and care to see that materials as used in the construction are in accordance with the Ove Arup guidelines.

Licence – The licence is also subject to the fees being paid (or tendered), though there is no exception for documents for the health and safety file. There are references to *Intellectual Property* and *Design Documents*, terms which are used in the BPF Consultancy Appointment, but might not be used in any other form of underlying appointment.

Insurance – The consultant is not free to agree in relation to each warranty the amount of insurance and the length of time he maintains it, but is bound to the funder or purchaser/tenant in the same terms as in the appointment. There is a reference to Clause 8 of the appointment, which will only apply if the BPF Consultancy Agreement is used. The test is *reasonable premium rates* instead of *commercial reasonable rates*.

Assignment – Assignment is limited (as in the CIC warranties) to twice only without consent (in earlier editions the parties could agree the number of assignments).

Limitation – The time for bringing claims is a fixed 12 years from practical completion or completion, or abandonment of the services if earlier.

Third party rights – The Contracts (Rights of Third Parties) Act is not excluded.

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