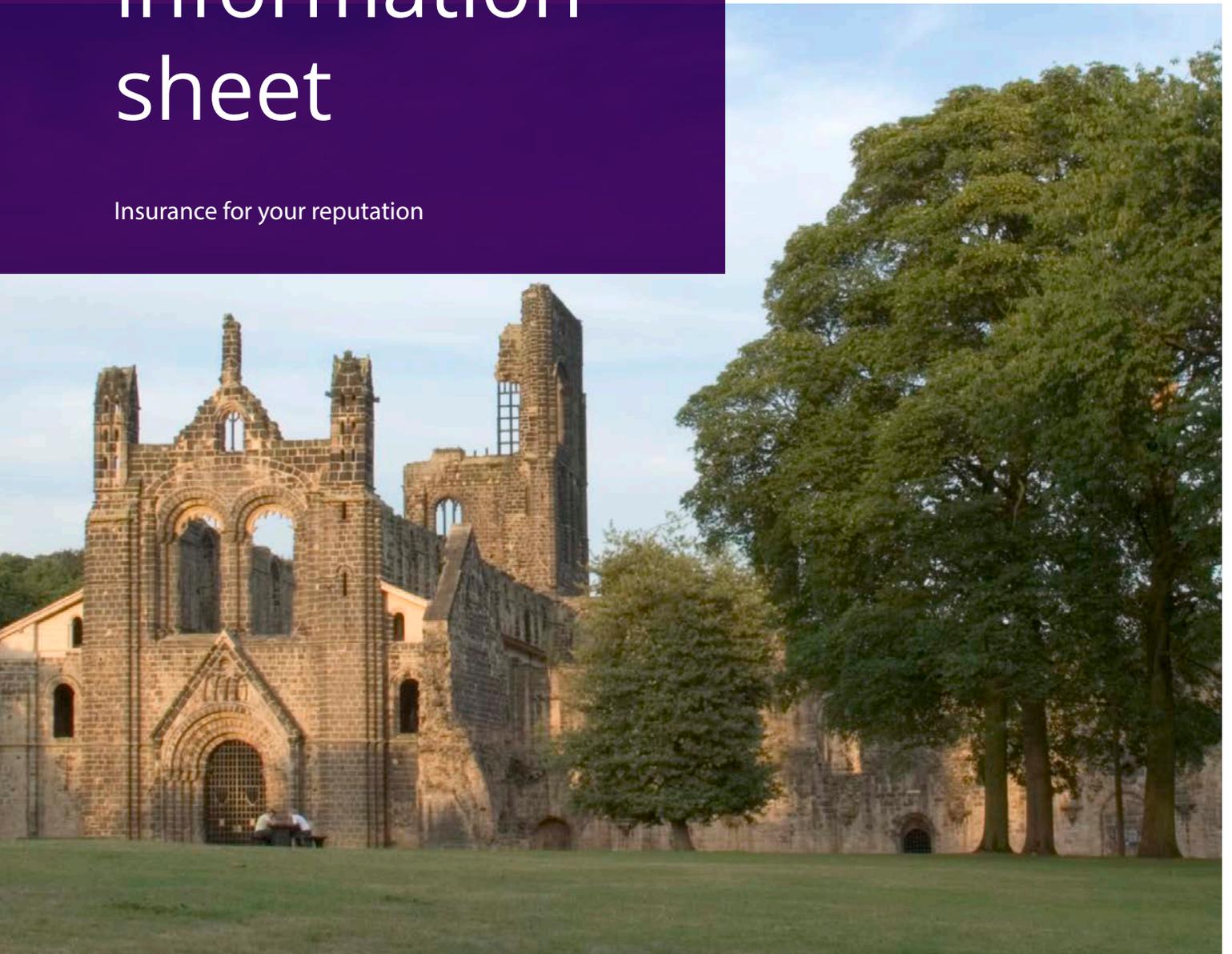


Appointment & collateral warranty information sheet

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Appointment & collateral warranty information sheet

Appointment agreements, or terms of engagement, often take many different forms. They can be based upon a verbal agreement, an exchange of correspondence, a letter of engagement or there may be formal terms of appointment drawn up by you or your client.

While many professional bodies require their members to have terms of appointment in place with their clients we would always recommend that a formal Appointment Agreement is used when accepting work from a Client. This provides you with an opportunity to define the services you will provide and the terms (including the fee) upon which the services will be provided.

However, this also presents an opportunity for those clients who use their own forms of appointment to impose obligations upon you, some of which may be quite onerous. Various examples are highlighted below together with generic advice as to how these may be amended to your benefit.

There are also many commercial issues that you, as a practice, must consider before reaching agreement with your prospective client.

Standard forms of appointment

There are several standard forms of appointment published by professional bodies that do not impose terms that take you outside the scope of your current professional indemnity insurance policy, so long as the clauses are not amended.

These forms of appointment are listed below and do not need to be referred to MFL Affinity for vetting:

- ACE Agreements A(1), A(2), B(1), B(2), C(1), (2) and the Shortform Agreement 2002 (amended 2009)
- British Property Federation Consultancy Agreement version 2.0 (2007)
- CIAT Conditions of Engagement (Sept 2012)
- RIBA Agreements 2010
- The Landscape Consultant's Appointment (2013)

Collateral Warranties

A "Collateral Warranty" is a contract between consultant and the end user (landlord, a purchaser, tenant) or funder of a development. It's a contract which is collateral to - in other words, it sits alongside the consultant's appointment agreement.

It creates a contractual relationship (and therefore rights of action) between the consultant and the end users and funders of developments where otherwise, no contractual relationship would exist.

The wording of the warranty is an area of possible conflict between you and the client.

While you will be looking to keep the terms of the warranty as narrow as possible, the client will often have the opposite aim. It's important to remember that you are not giving a guarantee about the performance or suitability of the development you have designed. You are only confirming you have exercised reasonable skill and care and the beneficiary of the warranty can rely upon that standard of reasonable skill and care.

A warranty which seeks to impose additional express guarantees may take you outside the scope of your professional indemnity cover and, as such, the warranty is likely to be useless to both your client and yourself.

Am I required to give a collateral warranty?

Check the terms of your appointment (whether an oral agreement, exchange of correspondence, written appointment agreement or letter of engagement) particularly as there may be a specific time limit for providing a warranty which you should adhere to.

You are only legally required to give a collateral warranty if you have agreed with your client as a term of your appointment that you will give a collateral warranty.

How many warranties am I required to give and to whom?

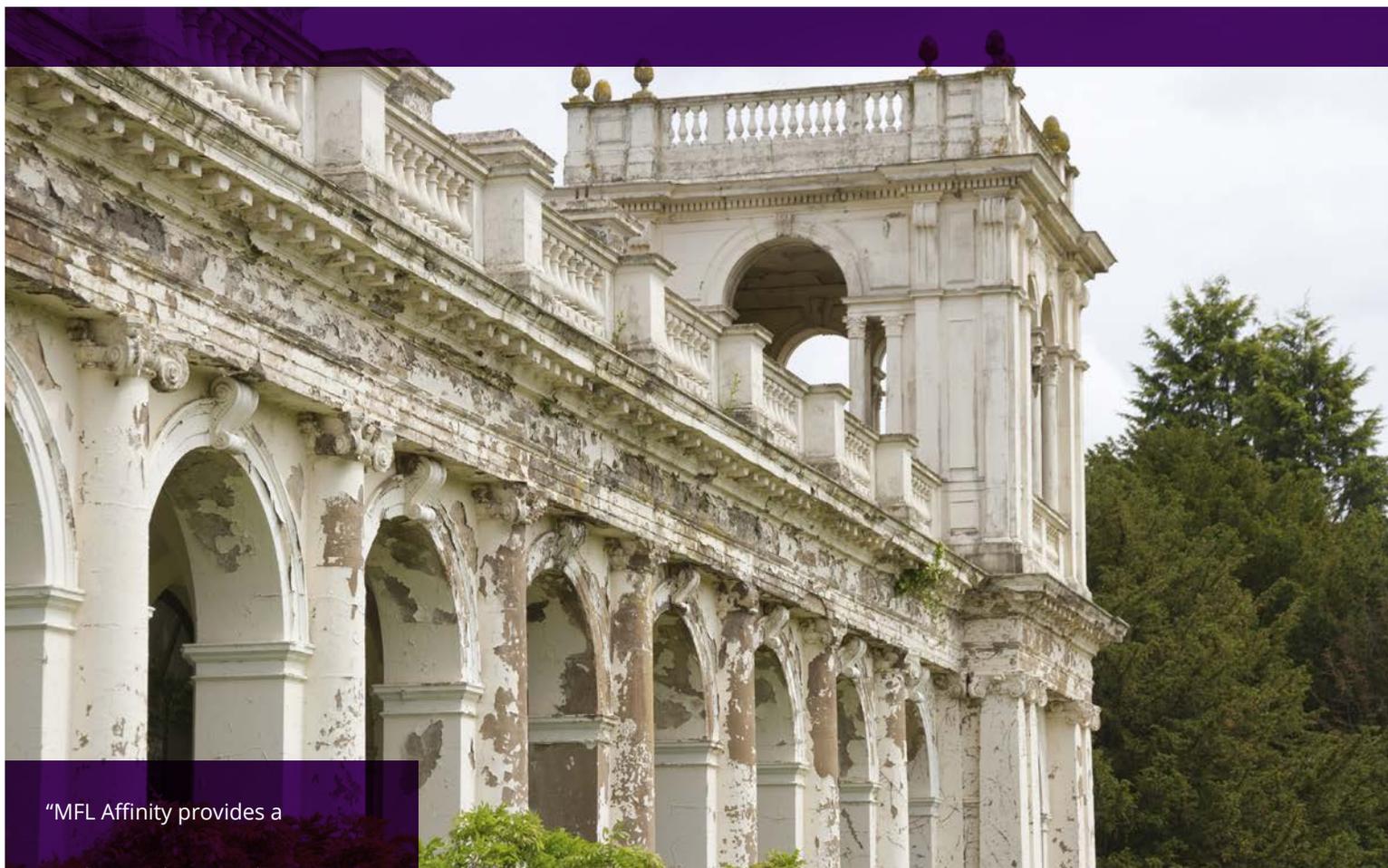
Again check the terms of your appointment. If under the appointment you have agreed to give collateral warranties, the appointment might be specific as to how many warranties you can be required to give and it should identify to whom the collateral warranties are to be given, for example, future tenants, purchasers and funders of the development.

What form of words should the collateral warranty take?

If you have agreed to give to a collateral warranty as a term of your appointment, the form of warranty may already have been agreed in which case it will usually be annexed to the appointment document.

If so, check the wording of the warranty you are being asked to sign is identical to the wording of the warranty you agreed to sign at the time of agreeing your appointment. However, if there was no prior agreement, but you decide to provide a collateral warranty you should offer to provide a warranty based upon one of the standard forms mentioned below.

As with Appointment Agreements, there are several standard forms of collateral warranty which don't impose terms that take you outside the scope of your current professional indemnity insurance policy, so



“MFL Affinity provides a vetting service to assist you in establishing whether non-standard appointment agreements and/or collateral warranties impose obligations ”

long as the clauses are not amended.

These forms of collateral warranty are listed over the page and do not need to be referred to MFL Affinity for vetting:

- CIC Collateral Warranty: Consultant – Purchaser/Tenant CIC/ConsWa/P&T (first edition, 2003) Standard form of agreement for use where a collateral warranty is to be given by a consultant to a purchaser or tenant of the whole or part of a commercial or industrial development.
- CIC Collateral Warranty: Consultant – Funder CIC/ConsWa/F (first edition, 2003) Standard form of agreement for

use where a collateral warranty is to be given by a consultant to a funder of a commercial or industrial development.

- National housing federation recommended form of agreement for collateral warranty

Advice and Assistance

On occasions, you may require some assistance when considering the terms of appointment or collateral warranty. As a result, MFL Affinity provides a vetting service to assist you in establishing whether non-standard appointment agreements and/or collateral warranties impose obligations which may not be covered by your current professional indemnity insurance policy.

MFL Affinity is available to discuss any proposed amendments as part of the Review Services, but it is important to bear in mind this service is designed to review individual appointments and/or warranty agreements to identify any obligations which may take you outside the scope of your current professional indemnity insurance policy. While we may provide a

‘tracked changes’ copy of the agreements, any comments or advice provided by MFL Affinity should not be forwarded to your clients or their solicitors, as this could undermine your negotiating position

However, the onus is upon you to take heed of the advice and use the advice to your best advantage in your negotiations.

While MFL Affinity can discuss the proposed amendments and possible effect of the Clauses, it is important to note that the service is NOT designed to provide:

- more than initial advice (for example, the onus is on you to check
- recommended amendments have been made in second, third etc drafts of the same contract).*
- advice regarding legal or commercial issues beyond those of a professional indemnity insurance policy nature.*
- legal representation in the form of

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written or verbal negotiations with your clients and/or their legal representatives.*

(* If you require a more detailed review, we can recommend an experienced legal firm who will provide preferential terms to you as a Membership benefit)

Regularly amended clauses in non-standard appointment and collateral warranty agreements

This section of the information sheet highlights some of the commonly amended clauses in non-standard appointment and collateral warranty agreements.

It's not a comprehensive guide to appointment and collateral warranty agreements but it does account for the majority of amendments that routinely arise.

If your client refuses to make any of the suggested amendments to these clauses, it becomes a matter of commercial risk for your practice as to whether you wish to enter into the appointment agreement and/or collateral warranty with the risks outlined above and having regard to the nature of the services you are to provide and the nature of the project you are working on.

With this information, you should be in a better position to understand these issues and deal with the negotiations with your client.

Adjudication clauses – these clauses often appear in appointments and sometimes in collateral warranties.

It's a condition of your professional indemnity insurance policy that you do not agree to accept a clause which states you agree to accept the decision of an adjudicator as finally determining the dispute with no further reference to legal proceedings, arbitration or alternative dispute resolution.

Failure to comply with this condition will entitle your Insurers to refuse to provide

cover under the policy.

Deleterious materials clauses

– these clauses often appear both in appointments and collateral warranties. The obligations in these clauses should be limited to seeing you (i.e. as opposed to others) exercise reasonable skill and care not to specify materials which are considered at the time of specification to be deleterious within your profession (e.g. as opposed to materials considered to be deleterious within the "construction industry generally" or amongst "professional consultants generally").

Failure to observe these guidelines could expose you to a contractual obligation which takes you outside the scope of the professional duties you have declared to your professional indemnity insurers. In turn this may jeopardise the cover available under the policy.

Professional indemnity insurance clauses – these clauses commonly appear in appointment agreements and collateral warranties.

There are a number of considerations:

- The level of professional indemnity insurance cover required of you should be commensurate with the nature of the services you are providing for each individual project and, naturally,
- You should not exceed the sums for which you are insured under your Professional Indemnity Insurance policy.
- The cover in relation to pollution and contamination claims is subject to an annual aggregate limit and the clause should be amended to reflect that.

A common amendment is to change references to 'occurrence or series of occurrences' to 'claims or series of claims' because the cover under your current policy and virtually every professional

indemnity insurance policy is on a 'claims made basis'.

As a general rule, you should resist any obligation to disclose your Professional Indemnity Insurance policy to your client. However, agreeing to supply a certificate from your insurance brokers is perfectly acceptable.

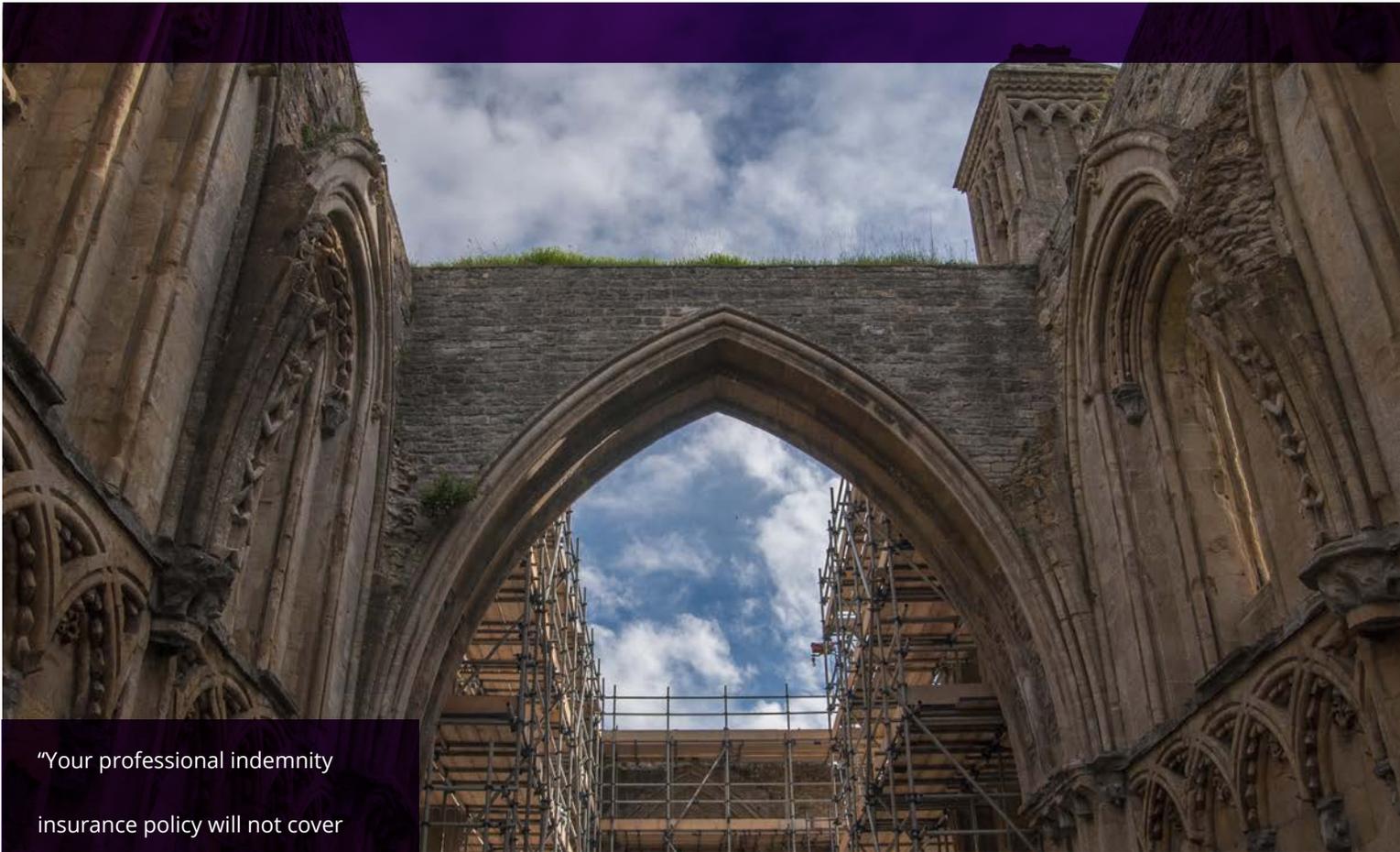
In addition, it is important to note that Professional Indemnity Insurance is written on a 'Claims Made' basis which means that any claims or circumstances which may give rise to a claim are noted against the policy in force at that time. As claims can often arise years after the works are complete, it is important to ensure that any Insurance requirements under these clauses are considered at renewal as you may need to maintain a certain level of cover for up to 12 years after the project.

Indemnity clauses – these clauses frequently arise in appointment agreements and sometimes in collateral warranties.

They usually attempt to make consultants liable to indemnify their clients in respect of 'all losses, claims, damages, expenses and costs' caused by a particular breach of contract or duty on the part of the consultant. This potentially allows your client greater or broader redress which is normally recoverable at common law and could exceed the cover provided by your professional indemnity insurance.

As a result, the best approach to Indemnity clauses is to seek to have them removed from the agreement in their entirety.

Removing these clauses doesn't disadvantage your client in the sense your client will not be precluded from bringing a claim for a breach of contract in the ordinary way. In addition, your client's position is usually protected by the usual requirement that you maintain professional indemnity insurance policy cover.



“Your professional indemnity insurance policy will not cover you for any contractual liability you incur as a result of accepting a fitness for purpose obligation.”

If your client will not agree to remove the indemnity clause altogether, there are a number of alternatives that could be adopted as a fall back position, for example you could amend the clause so that the potentially recoverable losses are expressed to be “all reasonably foreseeable, legally recoverable and fully mitigated losses, claims, damages etc”. However, we would recommend contacting MFL Affinity to discuss these clauses further.

Fitness for purpose clauses and Express guarantees – these clauses sometimes arise in appointment agreements and collateral warranties.

They amount to onerous, absolute obligations and impose a duty beyond the ordinary standard of reasonable skill and

care in the performance of your services. As such, your professional indemnity insurance policy will not cover you for any contractual liability you incur as a result of accepting a fitness for purpose obligation or guaranteeing fitness for purpose as a term of your appointment.

Nor will your policy cover you for any contractual liability you incur as a result of giving any express guarantee relating to the satisfaction of performance specifications and/or the period of a project as a term of your appointment.

There is policy cover in the event you would have incurred liability in the absence of any obligations of this nature.

However the extent of your liability, in the absence of such obligations, may well be less than your liability as a result of these obligations being present. In turn, the extent of cover available may be insufficient to cover the full extent of your liability.

Liquidated Damages and Penalty clauses – these clauses rarely arise in appointment agreements and collateral

warranties.

Nevertheless, you should be aware your Professional Indemnity Insurance policy will not cover you for any contractual liability you incur, as a result of any express penalty contained in a contract between you and your client or a third party.

Nor will the policy cover you for any contractual liability you incur as a result of any express acceptance by you of liability for liquidated damages. As with Fitness for Purpose Clauses, cover may be in place had the liability been incurred without the Clause, although this may not be sufficient to cover the whole of the liability.

The collateral warranty vetting service is provided by MFL Affinity:

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