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# Contracts & the Need for Certainty

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# Contracts & the Need for Certainty

## Starting a relationship on the Right Terms

**You met the Client for the first time, they were impressed with your suggestions and ideas, a fee has been agreed and off you go. While you are in this 'honeymoon' period, everything seems positive, but the position may change as the contract progresses, and situations may arise where there ceases to be such a meeting of minds and then it can become a game of 'he said, she said' with the Client and matters can quickly spiral out of control.**

When you are considering a new instruction there are a number of points to be considered and addressed, including and very importantly, the terms of your engagement, indeed it is especially important that these terms of engagement should be established from the outset, and confirmed in writing.

As the terms of engagement or contract are at the core of your appointment, they effectively amount to the foundations of the project. In the same way that you wouldn't prepare designs without adequate foundations to support the work, it is equally important to ensure that the relationship with the client is also adequately supported and evidenced in writing from the outset.

### "The Boring Bit"

If we are being honest with each other, we can all accept that the process of agreeing the terms of the contract with the client can be both time-consuming and more than a little dull. However, the consequences of skipping or paying insufficient attention to this process can have potentially serious ramifications both in terms of the requirements of your professional body and the conduct of any claims.

### "The Foundations"

You may ask yourself "Is it really necessary to sort out the Contract now?". Especially when the client is keen to progress things and has agreed the fees to be paid.

The short answer is, of course, "Yes". **But why?**

As anyone who has ever attempted to read a contract document can testify, they can rely on long, complex sentences and phrases and can be hard going for all but the most dedicated of legal scholars.

However, irrespective of how complicated the contract is, it will contain a number of 'key' provisions that directly impact on the liabilities that will arise in the event of a breach of the contract or any tortious claim.

To help explain the impact of these conditions, I would like to highlight a couple of the frequently recurring issues, namely:

- Reasonable Skill and Care
- Liability and Insurance

“**Is it necessary to sort out a contract now?**”

## Reasonable Skill and Care

When you accept an instruction from the client you are agreeing to provide a professional service to them and they are entitled to rely on that service.

However, when considering whether or not the service has been provided properly, one of the key considerations is whether a duty of care to the client has been breached.

While the law in this area has been developed over the course of decades, when it is boiled down to its most basic, the core of the test amounts to – did you provide the agreed services with reasonable skill and care?

As a result, one of the most important clauses in the contract relates to the degree of skill and care required in the performance of the services. Now, while the position in the law of negligence is quite clear, it is possible to (and some larger clients may actively attempt to push you to) enter into a contract that can extend the duty beyond ‘reasonable skill and care’.

However, you should be aware that accepting a higher standard than would otherwise exist, conflicts with the terms of your professional indemnity cover and could leave you facing an uninsured loss should a claim arise.

## Liability and Insurance

Another key area that the contract will invariably hit upon is the level of cover required and the duration of any period of liability.

For the most part, a contract will either be accepted ‘under hand’ or ‘under deed’ and this effectively creates a period of liability lasting 6 or 12 years, respectively. However, the contract may contain specific provisions that impact on how that period is considered. For example, the majority will state that liability lasts for 12 years from the date of Practical Completion; others may push to make this effective from the date of making good defects and some attempt to push even further into the future.

This gives rise to two issues, the need to maintain cover for the entire period and possible ramifications should the contract create a liability that would not otherwise exist.

There will also be additional clauses that set out the level and types of insurance required for the project. Again, the purpose of the clause is to clearly set the level of cover you agree with the client to maintain.

However, it is important to ensure that the Client’s requirements do not exceed the level of cover you currently maintain as this leaves you with either the need to purchase additional cover or potentially under-insured claims.



As you will appreciate, these conditions have been selected to highlight some of the issues that can arise out of the contract and is not exhaustive.

## The Envelope Agreement”

So, what happens if the terms of your engagement are scribbled on the back of an envelope or just agreed verbally with the client? While this skips past the difficulties and complications of the actual contract process, it can create its own Gordian knot of problems and complications.

First and foremost, is the expectation of the Courts that a formal appointment will be in place? In the event that there is no contract, the Courts will impose the terms and conditions of your engagement and, in reality, such terms are unlikely to fall in your favour.

Secondly, the lack of a contract can impact on both the extent of any liability you may have and the ability of your Insurers to defend a claim against you. Again, if the terms of the Agreement are not in your favour, it is likely that the Services the Court deems to be involved may go over your original intentions.

## “The Contract Itself”

The nature and form of the contract involved in your appointment can vary considerably depending on the client, the size, and complexity of the projects involved. But, when considering how to approach this topic, we would offer the following pointers:

**Small Scale Projects** – If it is a small project and you are being appointed directly by the client (in most cases, the home owner etc), they are unlikely to involve solicitors or have access to suggested terms. As a result, it is worth investigating whether or not your professional body has any pre-determined appointment documents for its Chartered Members. However, as an alternative, there are a number of standardised wordings (CIC, RIBA, JCT etc) that may provide the appropriate contractual terms.

**Mid to Large Scale Projects** – As you move away from the small scale projects, your appointment is increasingly likely to be part of a design team. In some cases, the Clients may still rely on the standardised wordings, but it is increasingly the case that they will appoint Solicitors to prepare bespoke contract documents.

## The Free Contract & Collateral Warranty Service

As you may appreciate, in any large scale project, the client will look to offset as much of the cost and potential liability to the design team and other professionals in order to protect their position. As a result, to assist in dealing with this type of arrangement, we at MFL Professional offer a free Contract & Collateral Warranty Review service

to all our clients who purchase insurance cover via ourselves.

The purpose of this Service is to highlight any issues that could arise between the wording of the contract and the terms of your policy and, wherever possible, offer potential solutions to any issues we note. To assist, our advice is provided in line with a ‘Traffic Light’ system to ensure that you are aware of the severity of the issues that could arise. However, it is important to bear in mind that our Service is limited to the insurance implications of any potential contract terms and should not be taken as being legal advice. In the event that you would like a contract reviewed by solicitors, we can look into referring the document to a firm of solicitors with experience in this area. As you would expect, while the service we offer is free, the solicitor will look to charge for their services although for customers of CIAT MFL Professional this may be at a discounted rate.

Another final thing to bear in mind when utilising the Contract & Collateral Warranty Review Service, while we can provide advice regarding the implications of the terms, it is ultimately a commercial decision for your company to determine if you are prepared to accept the terms notwithstanding our comments in relation to your insurance arrangements.

If you would like to discuss the issues raised in this article or if you have any questions about the Services we provide please contact:

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