



Schedule of Clauses in RIBA 2007 Appointment Agreements Which Give Rise to Concern:

Many terms in the new RIBA architect/client forms of agreement have been severely criticised by construction law experts and have caused concern amongst the RSUA, the ACA and the BIDA. The RSUA and the ACA refused to endorse the new forms. Some concerns relate to all of the new forms, others to just the Standard, Concise or the 'Domestic' versions (the latter misnamed as it is for use with consumer clients not just on domestic projects).

The following is a non-exhaustive list of selected clauses (numbers refer to clauses in the Concise version save where prefixed with an 'A' where they refer to the Standard version) which give rise to concern and the reasons for this concern:

A. Concerns raised by Rachel Barnes, specialist construction solicitor and a member of the Specialist Practice Consultant Panel of the RIBA, in Building magazine (7 December 2007, p57):

A2.1.2(a) (Standard and Domestic versions) Almost all projects undergo substantial revision of the budget and programme from those envisioned when the appointment agreement is entered into (and much of the compliance with these depends on the contractor). Yet the new agreements say, "The Architect performs the Services without undue delay and, so far as reasonably practicable, in accordance with any time scale or cost limits agreed with the client."

This is an entirely new term and places a great additional responsibility on the architect. Rachel Barnes, the legal columnist, commented about the new agreements in Building (7 December, p57), where she pointed out that the express duty to conform to the brief, programme and budget is "dangerous to a consultant's interests...at best muddies the waters on such a critical point."

In a letter printed in the same issue (p38), the author of the agreements (Roland Phillips) responding to another columnist says, "It is doubtful whether any tribunal would find in favour of an architect who put forward such poor reasons [only when 'reasonably practicable'] for overshooting the budget." In other words, he expects architects will held liable when a project exceeds budget or programme.

Curiously, the equivalent clause in the Concise version (clause 1.2.1) has different wording.

ID/05 covers this issue much better (clause 2.4.1), "The Designer does not warrant...that the services will be completed in accordance with the Timetable or the budget cost for the construction work."

Barnes goes on to say, "It has to be said, albeit with regret, that with the production of this agreement the RIBA has gone rather off the rails."

B. Concerns raised by David Chappell, an architect with legal qualifications who has written a number of books on construction contracts, in his book 'The JCT Design and Build Contract 2005', third edition, 2007 (amended from his text to include the Concise and Domestic versions where appropriate):

General

(All versions) The conditions are mostly written in the present tense. There is a potential for ambiguity. Although it is usually possible to make a reasonable guess as to the meaning, a reasonable guess is what a legally binding agreement is intended to



avoid. For example, where the Client ‘gives decisions and approvals as necessary...’ it is not clear whether the client has the duty to (shall) give them or simply the power (may), or whether the client has already given them or will do so in the future. To confuse matters, some clauses do include the word ‘may’. It is difficult to understand the advantage of this mode of expression.

A2.5.3

(Standard version) The client is given power to require the removal of any of the architect's staff by exercising the client's reasonable opinion. [This could conceivably include a principal of the firm.]

A2.6.1 (Standard version) At the completion of services, the client can demand all documents provided to the architect without the safeguard of being made subject to all fees paid in full.

A5.3

(Standard version) Definitions of ‘Construction Cost’ and ‘Relevant Cost’ are apt to be confusing. When read with this clause, which deals with the calculation of percentage fees, the result is something short of the clarity which is needed in this crucially important area. [There are no Definitions in the Concise or Domestic versions.]

A5.13 (All versions) It is not obvious why 5% has been inserted as the amount to be added to the current Bank of England rate for late payment in this clause. Why is it not 8% to match the Late Payment of Commercial Debts (Interest) Act 1998 rate? A client who pays on time does not have to worry about interest – whatever the rate. Hence, an architect should be wary of a client who complains about a high rate of interest for late payment.

A5.15, 5.6.7

(Standard and Concise versions) The provisions in this clause for payment on termination of restrict the architect's ordinary common law right to damages on repudiation of the appointment.

A8.4, 8.2 (Standard and Concise versions) Previous RIBA terms of engagement have contained the right for either architect or client to terminate at will, merely giving reasonable notice and stating the reason. This has always been a valuable clause to architects, particularly when an awkward client may make it impractical for the architect to continue although it may not be easy to identify a specific breach. This clause retains the right for the client, but not for the architect.

A8.5, 8.3 (Standard and Concise versions) This clause removes the architect's common law right to accept the client's conduct as repudiation and bring the architect's own obligations to an end.

Part B (Standard version) Although this part is apparently included to comply with statutory requirements, it omits any reference to notice which must be served by the client under section 110 of the Housing Grants, Construction and Regeneration Act 1996. Therefore, the Scheme for Construction Contracts (England and Wales) Regulations 1998 will apply and introduce an unwanted further complexity to an already complex document.

Chappell says at the end of this section of his book, “The overall content of the conditions is disappointing and the reader could be forgiven for being surprised to learn that these are RIBA terms.”



C. Additional concerns of the ACA:

5.6 (Domestic version) This clause requires the client to give written notice if he intends to withhold payment. Architects might feel they could rely on this to enforce payment in the absence of no set-off (see below). Yet they cannot, as in the case of *Domsalla v Dyason* on 4 May 2007 (judgement clause 95(1)), it was held that a withholding clause was unfair to consumer clients unless it had been explained to them.

5.9 (All versions) SFA/99 provided that not only would clients be liable for time and costs spent in recovering fees unreasonably withheld, but that these costs would be on an indemnity basis. This basis has now been changed to the standard basis. It seems wrong that architects should have to pay any part of costs incurred when successful in collecting fees reasonably due.

5.10 (Domestic version) The clause, “All rights of set-off at common law or in equity which the client would otherwise be entitled to exercise are expressly excluded.” has been omitted. This ‘no set-off’ clause has been in the RIBA standard agreements since SFA/92.

The form now has a footnote which states, “Guidance published by the Office of Fair Trading (OFT) says (consumers) are entitled to withhold part of the price, so long as the claim is genuine and the amount withheld is proportionate to the fault [*italics theirs*]. The letter of agreement includes procedures for deciding on such claims.”

This is surely a direct invitation for an unscrupulous or misguided client to unreasonably withhold fees. The architect then has to advise his insurers and, if he wishes to collect these fees, has to employ expensive solicitors, perhaps resist a security for costs application (see below) and fight the issue in the courts, a very lengthy, expensive and time consuming process. No wonder many architects in this position do not attempt to collect fees rightfully due.

Whilst the Notes on Use and Completion mention that the no set-off clause is omitted from the Agreement and suggests in Note 3 in the Model Letter that no set-off be mentioned there if desired, an architect who from previous experience has expected this clause to be in the contract as before or is not aware of its importance in collecting fees could be badly let down. Also, clients may be suspicious of a term which appears in an architect’s letter rather than in the standard form. One of the best points an architect can use in negotiating with a client is that a term is an RIBA standard.

The RIBA have said that they wish to avoid an OFT investigation into denying the right of set-off to clients. However, the OFT confirmed recently that they have had no complaints about no set-off in architecture or any other area and that they have no plans to investigate this issue.

The Unfair Terms in Consumer Contract Regulations 1999 (UTCCR) requires that terms such as no set-off be explained to consumer clients and agreed with them before the appointment agreement is entered into. This has been the case since before SFA/99 was published. Despite there being no significant changes in statute or case law since then, the reason now given in a letter from the acting Practice Director for the omission of the no set-off and other clauses was that it would be “too onerous a task for members to negotiate”. This seems contemptuous of architects’ abilities.

However, the Notes advise, “It is essential...to explain the Conditions and Letter of



Appointment in the context of the Client's status as consumer..." so architects will have to do this anyway. As demonstrated above, a practice will have to explain the withholding clause if it is to rely on it so why should they not be able to explain a no set-off clause?

One imagines that architects, given the choice, would prefer to explain these clauses to prospective clients at the beginning of the project where everyone is enthusiastic, rather than face an uphill battle of attempting to collect fees after much work has been carried out.

Detailed advice that architects should give to prospective clients and the wording of a letter confirming that this has been done should have formed part of the notes and model letter accompanying this version of the agreement.

Evidence that the RIBA's Director of Practice knows the value of the no set-off clause was shown in his column in *Building Design* of 3 August. Attached is a copy of Brian Water's letter in the 24 August issue which demonstrates the absurdity of omitting this clause in consumer contracts.

Whilst the Concise version includes a no set-off clause, a headnote states this version is not suitable for consumer clients (see below).

7.1 (Domestic version) Net contribution is omitted from this form. This is unfair for architects found only partially liable for negligence where the other negligent parties are unavailable.

9.2 (All versions) Clause 9.2.1 in SFA/99, etc providing for costs in adjudication to be awarded to the winning party has been omitted. This clause followed the well established practice in arbitration and litigation and seems only fair. More importantly, in the case of *Picardi v Cuniberti* on 19 December 2002, it was held that adjudication was unfair to consumer clients unless a successful client could recover his adjudication costs. Thus without this clause architects will be denied the use of this relatively quick and cheap dispute resolution procedure against consumer clients.

9.4 (Domestic version) SFA/99, etc state that arbitration is the means of dispute resolution after adjudication and for sums in excess of £5,000 with lower claims being litigated in the small claims court. The new agreement refers to the Model Letter in regard to disputes which sets out that litigation is the means of dispute resolution and makes no reference to small claims.

The advantage of arbitration is that by means of clause 9.5.3 (see below) the agreement directs that the arbitrator not award security for costs. Also, arbitration provides privacy for the parties. What architect wants to be Googled by a prospective client who might learn that he had a claim for negligence, even if that claim had been dismissed?

9.5.3

(Domestic version) This clause which reads, "The Arbitrator does not have the power referred to in Section 38(3) of the Arbitration Act 1996." has been omitted from this version. This prevents the arbitrator ordering security for costs. Just defending against an SFC claim will cost the architect several thousand pounds in solicitors', barristers' and accountants' fees.

If the client's SFC claim is successful, the architect will have to pay into court a sum reflecting the client's legal fees in defending the main action to collect architectural fees together with the client's legal fees in the SFC action. As the architect's financial



position may already be severely weakened by the non-payment of fees, he may not be able to resist a SFC application. If he wishes to continue the main action, the financially weakened architect then has to continue paying his own advisors.

Notes

(Concise version) There is a significant internal conflict within the documents for this agreement. The Notes on Use and Completion say in the section, "Client as 'consumer' ":

"...[the] Concise Conditions may be a suitable basis for the appointment...it is essential therefore to explain the Conditions and the Letter of Appointment in the context of the client's status as 'consumer' ..."

and yet the Concise Conditions of Appointment forms themselves have a headnote (printed in green to stand out) which says:

"The Concise Conditions of Appointment are applicable for a Client who is acting for business or commercial purposes or is a Public Authority but **not** [their embolding] a Client who is a consumer i.e. 'a natural person acting for purposes outside his trade, business or profession'."

What consumer client is going to sign a contract with such a note? Thus effectively the only version of the agreement for consumer clients which affords the architect some protection against non payment is the Standard version. However, the Standard version relegates many clauses protecting the architect to Part B which a headnote says do not apply to consumer client unless the client decides otherwise.

General (All versions) The wording of some clauses dealing with similar matters vary from version to version, e.g. clause A2.1.2(a) in the Standard version and clause 1.2.1 in the Concise version.

Please note that the ACA are not lawyers and do not purport to give legal advice. Architects are strongly advised to seek specialist legal advice if they propose to use the new RIBA forms so that they can fully understand the risks they might incur in doing so.

15 May 2008
ACA

Transcript of 'Letter of the Week' printed in 'Your Say' of Building Design on Friday August 24, 2007:

Vital 'not set-off' clause must stay

Despite Richard Brindley's claims (News August 10), two solicitors specialising in construction law have advised that the 'no set-off' clause is fully enforceable in consumer contracts, provided the consumer has the term explained to him and agrees to it beforehand. The regulations specifically provide for this.

Not only has the RIBA wilfully scrapped this clause, it has also dropped other fair protections for architects, including net contribution, the use of adjudication and the ban on security for costs.

Brindley knows the value of the no set-off clause. Asked in BD's *Practice* column on August 3, How do I get my client to pay me?, he chose to assume the client was commercial and went on to say: "The beauty of an RIBA standard form is that it also has a 'not set-off'



clause which is why I recommend using one whenever possible. This means the client has to pay the fee due and reclaim fees via adjudication." It could hardly have been better put!

Had Brindley assumed the client was a consumer, his answer should have been: "I am afraid that you will have to resort to arbitration or litigation as 'no set-off' and adjudication are not available to you under the RIBA's new domestic contract. As this will be very expensive and take many months, you might wish to abandon the whole matter and apply to your bank manager for a bigger overdraft to deal with the hole this non-payment will cause in your cash flow. Oh, and if your client claims negligence as a reason to evade payment, you should notify your PI insurer and hope he doesn't put up next year's premium."

Earlier this year the RIBA's own practice committee resolved to reinstate these protections in the new agreement. The chair of its small practice subcommittee has expressed grave concern at their omission, and eminent firms such as Paul Davis & Partners and Munkenbeck & Marshall have written to the RIBA President objecting to their removal.

The British Interior Design Association will not remove these protections from ID/05, which it publishes jointly with the RIBA, as it believes this would be irresponsible. The Association of Consultant Architects plan to update its own form of client contract, ACA98, and will do so jointly with BIDA to replace ID/05 and the RIBA SFA regulations.

Brian Waters, Association of Consultant Architects