'We have a responsibility to protect ourselves against onerous contracts'

Despite the fine sentiments in the industry about partnering in recent years, contracting in the UK remains in large part adversarial. Griffiths & Armour's roundtable of experts says architects must protect themselves against aggressive contract terms. *Felix Mara* channels the debate

LEFT TO RIGHT: HENRY PIPE, SIMON RILEY, MARTIN WHITE

Felix Mara The introduction to insurance broker Griffiths & Armour's latest Risk Management publication sets out that consultancy contracts are an everyday requirement. Such contracts should prove useful to both sides in a commercial transaction by clarifying agreements and undertakings established during pre-contract negotiations. However, it would appear that in certain quarters there is a continuing trend for bespoke contracts to create contractual risk that is, at best, misaligned to those pre-contract undertakings and in some cases could be placing a disproportionate risk on designers. With that in mind, we are here to discuss indemnities, strict liability, net contribution and limitation of liability clauses in consultancy contracts. On the one hand, indemnity and strict liability clauses can make contracts much more onerous for consultants and their increased use could be seen as symptomatic of a clients' market. But on the other hand, net contribution and limitation of liability clauses can potentially ease the burden by re-establishing a more reasonable and proportionate position.

First, we'll discuss indemnity and strict liability, then net contributions and limitations of liability. We'll focus on possible strategies when clients start talking about introducing indemnity and strict liability clauses. And we'll also discuss ways of persuading clients not to include these clauses, or at least of negotiating their terms. There's plenty of good advice in Griffiths & Armour's pragmatic and practical 'Contractual Liability Claims: Lessons to be Learned' document, which we read before the debate (it's available online and for iPad). >>

THE PANEL IN SESSION (CLOCKWISE FROM TOP RIGHT): INDU RAMASWAMY, JOHN ROBERTSON, HENRY PIPE, SIMON RILEY, MARTIN WHITE, PETER MURRAY, PAUL BERG, JOHN McRAE, KEITH LONSDALE, JONATHAN FRENCH, STEVE BAMFORTH AND FELIX MARA (CHAIR)

ALL PHOTOGRAPHY BY BEN BLOSSOM

THE PANEL

Steve Bamforth, senior partner and chief executive, Griffiths & Armour
Paul Berg, partner, Griffiths & Armour
Jonathan French, regional executive chairman – Europe, Woods Bagot
Keith Lonsdale, partner, Berrymans Lace Mawer
Felix Mara, technical editor, *The Architects' Journal* (*chair*)
John McRae, equity director, ORMS
Peter Murray, director, Stanton Williams
Henry Pipe, director, Max Fordham
Indu Ramaswamy, director, Allies & Morrison
Simon Riley, director, BDP
John Robertson, director, John Robertson Architects
Martin White, group counsel, Rogers Stirk Harbour + Partners

Steve Bamforth and Paul Berg, perhaps we could start off with your perspective on today's topic, before we go around the table to hear other people's views.

Steve Bamforth The vast majority of claims we see against our clients are within contract. So what is a contractual risk? The courts see it as a voluntary assumption of risk: no one forces you to sign contracts or to do work for a particular client, and that's why contractual risk management is so important.

Paul Berg Today we're looking forward to improving our understanding of the issues that you, as designers, are facing. As a firm, Griffiths & Armour always aims to be pragmatic, supportive and effective – and part of our process involves developing our understanding of the issues that our clients face, and including that experience in our day-to-day risk management support and the guidance we produce.

Peter Murray When it comes to onerous clauses, I'm adamant that, as architects of a certain ilk, we should be as strong as we can possibly be with clients, partly because I think we have a responsibility to protect ourselves and also to protect other practices which don't have the clout some of us have. I have clients say to me: 'I've had 16 people sign this contract, and you're telling me you're not going to.' And I say: 'I don't care how many people sign it – if it's not right, why should we sign it?' The big issue is knowing how others tackle these matters, so it's really good to have this session today. Many smaller practices out there could get clobbered and we might be able to do something about that by setting an industry standard, or at least some level of standard for these things.

INDU RAMASWAMY

JONATHAN FRENCH, FELIX MARA

Martin White I'm Rogers Stirk Harbour & Partners' group counsel. I've been there for 23 years doing this job, which involves handling the contractual risk management side of things and I'm responsible for drafting all our contracts.

We have exactly the same experience as Peter. Whenever we criticise sloppily drafted clauses – and it's usually a contractor who's involved these days – they say: 'We have dozens of architects and all the other consultants have signed without question.' And, in exactly the same way, we say: 'We take our own view.' Fortunately, because we have a certain reputation, we're perhaps more able to call the shots than smaller, less high-profile practices. It's interesting to see how everybody else deals with this because, in all those 23 years, I don't think I've met my counterparts in similar organisations.

Simon Riley I run the project management group at BDP and, like Martin, I don't really know who else does what I do. I experience great frustration negotiating contracts with people who don't really understand what they're asking for. They're asking for what they've been told to ask for and any opportunity to get the voice of the industry out there is a good thing.

Henry Pipe One of the things I struggle with is persuading engineers the things we're asking for are reasonable. I feel I'm often combating a perception – and I can't agree with Peter and Martin strongly enough – that everyone else has signed up for these clauses unquestionably, so how can you raise these issues without being deemed to being the awkward one? Sometimes we ask whether these things are needed or whether they're just a divide-and-conquer tactic

> 'When it comes to onerous clauses, we should be as strong as we can be with clients'

or, indeed, whether because everyone else has signed, no one reads the clauses.
John Robertson Recently we've found we're being asked to pick up a whole team of sub-consultants under our appointment.

Indu Ramaswamy It is incredibly reassuring to hear all of you saying the same thing, because I feel like I'm battling upstream and get the same spiel from the client: 'Every single person signed up to this agreement.' We've walked away from jobs – or the minute we threaten to walk away, remarkably, that indemnity clause is actually not required. What really disappoints me is that, especially on projects where we're supposedly collaborating with other architects and other consultants, we don't get together more often before negotiation starts and stand our ground united. Some have even been accused of colluding when they phone up other architects but, actually, we should be doing that as a profession. If the whole profession refuses to sign these clauses, we'll get somewhere.

FM So there seem to be two concerns regarding clients. One is that they're too savvy, and the other is that they're insufficiently informed. Perhaps we could continue the discussion by distinguishing indemnity clauses and strict liability. They seem to be overlapping topics.

Keith Lonsdale An indemnity clause involves contractually agreeing to indemnify a party under certain circumstances. There are risks, in that you are effectively giving a blanket indemnity, which gives no cover in relation to exercising reasonable skill and care. So you're indemnifying what will happen and effectively giving a warranty over something that will happen, which is potentially catastrophic, because you won't have insurance cover for that eventuality. Indemnity has a potential crossover with strict liability if you're indemnifying what forms a particular set of circumstances.

IR You don't actually have to be in breach if you've signed an indemnity clause, because you've indemnified them against all losses. All they have to demonstrate is that they've suffered a loss. It doesn't have to be through your breach.

MW It's essential to get at least the phrase 'against negligent acts' into the clause.

IR We also try to include 'reasonably foreseeable' and 'fully mitigated' provisions.

MW Different rules of law apply to the breach of an indemnity obligation and its limitation. Obviously, it's a separate breach of contract, not a breach of the appointment contract to provide services. It's a breach of a different obligation, so it carries its own separate limitation, mitigation and contribution rules and they are quite strict; I think this is because the law of indemnities seems to have grown up on its own, with its own different and stricter provisions.

IR Where do the indemnity clauses come from then? Who's telling the client they need an indemnity clause?

SB They've been in JCT contracts for years.

IR But not for performance.

SB Yes, you're absolutely right. But I think it's one of those things clients hear, that indemnities are given by contractors. So they ask: 'If contractors give them, why not consultants?'

SR We can't rule out clients' legal advisers in this. They're playing a big part. Some of the hardest negotiations we have are with clients' solicitors, who aren't necessarily experts in construction services and who don't really understand what they are procuring from people who are ultimately providing professional services rather than a product.

PAUL BERG, JOHN McRAE

PM Our starting point in our fee proposals is always quoting the RIBA standard terms and conditions and, of course, there are always just hoots of laughter. 'It's badly drafted,' they say, and so it immediately goes straight in the bin and out comes the Encyclopedia Britannica with everything under the sun in it.

SR That's reassuring to hear. As soon as you get to projects of a certain size, as soon as clients involve their solicitors, you get the encyclopedia treatment and it's things like net contribution clauses that give rise to the majority of the concerns. I'm under no illusion we can turn back the clock, but I wonder whether there's a more fundamental issue here about what clients think they're procuring.

Ten to 20 years ago we were there alongside the client as their professional advisers looking out for their interests. What seems to be happening is that, rather than entering into what is inherently a risky thing, the client is procuring the building with professional advisers to assist and support them, but then saying: 'I don't want a service, I want a product and the product is the building, so I'm just going to dump my risk on a load of people.'

IR Why aren't consultants speaking to each other on bespoke contracts and getting the same protection they would get on ACE contracts?

PB That's certainly one of our recommendations.

FM Do you think consultants have a perception that, by having these discussions, they are doing something illicit? They need to get that idea out of their heads.

IR Absolutely. But we've found that after you get unity in the bid, when it actually comes to signing up the sub-consultants, other consultants do a U-turn and refuse to sign. We always respond at the clarification stage, or actually with our bid, that we will not sign up to indemnities. If they still give us the project, we certainly won't sign up to them. We dig our heels in and have walked away from jobs over it, whereupon clients have come back and said 'fine'.

SB Procurement is at the root of the problem. The way contracts are procured in the UK is just plain wrong. It's all about clients thinking they can dump risk. If we can encourage clients to retain, manage and insure more of what is >>

PETER MURRAY

their risk, we'd have a much leaner mode of operation here in the UK.

JR Are indemnity clauses becoming more prevalent and if so, are you saying you would or wouldn't insure them?

PB It's a really interesting question. Is it better to have no insurance and therefore drive behaviour? The reality is that it's part of the market: there are a number of players involved and no one will agree to a standard position. From our perspective, it's critical to protect our clients. They must have the benefit of knowing that, if they have to sign something, they have protection. What is often missing from sections of our respective industries is clear advice on what risk looks like and what it could mean.

MW In an indemnity there is no implied obligation to act reasonably to mitigate your loss if you're a claimant, which is part of the normal contractual damages law. But the law of indemnity has grown up in a very narrow, technical and restricted way. So you have to put an obligation on the client to act reasonably. If that's not in there and they're claiming all this loss, you have no possibility of saying to them that you acted reasonably. The point that comes out of Griffiths & Armour's paper is that, for people who are trained to look at words and drafting as lawyers, a lot of this is relatively obvious. But for most architects, it isn't. Even as a qualified lawyer, I found this Griffiths & Armour document extremely illuminating and I think it should be widely circulated to architects.

JM The client has no building without a contractor or a design team. He's got the money, he's got the desire, but he has nothing to show for it. If we, as design teams and contractors, refuse to take on that risk, clients will have to change their attitude.

IR You'd think they'd understand that it's better to have us insured, than not.

JR Usually that's the strongest card we have to play. We consult with Griffiths & Armour, as I'm sure many of us around this table do, on our various contracts. If we go back and say: 'Look, this is just uninsurable,' they usually back off. I'd be interested to know what you all think. Just as collateral warranties became part of the suite of documents, do you think strict liabilities and indemnities are now becoming the norm?

'It would be unfortunate if we let strict liabilities and indemnities become the norm'

IR We're seeing more of them, but it would be hugely unfortunate if we let them become the norm. Why should we be bullied into allowing something to become the norm?

SR The most illuminating way of opening up discussions with clients on these things is to ask directly: 'What is the intention of contracting?
What are you trying to protect against?'
Very often I find there is no knowledge or understanding among clients why that stuff is in there, because in my experience successful projects actually come from relationships between people and none of this stuff makes any difference whatsoever. It actually gets in the way. So anything which educates fellow professionals or clients is good.

PM What about Part 3 students?

LEFT TO RIGHT: HENRY PIPE, SIMON RILEY, MARTIN WHITE, PETER MURRAY

Jonathan French If you give a Part 3 student a lot of information, it's like giving a child a loaded gun. A little knowledge in these matters is a dangerous thing. But, having said that, I think young people coming out of architectural education and going into practice have no concept of the implications or intent of contracts and contract law and I think there must be an improvement in the way education shines a light and sets up warnings about these things. It's necessary to educate our insurers as well – underwriters in particular.

MW Coming to strict liability – which I think is insidious and which appears in so many different guises – it can catch you unawares. Ultimately we should be telling architects to say to clients: 'I can only be responsible for what I can control directly.' The point about strict liability is it widens that liability.

IR Clients are changing risk profiles and they're making contractors liable for all of the design. So you can understand why contractors are asking for collateral warranties from designers and not novating. It's a vicious circle.
PB We're asked whether a client should have a risk-free project: they set the deal, it's their playing field and they decide things like the composition of their design and contracting teams. So why should an architect be held responsible for those decisions? To my mind that is why 'net contribution' is an inherently reasonable proposition.

IR It doesn't actually limit your liability in any way. It's just making you responsible for what you're liable for.

MW It places the risk of insolvency with clients, where it belongs. Why should we be responsible for subcontractors' insolvency? We haven't paid or chosen them. We're nothing to do with it.

FM Griffiths & Armour's document maintains there is a way forward with net contributions and assisting the overall process by clarifying roles and responsibilities.

SR Is there scope for rewriting the standard net contribution clause to make it more explicit? You need to see the client's position. Take the standard case where a net contribution clause comes in to play. The contractor does something stupid we don't spot. From the outset, the client has recognised their contractor is doing something that, if they do it wrong, will cost them a lot, so they engage professionals to check they act sensibly. If these advisers act negligently, the client wants to be able to pursue them. The only circumstance where the end game is different is when there's an insolvency. Clients get half-way down that logic to the point where suddenly we're taking away their opportunity.

We need to lead them all the way through that logic to the point where you get to the fact that we're covering insolvency risk. It also comes down to who you're working with, because the thing about not having a net contribution is the risk of being the last man standing. I would strongly advocate that as design teams, the more we can do about discussing these issues before they're set in stone so that we can present a unified front to our clients, not only on the project, but across the industry to clients in general, the better.

As consultants we sometimes buy in to what contractors, sometimes architects, provide us with as a set of terms and say: 'Well that's all very well and it's very interesting and enlightening, but it's too late because we've already signed up, and we need you to be back to back.' So the more we can do to get in collectively at an early stage and have a look at what this is, the better.

PB Ultimately, the aim behind our publication is to help the professional to identify, understand and mitigate the current contractual liability challenges. Sharing good practice and promoting greater communication are simple but essential ingredients in our collective efforts in this increasingly challenging area.

STEVE BAMFORTH

JOHN ROBERTSON, HENRY PIPE

KEITH LONSDALE, JONATHAN FRENCH

Many thanks to Griffiths & Armour for organising and taking part in this debate. For your free copy of Griffiths & Armour's Contractual Liability Claims: Lessons to be Learned, send an email to: LessonstobeLearned@griffithsandarmour.com or scan the QR code below.

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