

# COLLATERAL WARRANTIES, RELIANCE, AND LIMITING LIABILITY

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BEALE & CO

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# What's all the fuss about?

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Economic loss is not recoverable in tort.

Creating contracts with third parties gives them the ability to sue you for economic loss.

Your commercial exposure is (at least) doubled

May not be covered by Professional Indemnity Insurance (PII)

# Limiting Liability - Fundamentals

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Limit your liability with a financial cap.

A reasonable (i.e. low) aggregate cap on your liability under the appointment is essential to protect you in the event of claim.

Aggregate cap “Subject to a limit of £300,000 for all such claims”  
(as opposed to “each and every claim.”)

Beware of ‘carve outs’

Reasonable limits are enforceable: *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018].

The level of your professional indemnity insurance is NOT a limit of liability. All appointments should include a limit of liability to avoid risk of uninsured liability.



# Limiting Liability – Fundamentals (2)

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Net contribution clause - ensures that the consultant is not on its own held liable for the full amount of any loss suffered by the client where such loss has been contributed to by other parties.

Exclusion for indirect and consequential losses - prevents the consultant being responsible for losses far removed from its services under the appointment.

Resist liability periods that extend liability beyond 6/12 years from completion of your services.

Resist indemnities – risk of uninsured losses.



# Third Party Rights

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Starts with terms of Appointment/contract with original client.

Standard to prohibit assignment and exclude Third Party rights. Essential!

Client may seek to include clause such as:

“The Consultant shall provide, upon a request from the Client, a collateral warranty in the terms contained in Appendix 2 in favour of:

- any purchaser of the Project;
- any tenant of the Project; and/or
- any funder.”

# Third Party Rights (cont.)

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Avoid obligations to provide CWs whenever possible.

Limit your obligation to provide CWs to closely defined classes:

- First Purchasers
- First Tenants, etc

Not to “any party with an interest”.

If possible, a cap should be provided on the total number of collateral warranties e.g. a maximum of three.

# What are Collateral Warranties (CWs)?

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Contracts with third parties (i.e. not your original client.)

Create liabilities in addition to liability to Client under the Appointment.

Capable of being assigned to other parties.



# Tackling Collateral Warranties

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Exclude Third Party rights and limit assignment.

Obligations should be “back to back” with appointment – no more onerous duties.

Should include clauses limiting liability by reference to Appointment, e.g.

- a no greater or longer lasting liability clause; and
- an equivalent rights of defence clause.

*Swansea Stadium Management Company Ltd v City & County of Swansea & Anor* [2018] enforced no greater liability clause



# Tackling Collateral Warranties (cont.)

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Funder's step-in rights – subject to payment of outstanding fees.

Exclude consequential losses.

Check your PI, ask your broker/insurer to consider any CW.

PI policies typically will not provide cover if:

- the liabilities created by the CW are “greater or longer lasting” than under the Appointment; or
- the CW has been assigned on more than two occasions.

See Construction Industry Council (CIC) CW for a good standard form.



# Reliance by Third Parties

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Third party may use your report but has no legal right to rely on it without CW/formal assignment. *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018]

Retrospectively assigning the benefit of an existing report to a third party can take numerous forms, including:

- Letters of Assignment/reliance
- “re-addressing” the report / changing the client’s name.

May seem innocuous “easy money”. They are not!

- Less formal, fewer safeguards
- Passage of time
- Often worded as if the third party was the original client (*BDW v IGL*)



# Minimize Exposure to Risk

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Disclaimers / caveats in reports (*BDW v IGL*)

Standard letter/Agreement to assign should provide that:

- No further assignment of the report
- No proceedings or action can be brought after 6 years from the date of the report
- Performance to be assessed by reference to
  - Standards prevailing at the time report prepared
  - Terms of original appointment
  - Instructions and information provided by original client
- No liability arising from changes to site conditions (disclaimers in reports are also useful)
- Financial cap on liability
- Exclude consequential losses
- Equivalent rights of defence.

Price the risk!

# Recent Trends

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Hardening insurance market. Push back against high limits of liability.

Generally clients expect limits to be same as PII cover. But this is not your only project!

Modest limits of liability, NCCs, exclusion clauses, disclaimers/caveats are being enforced by the courts - see *Goodlife Foods*, *BDW v IGL*, *Swansea Stadium*



# Contact Us

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Beale & Co is pleased to provide AGS members with guidance in respect of issues arising in connection with their practice, including in relation to:

- Appointments and collateral warranties
- Assignment and novation
- Non-payment
- Disputes
- Intellectual property rights
- IT
- Employment
- Corporate and commercial matters

To get in touch, please use the following contact details:

Tel: +44 (0) 20 7469 0400 (please quote “AGS Helpline”)

# Thank You for Listening

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