

ANC

Its Contractual and Insurance Arrangements

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About your speaker - Nicolas Oldham



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From our London office, I head up the firm's Construction and Engineering Risks practice - a national offering across five offices.

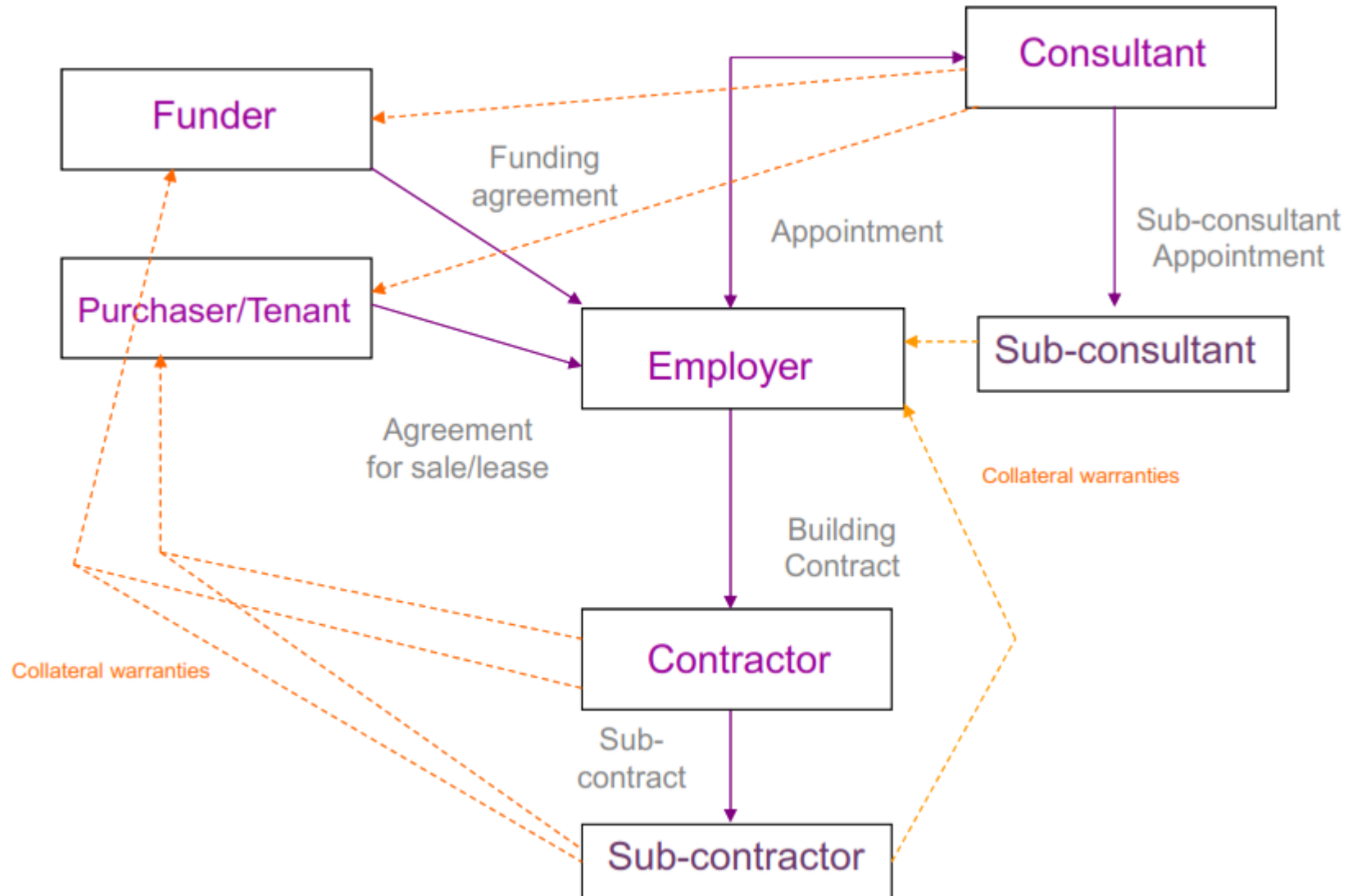
For almost thirty years, I have dealt with claims against most professionals. Since 1995, I have dealt exclusively with claims against construction professionals, including surveyors and valuers. I have substantial experience of court proceedings, arbitration proceedings, adjudication and ADR. I very much enjoy being instructed to advise on policy coverage and have been appointed coverage counsel for claims not only in this country, but also abroad, including Australia, Canada and Turkmenistan on a CAR policy!

Clients say that: "strong technical skills provide the platform for an innovative and commercially focused approach." and "Nik's ability to build up trust and rapport enables messages to be conveyed quickly and effectively and is a major contribution to the facilitation of the settlement of complex and multi party disputes."

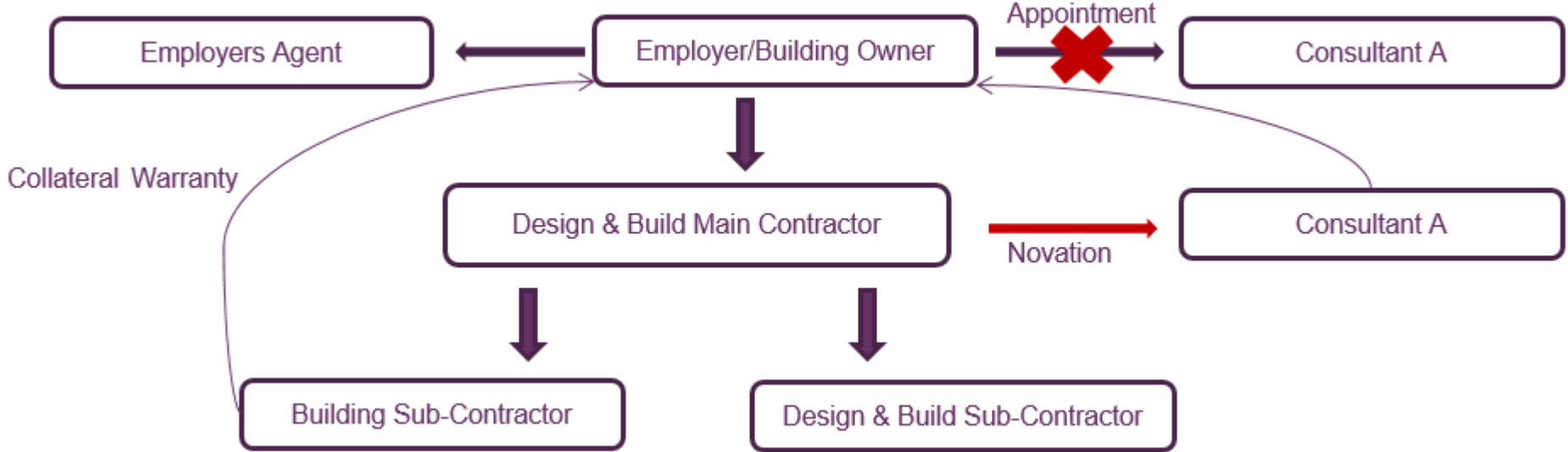
Introduction

- Walk through typical PI Policy
- Identify issues in Appointment documents
- Identify issues in Collateral Warranty documents
- General Discussion
 - Notification
 - Types of Claim
 - No Brexit
 - No English Rugby

Parties to a traditional construction project



Design & Build Project



1 - What is covered?

- The Schedule
 - Policy Date
 - Retroactive Date
 - Excess
 - Limit of Cover (e.e.c. or in the Aggregate)

2 - What is covered?

- Insuring Clause
 - Cover for:
 - Compensation Damage
 - Claimant's Legal Costs
 - Defence Costs and expenses in respect of
 - Any civil Liability
 - Negligent mitigation or misrepresentation
 - Infringement of Intellectual Property Rights

3 - What is covered?

- Other Insuring Clause
 - Costs of Court attendance
 - Witness attendance costs
 - Damage to Docs
 - Damage to client docs?
 - Dishonesty of Employers
 - Client Monies
 - Data Protection Act 1998
 - Health and Safety Costs – Defence Costs - £250,000

1 - What is not covered?

Collateral Warranties and Contractual Liabilities

any:

1. Collateral Warranty or other agreement:
 - a. That has been assigned on more than two occasions
 - b. Under which the Insured is liable to:
 - i. Provide a level of service or produce a result beyond the scope of any duty that would otherwise be implied by common law or statute;
 - ii. Any greater extent or for any longer a period than is the case under the agreement with the person or party with whom the Insured originally contracted to perform the Professional Services;
2. Provisions in a Collateral Warranty or other agreement which;
 - a. Guarantee or warrant a particular outcome, including but not limited to any performance warranty or express guarantee beyond the scope of any duty that would otherwise be implied by common law or statute; (“Fitness for Purpose”) or
 - b. Comprise a penalty clause or a liquidated damages clause or an additional damages clause of any kind.

2 - What is not covered?

Contractual Liability

any liability incurred by the **Insured** pursuant to provisions in a contract or other agreement which:

1. Guarantee or warrant a particular outcome, including but not limited to any performance warranty or express guarantee beyond the scope of any duty that would be implied by common law or statute; or
2. Comprise a penalty clause or a liquidated damages clause or an additional damages clause of any kind; or
3. Provide for a level of service or produce a result beyond the scope of any duty that would otherwise be implied by common law or statute; or
4. Impose any other liability wider than the liability of the **Insured** would have at law in the absence of such contract or other agreement.

Appointments / Contracts

- Limitation – “Underhand” 6 years or “seal” 12 years
- Jurisdiction – Exclusive Jurisdiction of England and Wales
- Insurance – You have in place professional indemnity insurance with a reputable insurer, with a cover of at least £xxxx for each and every claim. Please provide to us, forthwith, documentary evidence that such professional indemnity insurance has been taken out and is being maintained for a period of 12 years from the date of this contract.
- Copyright – Do not warrant that which is not in your control:
“The Consultant warranty that the use of the documents ... produced or employed by the Consultant for the purposes of the Development will not infringe the rights of any third person”.

Appointments / Contracts

Policy Exclusion – reminder:

“Guarantee or warrant a particular outcome, including but not limited to any performance warranty or express guarantee beyond the scope of any duty that would be implied by common law or statute; Fitness for purpose liability”

Express:

“Shall indemnify the Contractor against liability arising out of any act, error or omission by the contractor in carrying out the Contractor’s design obligations under the Contract that results in the Works (or Section or Part or major item of Plant, if any), when completed, not being fit for the purpose(s) for which they are intended under Sub-Clause 4.1...”

Appointments / Contracts

Implied FFP more readily applied where employer reliant on the skill of the Consultant to provide a design fit for the intended purposes specifically made known to the consultant.

It must be:

“reasonable and equitable in all the circumstances, necessary, obvious and

Extension to the insurance policy:

“The Insurer will pay on behalf of any Insured all loss arising out of any implied fitness for purpose warranty solely in respect of Professional Services provided that:

- 1. The contract defines the intended purpose of the works”

What is a Collateral Warranty

- Contractual document - two or more parties
- Can be enforced on its own
- Put in place where there is no existing relationship between the parties
- Allows direct claims (e.g by funder against sub-consultant) / claims in contract, not tort
- Can be read as a short form version of the sub-contract or Appointment
- Possibility of assignment

Why do we review collateral warranties?

- To ensure that they are no more onerous than the contract the Insured entered into
- To ensure that the Insured does not enter into a contract which would risk seeing a claim against them be uninsured as a result of the Policy's terms and conditions
- Another layer of risk management for Insured

How we review

- Policy perspective only
 - Design only (not workmanship)
 - Red amendments
 - Orange amendments
-
- Key issue: no more onerous than the law

Common issues: reasonable skill & care

- *“The Insurers agrees to indemnify the Insured [...] in respect of a Claim first made against the Insured [...] against Civil Liability arising out of:
a. the provision or failure of Professional Services”*
- Professional Services = *“professional services performed or advice given by the Insured in relation to those activities declared in the Proposal”*.

Reasonable skill & care provisions

1 The Subcontract Works

1.1 The Subcontractor warrants to the Beneficiary that:

1.1.1 the Subcontractor has carried out and completed the Subcontract Works and/or shall carry out and complete the Subcontract Works in accordance with the Subcontract;

1.1.2 the Subcontractor has complied with and/or shall comply with all the obligations of the Subcontractor under the Subcontract; and

1.1.3 in relation to any design carried out by the Subcontractor, that it has exercised and shall continue to exercise in the performance of the design, all the skill, care and diligence to be expected of a properly qualified and competent [discipline] experienced in designing works of a similar scope, nature, size and complexity to the Subcontract Works.

Reasonable Skill and Care – Concern!

2 Deleterious materials

2.1 Notwithstanding and without prejudice to the terms and conditions of its Building Contract, the Contractor confirms to the Beneficiary that (unless otherwise authorised or instructed by or on behalf of the Employer):

2.1.1 the Contractor has not used and/or specified, selected and/or approved and will not use, specify, select and/or approve for use; and

2.1.2 (consistent with the Contractor's duties under the Building Contract) the Contractor has exercised and will continue to exercise the level of skill, care and diligence expected of a competent and qualified contractor to ensure that none of the following shall be used in the Project:

Assignment clauses

8 Assignment

- 8.1 The Beneficiary may at any time assign or transfer all or any of its rights under this Deed to any party without the Subcontractor's consent on two occasions. The Subcontractor's consent (which shall not be unreasonably withheld or delayed) is required for any further such assignments.
- 8.2 The Subcontractor shall not contend that any person to whom the benefit of this Deed is assigned under clause [8.1] may not recover any sum under this Deed because that person is an assignee and not the named Beneficiary to this Deed.

Common issues: limitation

6. **LIABILITY PERIOD**

The Beneficiary may not commence any legal action against the Sub-Contractor under this agreement after [12] years from the date of [practical completion **OR** making good of defects] of all of the Works.

Common issues: No greater or Wider

“Notwithstanding any other clause to the contrary, the Sub-Consultant shall owe no duty or have any liability under this Deed which is greater or of longer duration than that which it owes to the Consultant under the Sub-Contract.”

Orange amendments

- Purpose
- Net contribution clauses

“The Sub-Contractor’s liability under this Deed shall be limited to such proportion which it would be just and equitable to require the Sub-Contractor to pay having regard to the Sub-Contractor’s responsibility for the same and on the basis that all other interested parties, including but not limited to the consultants, Contractor and other sub-contractors, shall be deemed to have provided contractual undertakings to the claimant in respect of the performance of the Works and shall be deemed to have paid to the claimant such proportion of it which it would be just and equitable for them to pay having regard to the extent of their responsibility.”

Orange amendments

- Caps on liability

“The total liability of the Sub-Contractor under or in connection with this Deed, whether in contract or in tort or in negligence or for breach of statutory duty or otherwise, as far as is permitted by law, shall not exceed £[amount of PI cover].”