
Liability Briefing

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Consultant - client confidentiality obligations

Strictly speaking, it is not necessary to impose an express duty of confidentiality on a consultant. A duty of confidentiality arises under the common law where a client imparts confidential information in circumstances which give rise to an obligation of confidence. Such circumstances would include disclosure to a professional person. However, it is common to find a confidentiality clause in consultants' appointments (in both standard forms and bespoke contracts). Further, on occasion – perhaps if the project is a sensitive one, but not always in that context – a client may ask a consultant to sign a separate stand-alone confidentiality agreement. This *Briefing* discusses confidentiality obligations in these various contexts.

Common law duty of confidentiality

First, what is the position if no mention is made of confidentiality in the consultants' appointment and there is no separate confidentiality agreement? In order for a duty of confidentiality to arise and therefore for a consultant to be at risk of breaching that duty, the information concerned must have 'the necessary quality of confidence'. That is, it must fairly obviously be important and of value to someone, of limited public availability and distinguishable from any generally available information. The law aims to protect individuals' valuable information until they choose to put that information in the public domain or the information enters the public domain through an independent source. Sensitive information about the client's proposals for a building development, for example, or about the client's financial affairs, is likely to qualify as confidential information. The client must believe that disclosure of the information would either harm him or benefit his competitors and reasonably believe that the information is not generally available.

Confidentiality under standard and bespoke forms of appointment

The ACE, CIC and RIBA forms of appointment and PSC3 all include straightforward obligations on both parties not to disclose confidential information. The composition of 'confidential information', and how far the obligation extends, varies between the different contracts. Similar obligations are imposed by professional bodies, for example in the RIBA's Code of Professional Conduct.

Bespoke appointments tend either to make all information 'confidential' or define 'confidential information' in fairly wide terms. Consultants will want to check the definition, and also ensure that appropriate exceptions are included. See the checklist in the next section below.

What are the consequences of breaching the duty of confidentiality?

For there to be a breach of the obligation, there must have been some unauthorised use or disclosure of the information. The obligation is not just to use reasonable skill and care. Innocent use can give rise to liability – though in that case the remedies might be restricted. The remedies available to a party whose information has been wrongly disclosed are primarily damages and/or an injunction. Damages may be awarded where unauthorised disclosure or use of confidential information has caused the owner to suffer loss. In general, the level of damages awarded will reflect the commercial value of the information. The client can seek an injunction preventing the use or further disclosure of confidential information. Whether the court will grant one depends on the facts of the case: it is in the judge's discretion. Other remedies the client can seek are orders for the delivery up or destruction of documents, or an account of profits (again these are discretionary remedies).

Stand-alone confidentiality agreements

Clients may have specific concerns about confidentiality, driven by the nature of their business or the project, and therefore wish to have a stand-alone confidentiality agreement to reinforce the obligations placed on the consultant. From the client's point of view, to be enforceable, the restrictions imposed by such an agreement must not extend beyond those reasonably required to protect the disclosing party's confidential information. So far as consultants are concerned, they will want to check the following:

What does the agreement require the consultant to do? It must be possible to comply from a practical point of view with the obligations imposed.

What is regarded as confidential information? It should be clear what information is to be treated as confidential, and the uses and disclosure that can be made of it. The definition should not be so wide as to hinder the consultant's ability to perform the services or restrict his ability to comply with his obligations under the contract.

What information should be expressly excluded? A stand-alone confidentiality agreement should not apply to information:

- already in the public domain,
- provided by third parties,
- already known to the consultant independently,
- required to be disclosed by law,
- developed independently,
- disclosed otherwise than by wrongful disclosure,
- necessary in connection with entry into the appointment,
- required for the proper performance of the services, or
- to be used in any legal proceedings.

The consultant may also seek a dispensation to enable him to publish project photographs and project descriptions for marketing purposes.

For what period is the consultant expected to keep things confidential? If a period is expressly stipulated, is it appropriate? If the agreement is silent, then the obligation under the common law would continue until the information no longer retains its confidential nature, for example because it enters the public domain. Such an obligation could therefore continue indefinitely.

What about remedies for breach under a confidentiality agreement? Sometimes these can be spelt out in the agreement, although they need not be. The consultant might be required to acknowledge in advance that damages are not an adequate remedy and that the client is entitled to injunctive or other equitable relief. It might be unwise to agree to this sort of provision, which would deprive the consultant of any arguments otherwise available as to the appropriate remedy.

Can the consultant limit his liability under the confidentiality agreement? Yes, in the same way that liability under the form of appointment can be limited.¹

Are limits imposed on the use to which the consultant can put his own information? The consultant should not be required to keep his own work confidential – thus preventing him using it on other projects, for example – save to the extent that this can be justified on a project-specific basis.

Watch out for ... provisions which have no place in a confidentiality agreement, such as exclusivity clauses, restrictions on competition clauses or/and those interfering with intellectual property rights (unless they simply confirm that ownership remains with the disclosing party).

When might the consultant require a confidentiality agreement?

There are some types of information a consultant may wish to keep confidential, for example details of staff, financial information relating to his business or other information about other clients, particularly when tendering. If the client has not already agreed to treat such information as confidential, it would be advisable for the consultant to mark it as such so as to alert the client to its confidential nature.

As far as technical information is concerned, this will be protected by copyright and therefore by the extent of the licence given to other parties to use that information, as long as that information is contained in writing or drawings. Ideas and information (such as ideas which may be put to practical use on a project) given to third parties orally cannot be so protected and this could be important, for example in the context of bidding for work that the consultant may not win. A confidentiality agreement would then be essential in order to prevent the client or other third parties using this information in the future without involving the consultant.

Another example is where a consultant prepares an alternative tender for submission in a bidding process, incorporating a different design to the one on which tenders

¹ See CIC *Liability Briefing* 'Managing liability through financial caps' available at www.cic.org.uk/liability.

have been invited. It would be galling for the consultant to find his alternative design being adopted without the consultant being involved. The consultant should at the least make it clear that his alternative design is confidential, and its use conditional upon terms being agreed for the consultant's involvement in its implementation. An obligation of confidentiality cannot be imposed unilaterally, but if the alternative design is considered, the obligation of confidentiality will usually be held to have been accepted.

Subconsultants

If a consultant appoints subconsultants, he will want to ensure that his own confidentiality obligations are passed on to the subconsultants through their contract of appointment.

Confidentiality obligations and novation

A consultant's duty of confidentiality to his client could cause difficulties where a consultant is novated from one client to another client, or to a contractor. Once novated, the consultant will have a duty of confidentiality to his new client, but his duty of confidentiality to the first client remains. As a professional he is also required to inform his client of anything that is material to the interests of that client. This could include revealing the confidential information he has received from the first client – which could be of considerable concern where the second client is a contractor. It is important therefore that the parties agree expressly whether confidential information is to be given to the second client: if so, the consultant must be released from his duty of confidentiality to the first client.² Equally, if such information is not to be given, the second client should release the consultant from his obligation to give him all information that is material to his interests where this comprises confidential information belonging to the first client.

This *Liability Briefing* is for information only, and insurance or legal advice should be taken to cover your particular circumstances.

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2 See clause 1 of the CIC Novation Agreement.