



WICA 2023

Working Party: Building & Construction Insurance

Aaron Sherriff

Wednesday 30 August 2023

| Specific advice should always be obtained before relying on any aspect of the content of this presentation or associated materials.

New Zealand Some Issues on Construction Claims

Factors impacting the resolution of large construction claims in New Zealand:

- Joint and several liability for negligence
- Wide liability of local authorities
- Uptake of alternative dispute resolution processes, particularly mediation
- Plaintiffs / claimants therefore focus on the “deep pockets”: councils and insured consultants

Defences and arguments often raised by construction consultants:

- The scope of their duty of care when providing advice: what is “reasonable”?
- The application of limitation of liability clauses contained in construction contracts

New Zealand *Tadd v Weine* decision: overview

This case concerned a commercial building

The owner of the building engaged an engineer to undertake a seismic assessment of the building to be included in marketing material to sell the building

The engineer assessed the building at “60% NBS”. Then said “no chance” the NBS rating would go higher, but then the NBS rating *might* go higher (but not guaranteed) if a more detailed assessment was carried out

The building was sold with the 60% NBS assessment included

The purchaser then had a more detailed seismic assessment undertaken: <30% NBS

New Zealand

Tadd v Weine decision: standard of care

“The standard of care of an engineer when making a statement is the degree of skill and competence that an ordinary member of the profession would bring to the same task at the time the statement is made.”

A construction consultant meets this standard if she or he demonstrates a reasonable basis for the conclusions that were presented

An alternative conclusion does not necessarily mean a professional has been negligent

New Zealand *Tadd v Weine* decision: limitation of liability

SHORT FORM AGREEMENT FOR CONSULTANT ENGAGEMENT	
BETWEEN: (CLIENT)	
AND: (CONSULTANT)	
Collectively referred to herein as the "Parties" and individually as a "Party"	
PROJECT:	LOCATION:
SCOPE & NATURE OF THE SERVICES:	
PROGRAMME FOR THE SERVICES:	
FEES & TIMING OF PAYMENTS:	
INFORMATION OF SERVICES TO BE PROVIDED BY THE CLIENT:	
The Client engages the Consultant to provide the Services described above and the Consultant agrees to perform the Services for the remuneration provided above. Both Parties agree to be bound by the provision of the Short Form Model Conditions of Engagement (overleaf), including clauses 2, 3, 9 and 10 and any variations noted below. Once signed, this agreement, together with the conditions overleaf and any attachments, will replace all or any oral agreement previously reached between the Parties.	
VARIATIONS TO THE SHORT FORM MODEL CONDITIONS OF ENGAGEMENT (OVERLEAF):	
CLIENT AUTHORIZED SIGNATORY (ES): PRINT NAME: DATE:	CONSULTANT AUTHORIZED SIGNATORY (ES): PRINT NAME: DATE:

July 2011

Page 1



July 2011

Page 2



SHORT FORM MODEL CONDITIONS OF ENGAGEMENT

- The Consultant shall perform the Services as described in the attached documents.
- Nothing in this Agreement shall restrict, negate, modify or limit any of the Client's rights under the Consumer Guarantees Act 1993 where the Services acquired are of a kind ordinarily acquired for personal, domestic or household use or consumption and the Client is not acquiring the Services for the purposes of a business.
- The Client and the Consultant agree that where all, or any of, the Services are acquired for the purposes of a business the provisions of the Consumer Guarantees Act 1993 are excluded in relation to those Services.
- In providing the Services the Consultant shall exercise the degree of skill, care and diligence normally expected of a competent professional.
- The Client shall provide to the Consultant, free of cost, as soon as practicable following any request for information, all information in his or her power to obtain which may relate to the Services. The Consultant shall not, without the Client's prior consent, use information provided by the Client for purposes unrelated to the Services. In providing the information to the Consultant, the Client shall ensure compliance with the Copyright Act 1994 and shall identify any proprietary rights that any other person may have in any information provided.
- The Client may order variations to the Services in writing or may request the Consultant to submit proposals for variation to the Services. Where the Consultant considers a direction from the Client or any other circumstance is a variation the Consultant shall notify the Client as soon as practicable.
- The Client shall pay the Consultant for the Services the fees and expenses at the times and in the manner set out in the attached documents. Where this Agreement has been entered by an agent (or a person purporting to act as agent) on behalf of the Client, the agent and Client shall be jointly and severally liable for payment of all fees and expenses due to the Consultant under this Agreement.
- All amounts payable by the Client shall be paid within twenty (20) working days of the relevant invoice being mailed to the Client. Late payment shall constitute a default, and the Client shall pay default interest on overdue amounts from the date payment falls due to the date of payment at the rate of the Consultant's overdraft rate plus 2% and in addition the costs of any actions taken by the Consultant to recover the debt.
- Where Services are carried out on a time charge basis, the Consultant may purchase such incidental goods and/or Services as are reasonably required for the Consultant to perform the Services. The cost of obtaining such incidental goods and/or Services shall be payable by the client. The Consultant shall maintain records which clearly identify time and expenses incurred.
- Where the Consultant breaches this Agreement, the Consultant is liable to the Client for reasonably foreseeable claims, damages, (including), losses or expenses caused directly by the breach. The Consultant shall not be liable to the Client under this Agreement for the Client's indirect, consequential or special loss, or loss of profit, however arising, whether under contract or otherwise.
- The maximum aggregate amount payable, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, shall be five times the fee (exclusive of GST and disbursements) with a maximum limit of \$1,000,000.**
- Without limiting any defences a Party may have under the Limitation Act 2010, neither Party shall be considered liable for any loss or damage resulting from any occurrence unless a claim is formally made on a Party within 6 years from completion of the Services.
- The Consultant shall take out and maintain for the duration of the Services a policy of professional indemnity insurance for the amount of liability under clause 11. The Consultant undertakes to use all reasonable endeavours to maintain a similar policy of insurance for six years after the completion of the Services.
- If either Party is found liable to the other (whether in contract, tort or otherwise), and the claiming Party and/or a third Party has contributed to the loss or damage, the liable Party shall only be liable to the proportional extent of its own contribution.
- Intellectual property prepared or created by the Consultant in carrying out the Services ("New Intellectual Property") shall be jointly owned by the Client and the Consultant. The Client and Consultant hereby grant to the other an unrestricted, royalty-free license in perpetuity to copy or use New Intellectual Property. Intellectual property owned by a Party prior to the commencement of this Agreement and intellectual property created by a Party independently of this Agreement remains the property of that Party. The ownership of data and factual information collected by the Consultant and paid for by the client shall, after payment by the client, lie with the Client. The consultant does not warrant the suitability of New Intellectual Property for any purpose other than the Services or any other use stated in the Agreement.
- The Consultant has not and will not assume any obligation as the Client's Agent or otherwise which may be imposed upon the Client from time to time pursuant to the Health and Safety in Employment Act 1992 ("the Act") arising out of this engagement. The Consultant and Client agree that in terms of the Act, the Consultant will not be the person who controls the place of work.
- The Client may suspend all or part of the Services by notice to the Consultant who shall immediately make arrangements to stop the Services and minimise further loss. The Client and the Consultant may (in the event the other Party is in material default) terminate the Agreement by notice to the other Party. Suspension or termination shall not prejudice or affect the accrued rights or claims and liabilities of the Parties.
- The Parties shall attempt in good faith to settle any dispute by mediation.
- This Agreement is governed by the New Zealand law. The New Zealand courts have jurisdiction in respect of this Agreement, and all amounts are payable in New Zealand dollars.

11. The maximum aggregate amount payable, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, shall be five times the fee (exclusive of GST and disbursements) with a maximum limit of \$NZ500,000.

- Comprehensive contract of rights and obligations
- The clause is broad and captures a wide range of conduct

New Zealand Some learnings

Just good practice...

- Care over how advice is incorporated and presented if it is being passed on to third parties
- Letters of engagement always issued
- Critical, discrete and reasoned judgement exercised on each piece of advice, with internal review conducted
- Keep a good paper trail!

Contact us



WELLINGTON



Aaron Sherriff
Partner, Wellington

D +64 4 471 9405

M +64 27 704 9604

E aaron.sherriff@duncancotterill.com