



ACE Process Network

“Dotting the I’s and Crossing the T’s”

R L Langley
Head of Engineering
Watson Burton LLP

Robert.langley@watsonburton.com
0207 337 8300
29 St Mary Axe
London
EC3A 8EF

Dotting the I's and Crossing the T's

Who am I contracting with?

- Individuals, partnerships, LLP's, companies.
- Companies:
 - where are the assets?
 - www.companies-house.gov.uk
 - always use the Registered Number
 - beware dodgy PLC's.

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What am I contracting for?

- verbal contracts, and hybrids
- record in writing by:
 - exchange of letters
 - single formal “*agreement*”
- Uncertainty = legal fees!

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Written contracts =

- Certainty
- Statutory protection
 - The right to challenge set-off
 - The right to reject pay when paid
 - The right to installment payments (more than 43 days duration)
 - The right to adjudicate

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Liability to Clients

- reasonable skill and care
- objective standard, BUT

Strict Liability to Clients

- professionals sell a service, not an outcome, BUT BEWARE
- “ensure”; “fit for purpose”; “will deliver – achieve”; “shall be, shall happen, shall conform, shall procure”
- anything that binds you to a specific outcome

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Indemnities

- Never agree to indemnify a client against the consequences of your failure (or “*breach of contract*”).
- You lose –
 - protection of normal limits on damage recovery
 - so anything logically flowing from your breach, however remote, unreasonable or unforeseeable is payable by you.
 - protection of limitation period
 - normally six years, or 12 years if you have signed a Deed.

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Restrict your liability to clients:

- (1) always do your contracts in writing (so client can't challenge your scope)
- (2) try to sign as “*under hand*” not “*under seal*” – no Deeds
- (3) reject strict liability drafting or cancel it out by inserting a paramount “*reasonable skill and care clause*”.

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- (4) reject indemnities
- (5) insert a financial punitive cap on liability OR
- (6) a cap by reference to your agreed insurance cover OR
- (7) exclude loss of profit, loss of opportunity, economic loss and consequential loss
- (8) any copyright license should be expressly limited to repair or extension with a disclaimer for the consequences of any works of extension.

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Restrict your “Clients”

- insert a clause excluding the operation of the Contracts (Rights of Third Parties) Act, 1999.
- consult your brokers warranties
 - reject “*breeder clauses and assignments*”
 - limit the number of warranties you have to give.

N.B. Proportionate Payment Clause.

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Avoiding Third Party Liability

- very difficult
- if x designs a factory for y, who sells it to z, z can sue x for economic loss for up to 15 years.
- if x designs a skyscraper for y and a panel falls off injuring pedestrian z, z can sue for personal injury within 3 years of the accident, up to 15 years from the design event.

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How to renegotiate onerous terms?

- avoid confrontation, amend rather than reject.
- explain and debate – what does the client actually want?
- outflank the lawyers, go direct to the client
- use your negotiating strengths (if any)
- talk of risk management and risk pricing
- blame the brokers?

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