The Terms upon which Contaminated Land Consultants are employed.

A Guidance paper by the AGS, EIC and ACE
describing common areas of tension and disagreement
and the compromise arrangements
that might be adopted.

AGS Association of Geotechnical & Geoenvironmental Specialists

THE ENVIRONMENTAL INDUSTRIES COMMISSION

ace
consultancy engineering business environment

A. Introduction

1. The contaminated land consultancy market is estimated to be worth, in the UK alone, some £400m pa. The work of consultants in this area brings enormous economic benefits to society generally. Using their scientific, engineering and geological expertise they are able to provide crucial information about the substances in, on or under the ground, their concentrations, fate and behaviour, mobility and implications for the wider environment and for human health. With the assistance of this information:

    - developers can bring derelict sites back into re use, supporting regeneration and protecting the UK's green belt areas;

    - funders, typically a risk-averse community, have the confidence to make finance available, giving developers access to cheaper capital;

    - planners and public health regulators can in the right circumstances permit even sensitive development safe in the knowledge that contamination problems will not generate unacceptable health or environmental hazards.

2. The UK statutory regime for identifying and, in certain circumstances, remediating contaminated land, even if it has not directly increased the risk of dealing with contaminated land, has certainly highlighted the size of the risk. Property and even share sales where the target company has significant landholdings may be greatly influenced by a consultant's opinion on the presence of substances in soil and groundwater and the ramifications of that presence. The view of consultants can affect the price paid for land or shares and the risk allocation devices which are put in the sale agreement.

3. However, despite the importance of their professional contribution, the procurement of consultants' services is a problematic topic. Many consultants and the trade associations that represent them believe that the rewards consultants earn from their work are out of kilter with the risks they assume. Consultants believe that clients misunderstand the nature of the services they are providing. Consultants think that the terms upon which they are appointed by their clients are often unduly harsh and penal in their operation. Whether or not these perceptions are justified, the fact that they are sincerely held is in itself an important point. Other professionals (for example, accountants, lawyers, IT and management consultants), while they may have concerns about the fees they earn for their work, do not appear to be as concerned about the basic terms and conditions upon which they are employed as do many of those undertaking contaminated land consultancy work.

4. It is not the purpose of this paper to identify a set of ideal terms upon which consultants' services should be procured. Rather, the aim is to highlight some of the areas of perennial tension between consultants and those who employ them and to describe some

of the ways open to the parties to diffuse this tension and agree compromise arrangements.

5. The organisations that prepared this paper comprise the AGS (Association of Geotechnical and Geoenvironmental Specialists), the ACE (Association of Consulting Engineers) and the EIC (Environmental Industries Commission). These bodies represent consultants who undertake contaminated land work. In no sense does this paper represent a wish list of ideal terms to which consultants would like to work. Indeed, those representing consultants have highlighted here the types of conditions consultants seek to impose on those who employ them which are often regarded as unacceptable by the property side of the industry

6. The document has been reviewed and commented upon by UKELA (the United Kingdom Environmental Law Association) and these comments have been reflected in the final version of the document. UKELA aims to make the law work for a better environment. UKELA appreciates the importance of the work of contaminated land consultants. Importantly UKELA members act both for consultants and those that employ them. While lawyers act only as intermediaries, and their role is to give expression to the commercial objectives of their clients, it must be recognised that lawyers' knowledge and experiences are a significant factor determining the terms upon which consultants are employed

B. Common Contractual Issues

7. In summary form, we set out here our views on some of the common contractual practices adopted by consultants and client undertakings. Later in this guidance, these views are developed further.

Limitation on Liability	Regarded as acceptable for a fair limitation to be incorporated. Evaporation clauses fair in most cases.
Collateral Warranties	Unlimited obligation to execute warranties regarded as unfair. Will often be designed to create liability greater than that which exists under the primary contract. However, liability under the warranty should be no greater and preferably more limited than that under the primary contract.
Strict Obligations/Fitness for Purpose	Unacceptable and not covered by insurance. Consultant's duty should be "care and skill" based.

Insurance Clauses	Policies written on a "claims made" basis. Obligation to maintain insurance should be subject to affordability.
Indemnities	Not necessary for either client or consultant.
Incorporation of standard forms	Should be open and straightforward not covert.
Assignment	Should be allowed with consultant's consent (not to be unreasonably withheld or delayed).
Duration of risk	Starting point should be all claims (contract, tort) barred if not brought within 6 years.

8. Consultants are involved in very many aspects of contaminated land work. They might design site investigation works or indeed remediation schemes. Consultants often supervise or direct the work of contractors on site.

C. The Work of Contaminated Land Consultants

9. Broadly, consultants' site reports can be put into two main categories[1]. A report containing a preliminary conceptual model may be based on an examination of publicly available data about the site, a brief site visit and, in some cases, discussions with various people such as site managers and local authority environmental health officers. This is often referred to as a Phase 1 survey. Phase 1 surveys are intended to derive indirect evidence of substances in soil from the history of the uses of the site and information about particular incidents involving spillage or leakage from tanks. A Phase 2 survey incorporates the results of intrusive surveys, in situ measurements and tests of samples of soil, surface water and groundwater and sometimes land gases. A Phase 2 survey therefore produces direct evidence of the substances in, on and under the land and reduces the uncertainty in the conceptual model.

10. Phase 1 surveys might be obtained for a few thousand pounds depending on the size of the site and other factors. On many occasions surveys will be undertaken as part of the due diligence on a share sale and, if the target company has significant landholdings, consultants will be expected to report on several sites. Phase 2 surveys can be costly, may involve site investigation contractors, laboratories and consultants and many will require significant planning from a health and safety and environmental perspective. Drilling into the ground, if performed by unqualified persons, can cause human injury and property damage and can exacerbate existing contamination problems.

[1] *Whilst Phase 1 and Phase 2 surveys are the most common services undertaken by contaminated land consultants they are also commonly commissioned to prepare design reports and validation reports for the remediation of contaminated land. See AGS 2003 Guidelines for the Preparation of Ground Reports.*

11. Consultants' skill is in providing meaningful interpretations of the always incomplete information about the condition of the site based on incomplete evidence. The conclusions that can be drawn following a Phase 2 survey will be more robust than following a Phase 1 survey. But in all cases, the consultant cannot promise to describe with complete accuracy the substances in or on the land, their movement, the costs of monitoring or removing them or the attitudes that regulatory authorities will have to their presence.

12. Sometime, the circumstances of a particular project allow plenty of time for the instruction of consultants and the generation of their reports and other deliverables. All too often though, the entire process is rushed and consultants find themselves working to tight timetables. In such circumstances, the consultant's terms of appointment are often overlooked, although when commercial decisions need to be made later, difficulties with these terms of appointment can cause considerable cost and delay.

13. Often, relationships between consultants and clients are hindered by their respective attitudes. Some clients believe consultants' concerns about liability are exaggerated, especially when they have professional indemnity insurance to protect against such an eventuality. Consultants believe clients focus on insurance too much, indeed some consultants take the view that it is the presence of insurance - and the chance to pass on losses to a solvent undertaking - which is the predominant reason for their being instructed. In reality, neither consultant nor client can rely on insurance to hold themselves harmless against losses. In an environment where limits of indemnity are lower and uninsured excess higher consultants will have to carry more of the risk. Further, for most professional indemnity policies to respond, the claimant will have to prove the consultant's negligence.[2] Because negligence claims raise reputational issues for consultants, this is often a hard-fought area with the result that establishing negligence is expensive and time consuming. It is not surprising therefore that environmental project insurance - which protects against a wide range of development and project losses without the need to establish negligence or other breach of contract by a consultant or contractor - is playing an increasingly important part. Those who were previously put off by the limited capacity of the market, onerous insurance requirements and untested policy wordings might revisit environmental project insurance which is now more viable as a cost effective risk transfer measure than ever before.

D. The principle of freedom of contract

14. It is a general principle of English contract law that the parties to a contract are able to frame their commercial relationship in any way they see fit. Save for exceptional circumstances, the law will not protect the contracting parties from the consequences of their own bad bargains.

15. It might therefore be argued that the difficulty consultants perceive

[2] *Some professional indemnity policies do not respond to non-negligence claims against consultants such as claims based on breach of a strict contractual duty.*

is an illusory one. If they do not like the terms they are offered they do not have to accept the commission. On this assessment, the issue is simply one of bargaining power. We have some sympathy for this view and consultants need to appreciate that a viable strategy is to refuse to take on work where the rewards are not commensurate with the perceived risks.

16. But bargaining power is not the only principle at work. Often, clients want to contract on what they regard as fair terms. They may articulate this in a number of different ways. They may talk about wanting to hire consultants on the standard basis or according to market practice. Even though they may have significantly more bargaining power than the consultant, they may not want to leverage that bargaining power to its full effect, and push the consultant to the limit of what he is able to endure. There are a number of reasons for this. The client may have a social responsibility objective which requires it to treat its contractors and suppliers fairly at all times. It may have a philosophy that its contractors and suppliers are unlikely to show real human commitment to its cause if they feel they have been treated inequitably. Some businesses will want to ensure that their contractors and suppliers earn a fair return on the risk they assume, because they will want those consultants to stay in business, become more familiar with their operations and commercial objectives, and therefore deliver to them better services, more tailored to their needs, at a cheaper overall cost. Looked at in this way, treating consultants fairly is just enlightened self interest. But whatever the reason, lawyers know that it is only rarely that they receive instructions from their clients to employ consultants on terms which take them to the absolute limit of what they can tolerate. Most clients just want a fair deal.

17. Accordingly, the purpose of this document is to highlight those issues which often cause concern and disagreement. In some cases, it is our belief that there is misunderstanding about the effects and implications of certain contracting practices and an explanation of the legal position might assist both sides to come to agreement. In other cases, we suspect there is a lack of knowledge about the sorts of provisions often agreed between parties. Perhaps lawyers who do not employ consultants regularly are less familiar with the terms upon which they are commonly employed.

18. In the remaining part of this document we highlight some of the main contractual issues which appear often to cause friction. For the sake of simplicity, we have divided the remainder into two sections. Section E contains an analysis of issues which consultants often find objectionable. Section F describes the types of arrangement which consultants regularly propose and which clients find unacceptable. As has been said, the aim is not to eradicate the need for negotiation on a case by case basis but rather to ensure that that negotiation is better informed by a fuller understanding of the concerns of the other party to the negotiation.

E. Issues commonly of concern to consultants

19. Unlimited liability

19.1 The general principle is that a party who is in breach of contract is responsible for the entire loss suffered by the innocent party as a result of that breach provided always that it was within the reasonable contemplation of the contract breaker when he entered into the contract that the other party might suffer loss of the type complained of if the particular promise was broken.

19.2 However, the law allows parties to limit or occasionally even exclude liability in an agreement. It is accepted that limitations of liability can appear in contracts for professional services.

19.3 There is therefore no legal impediment to a clause in a contract with a consultant providing for a limitation on the monetary amount of any liability to the client. The efficacy of such a clause would depend on whether it is reasonable, judged under the Unfair Contract Terms Act 1977. There are a number of factors which the courts will take into account when considering whether an exclusion or restriction of liability for negligence or other breach of contract will be regarded as reasonable. These will include the following:

- Whether the client knew or ought to have known of the particular term. It is important that limitation clauses are brought to the client's attention before entering into the contract rather than buried in the small print on the back of a standard form of consultant's terms and conditions. We certainly support the position of straightforward conduct in negotiations. If either a consultant or client seeks to impose some form of limitation on liability it should be brought specifically to the attention of the other. Attempts at covert incorporation of limitation clauses tend to generate suspicion meaning that, once the limitation is spotted and relied upon, it is much less likely to prove acceptable to the courts.

- The nature and bargaining power of the parties. The more sophisticated the client and the greater his bargaining power the more likely it is that the term will be held to be reasonable.

- The size of the fee payable. The higher the fees the higher the court would expect the limitation of liability to be.

- Whether any inducement was received by the client to agree to the terms. A clear inducement would exist where the consultant lowers his fee quote to obtain a lower limitation on liability. If an inducement was received then it would be easier to argue that the term was reasonable.

19.4 Consultants need to accept that they must take responsibility for the quality of their work. Amongst other things, this means that they

might receive a claim should their negligence or other breach of contract cause their client to suffer financial loss. Some consultants regard this reality with distaste but that is commercial naivety. Looked at another way, if it was not possible that consultants' negligence might cause their clients' loss their services would have no value. However, it is accepted that the vast majority of consultants do not shy away from responsibility. They are simply concerned to manage the risks in the event of a mistake.

19.5 It is much more accepted today than it was previously that professional advisers will seek to limit their financial exposures. While accountants cannot exclude or limit their liability for certain statutory audits they undertake they commonly limit their liabilities for non audit work, especially where they regard the risks associated with that work as being unacceptably high. Law firms are entitled to limit their liability for non contentious legal work that they carry out. A recent survey by PricewaterhouseCoopers has revealed that 30% of law firms routinely cap their financial exposures to their clients. In relatively new areas, such as IT consultancy, it is rare to find consultants who are prepared to do substantial design or remediation work without the comfort provided by some sort of financial cap. It must be accepted that, like other professionals, it is therefore perfectly right and proper for contaminated land professionals to seek to limit their own financial liabilities for the work they undertake.

19.6 While some consultants are substantial undertakings clients accept that others do not have large assets. Indeed, many clients will appreciate that even if they are dealing with an apparent leader in the field with a significant brand name it may be difficult and time consuming for them to try and determine whether the particular subsidiary company they are negotiating with has assets or whether those assets are with another company within the consultant's group. Well advised consultancy companies will not give parent company or director guarantees. For these reasons, there is inevitably much focus on the professional indemnity cover consultants normally maintain to protect themselves against claims for professional negligence. While there is no legal requirement upon consultants to maintain professional indemnity insurance the vast majority of those who practice have such cover.

19.7 Clauses which limit the consultant's liability to the client to that sum for which the consultant is entitled to be indemnified under its PI policy are not uncommon. Such clauses are commonly known as evaporation clauses in that the consultant's liability evaporates to the extent that it is not covered by his professional indemnity insurance policy. For contaminated land consultancy services these clauses are designed to recognise the fact that professional indemnity insurance cover for pollution and contamination claims is only available in the aggregate. As such, there is a possibility that in any given year if more than one client of a consultant successfully makes a claim for pollution and contamination, which is met by the consultant's professional indemnity insurance, the amount of cover remaining for subsequent claims will be reduced accordingly.

19.8 In some respects, evaporation clauses may not be regarded as ideal from the client's perspective. Because the cover for claims relating to contamination and pollution is available generally only in the aggregate it is always possible that in any one policy year that aggregate limit might be exhausted meaning that there is no or very little cover available in relation to a claim made against a consultant later in the insurance year. However, this can be provided for by a low limitation on liability to be applied in the event that PI insurance cover is not available to the consultant.

19.9 Some clients have remarked that evaporation clauses appear to enable consultants to avoid taking personal responsibility for their errors. Of course this is not true. In many cases, especially in the harder insurance market that currently prevails, consultants have gone out of business because of the size of their uninsured contribution (excess). And increases in premiums in subsequent years will mean that, notwithstanding the presence of an evaporation clause, all claims will cost the consultant dearly.

19.10 Many consultants will ask for what are known as equitable contribution limitation clauses to be incorporated into their terms of appointment. In some cases, the client's loss might be caused not only by the negligence of a contaminated land consultant but also by negligence or other breach of contract committed by other advisors or contractors. The principle of joint and several liability will mean that all of those who have caused the loss are fully responsible for the entirety of it although, by the use of contribution proceedings, those losses can be fairly allocated. For example, a contractor might be liable for the negligent carrying out of remediation work and that might be accompanied by negligence on the part of the consultant with respect to the supervision of that work or the advice given as to the extent of that work. Both might conceivably be liable for the same loss suffered by the client. A consultant will regard it as unfair if he is sued for the entire loss and has no effective ability to bring contribution proceedings against the contractor because (for example) the client had agreed a complete exclusion of the contractor's liability or because the contractor was insolvent and so unable to contribute its part for the client's loss. While the insolvency of business undertakings is a fact of life, the client has an opportunity to consider the risk of insolvency. The consultant will have had no such opportunity. Equitable contribution clauses mean that, in accessing a consultant's liability to the client, it is assumed that all other consultants and contractors whose negligence or other breach of contract have caused or contributed to the client's loss have paid their fair share toward that loss.

19.11 While these different formulae are all trying to arrive at a fair way of limiting liability, a further limitation to a particular sum of money has the advantage of making clear to all concerned what the maximum level of exposure to a negligence claim is. To be effective the cap needs to be set at a realistic level, not so high that it could never conceivably operate to limit the consultant's exposure and not so low that it relieves the consultant in toto for

the consequence of his breach.

19.12 Take a very simple example. A consultant advises a buyer of land that the substances in, on or under the soil do not pose an unacceptable risk to human health or the environment and it is therefore unlikely that the land will be designated "Contaminated Land". Even with such advice, very rough calculations for the cost of clean up can be easily done. If the worst case for clean up costs is £5 million limiting liability to £10 million will do little good. Clients, consultants and the lawyers who advise both should be prepared to discuss what losses might flow from particular types of reporting error and what limitations might be agreed.

19.13 Where it can be envisaged that remedial work may be undertaken following the consultant's work then the consultant may want to limit its liabilities to any loss or damage caused by that work or the added cost of doing further or different work if, negligently, the consultant's advice leads to the taking of inappropriate remediation measures. Clients can suffer indirect losses unique to their particular circumstances or commercial objectives. A limitation on these terms avoids the need to argue about whether these indirect losses were in the contemplation of the parties when they entered into the contract.

20. Collateral Warranties

20.1 No contracting practice is as widely misunderstood as the requirement, often incorporated into contracts, that consultants should execute collateral warranties in favour of certain beneficiaries when called upon to do so.

20.2 Much of the difficulty is caused by cumbersome warranties which contain inappropriate clauses. When presented with these, consultants - especially those who are not receiving specialist legal advice - do not just assume that the redundant clauses have no relevance to them; often they will assume that these clauses will operate to their prejudice, albeit in ways they cannot anticipate. A common example of this is the requirement that consultants should not specify deleterious materials in their design. Where a consultant is only producing a site report such a clause is clearly inappropriate. In fact, where a consultant is only undertaking an initial site investigation or desk study, collateral warranties should not be considered the norm.

20.3 If certain changes were made to a deleterious materials clause then it could operate in a severely prejudicial way. For example, some such clauses state that the consultant warrants that deleterious materials have not been used in the development. The term "development" will often encompass the final structure which may not be designed or envisaged at the time the contaminated land consultant provides his services. He might (wrongly) regard this as being irrelevant because he is not producing any sort of design where materials will be specified but the clause could be construed to be a strict fitness for purpose obligation where the consultant might be liable if deleterious or harmful substances appear, perhaps

rendering the development unsaleable, as a result of the work of some other consultant or contractor of which the contaminated land consultant was not even aware.

20.4 All parties and those who advise them would do well to bear in mind the fundamental purpose of warranties. Warranties are there to ensure that the consultant owes duties of care to person(s) other than his client. Because of the vagaries of the tort of negligence, it is certainly possible that someone might consider a consultant's report and suffer a loss as a result of relying on it but will not be able to make a claim because the law recognises no duty of care. The collateral warranty is primarily intended to generate a contractual duty of care where none would otherwise exist. Consequently, they impose additional liabilities on consultants where none would otherwise exist and so consultants who refuse to give them should not be viewed as depriving anyone of their legal rights.

20.5 Some clients believe consultants protest too much about collateral warranties. Consultants sometimes regard the fact their deliverables have value to more than one undertaking to a transaction as somehow undermining their professional status - as if the value their work has to many parties suggests that that work is no more than a commodity, so implying that the normal close relationship between the professional and his adviser is lacking. This is not so, and collateral warranties serve a purpose in the current commercial property market.

20.6 But the requirements to execute collateral warranties can create unintended and negative effects from a client's perspective. All professionals appreciate that their advice is conditional by interaction with their client and a consideration of their client's interests. Legal professional privilege operates to enable lawyers to advise freely and honestly safe in the knowledge that their advice need not be disclosed to their client's counterparty. And yet (for example) consultants are expected to advise a seller of land in circumstances where - via warranties - their advice is considered and relied upon by the buyer. It is not surprising that such a situation leads to over-caveated and insufficiently robust advice. With this in mind, clients should not be surprised to find that consultants' attitudes to collateral warranties are considerably more relaxed when the underlying report is factual than when it is interpretative, although these are fluid terms. Consultants will also tend to be more sanguine about giving collateral warranties to an undertaking whose commercial interests are similar to their client's (for example, when a collateral warranty is given to their client's funders) than where asked to give warranties to those who have diametrically opposed interests (where a warranty is given to a buyer, the consultant having advised the seller).

20.7 To avoid uncertainty, the forms of collateral warranty the client will be able to call upon the consultant to execute should be appended as schedules to the consultant's agreement. There may be clauses that provide that the client can alter the wording of the warranty in such a way that he finds acceptable and then require the consultant to execute it in its altered form. It is no surprise that all consultants

find such clauses unacceptable. At the very least, these clauses create a huge source of risk for consultants. At best, they will generate mistrust and enormous time and costs as the adequacy of the altered wording will need to be assessed.

20.8 Consultants are also concerned about the number of warranties they might have to execute. due to the fact that each collateral warranty represents another extension of their risk as they are giving someone the right to sue them which they might not otherwise have and they are being asked to do this for nothing or only a small consideration which does not reflect the additional risk. Under some professional indemnity policies the question of policy coverage for collateral warranties can be so complicated that each warranty must be approved by insurers or advice sought from lawyers. On a small project, this can create an administrative burden completely out of kilter with the work undertaken. When acting for the seller of a large site consultants will not want to give warranties to all purchasers or all tenants. The site might be divided up into sub units and under the formulation commonly proposed by clients, dozens, perhaps hundreds, of warranties would need to be executed. Consultants will, quite reasonably, attempt to limit their obligation to anyone buying the whole site or a substantial part of the site.

20.9 With regard to the content of the warranties, consultants will object where the warranty seeks to impose upon the consultant a greater burden or liability than he assumed under the appointment. The consultant will argue that a warranty is merely an agreement collateral to the principal agreement and, as such, should bear the major characteristics of the principal agreement. Often consultants will seek better protection in a warranty than is allowed them under the appointment. Consultants will object to fitness for purpose obligations appearing in warranties. They will expect provisions limiting the extent of liability or the period in which claims can be brought which are preferably less, but no greater, than their liability in the main agreement. This is not unreasonable, especially when the collateral warranty is to be given to a person who is taking only a limited interest in the project and also because, as previously mentioned, collateral warranties represent another extension of a consultant's risk and he is being asked to do this for nothing or only a small consideration which does not reflect the additional risk.

20.10 Consultants prefer to agree collateral warranties as part of the negotiation of their appointment. If they understand the transaction, they can at least assess the risk of the warranties they are being asked to provide and make an attempt to take that risk into account when negotiating the fee for their work. Often, warranties are not agreed at the time that the appointment is executed and this can give rise to difficulties. Most consultants will, nonetheless, agree to provide a warranty although, as they have not been given a chance to incorporate the price of this in the fee that they have quoted, they will expect some form of financial compensation together with agreement that the costs they incur in negotiating and executing the warranty - which may include the costs of appointing external legal counsel - are reimbursed by the client or by the beneficiary of the

warranty.

20.11 Some clients and the lawyers that advise them object to the consultant seeking to charge for executing a warranty he did not know he was going to be asked to execute. They argue that as the consultant is doing no extra work he should give the warranty for no extra fee. However, this ignores the fact that by agreeing a warranty a consultant is opening himself up to a potential claim which, in its absence, he would not have had to meet. Save where the position is agreed in the consultant's appointment, a failure to grant a warranty is not to deny someone their existing rights.

20.12 There is no standard charge for these warranties and much will depend on the nature of the work, the fee proposed and the existence or otherwise of any ongoing relationship between the consultant and client. For example, a consultant may be more willing to agree a collateral warranty in relation to a project where he has merely provided a factual report rather than an interpretative report because he may regard the risk of being negligent in providing a factual report to be relatively low. Further, a consultant might quote a relatively low fee for providing a warranty in relation to a project where he has undertaken a Phase 1 survey because he might regard it as unlikely that a well advised beneficiary would make a substantial business decision relying only on a Phase 1 survey. Some consultants will simply refuse to provide collateral warranties what they regard as a long period after first delivery of their report because of the risk that the beneficiary will be relying on out of date information to make a business decision.

20.13 It is unacceptable to put unreasonable pressure on a consultant to execute warranties in favour of certain beneficiaries. There have been cases where consultants' invoices have not been paid by their clients until they agree to execute warranties even though no such obligation appeared in their appointment. While such behaviour amounts to duress, and so strictly the consultant put under pressure in this way has a legal right of recourse, this conduct does very significant damage to the relationship between not only that client and that consultant but also between that client and other consultants who may be told about this behaviour.

20.14 Clients and their advisers will sometimes tell the consultant that he will not work for them again unless he executes a warranty in an agreed form although they may promise further work if he agrees to execute a warranty. While tactics of this sort may work, in our experience the best method is simply to agree a fair price. If the warranty is worthwhile then the beneficiary will agree to pay the price. The client should also recognise that had he proposed the execution of warranties when he originally negotiated the appointment he would have had to pay a higher fee so he should not be surprised at being asked to pay later.

21. Inappropriate clauses

21.1 Collateral warranties being contracts, the parties should be concerned that each obligation has relevance. Unfortunately,

this is often not the case and significant time and effort may be spent dealing with warranties which are not suited to the relevant commercial and legal context. Often collateral warranties contain deleterious materials clauses even where the warrantor has produced a factual site investigation report and have no design duty. It is not enough to argue that such clauses, being irrelevant, create no risk. Some deleterious materials clauses are strict obligations and so will create liability if deleterious materials appear in the development even if the consultant could not be said, in any sense, to be responsible. Warranties form a part of the general commercial backdrop to a development and inappropriate warranties can give a misleading impression over who had what responsibility, leading to misunderstanding, costs and expense later when decisions are made about refinancing or, more starkly, about the existence of legal liability.

21.2 Sometimes inappropriate warranty wordings can cause unnecessary confusion amongst regulatory authorities. In one example, a warranty obliged the warrantor to comply with health and safety laws even though the warrantor had never visited the site and had simply conducted a desk top study. The Health and Safety Executive (perhaps reasonably but wrongly) assumed that the warrantor had a site presence: if not (the HSE argued) why had the warrantor assumed such an obligation?

22. Fitness for purpose and strict obligations

22.1 It is now accepted by most clients that the basic obligation the consultant assumes is to exercise reasonable skill and care in and about the tasks he has been instructed to undertake. The consultant does not guarantee that he has perfectly described the substances in, on or under the land, their migration or perfectly predicted the attitude that regulators might take to the condition of the land.

22.2 Occasionally, clients seek to impose some greater burden on consultants whereby they are seen to be guaranteeing the quality of their reporting. For example, there have appeared terms as follows:

- "The Consultant shall accurately set out the substances in, on and under the site."
- "The Consultant shall state in his report the remediation or clean up costs required for the Client's planned end use."
- "The Consultant shall drill boreholes, take samples, set out its findings in a report and do all other things necessary to ensure that the state of the Site and the presence of any conditions or features that might affect the development are made known to the Client."

22.3 The risk is that the consultant might be held to be liable if he does not discharge the obligation even though he has at all times conducted himself with proper professional care and skill. Such a situation presents intolerable risks to consultants who may find that they have assumed a liability not covered by their professional

indemnity insurers.

23. Professional Indemnity Insurance Clauses

23.1 There is inevitably a considerable amount of focus on the professional indemnity cover most consultants have to protect themselves against negligence claims. Consultants often regard the focus upon their insurance arrangements as being intrusive, and as suggesting that their clients are less interested in their work and credentials than they are in the presence of insurance. Some suspect that the client's main ambition is to have access to that fund as quickly as possible in the event that he suffers loss arising out of his use. It must be said that, to date at least, these fears have not been realised and contaminated land consultants have not had to face a flood of claims to which the presence of insurance has acted as a magnet, but those claims that have been made have been expensive. Some consultancy businesses have left the contaminated land field taking the view that the liability risks are too high.

23.2 Clients though need to appreciate that professional indemnity policies are written on an annual claims made basis, meaning that it is the terms of the policy in force at the time of submission of a claim which governs the insurance policy's response to that claim. Accordingly, even if a consultant agrees at the time of entering into the appointment that it has insurance, it is highly unlikely that the claim will be made in that insurance year. When the claim is made, which will probably be in future years, the consultants may have gone out of business and will have no insurance cover in place.

23.3 It is common for the consultant to agree to maintain insurance in future years, perhaps for as long as it might have to meet a claim under the appointment, but that obligation should only bind the consultant if insurance is available at affordable rates and on sensible commercial terms. No consultant should be under an obligation to buy insurance, simply to guard against the risk that a client might make a claim in relation to work which was done some considerable number of years ago, if that insurance is now prohibitively expensive. Of course, there is some uncertainty in these arrangements. What does affordable mean? However, any attempt to add certainty to this obligation is likely to be at the expense of fairness. Clients might find comfort in the fact that consultants are as eager to ensure that their liabilities are insured against as are those that instruct them.

F. Issues commonly of concern to clients

24. Covert attempts to incorporate standard forms

24.1 Experienced users of consultants' services and most lawyers would expect to be aware of the various ways in which consultants might seek to incorporate their in-house terms of appointment. For example these can be put on the reverse of work confirmation sheets, they can be faxed or emailed to clients just prior to work

with a note stating that a failure to object to them before the work commences is taken to be agreement that they will apply or a communication can say simply that "our standard terms and conditions shall apply" which might, conceivably, operate to incorporate the document because the client has worked with the consultant before. Sometimes, these practices arise out of sheer lack of time. But used in inappropriate situations they can create real distrust and cause many clients to dismiss the use of consultants' terms and conditions immediately, without any consideration of their merits.

24.2 Consultants are entitled to try and ensure that their standard terms are the basis of the contract and, where they give clients an opportunity to consider them and make any objections or suggest alterations, it is in these circumstances inappropriate for clients to complain that they were not given an opportunity. The prospect of costly and time consuming disputes will be limited if both parties behave openly when agreeing contract terms.

24.3 It is suggested though that clients should be less concerned when consultants seek to incorporate industry accepted forms of contract, such as the Association for Consultancy and Engineering terms and conditions. Provided the industry form is appropriate to the work, industry accepted form go a long way toward reducing claims and conflict.

25. Indemnities

25.1 Indemnities are controversial clauses, often badly drafted, which can have a devastating effect but whose true legal purpose is often misunderstood. An indemnity is simply an obligation on the part of one party (the indemnifier) to pay the other (the indemnified) according to the arrangements set out in the indemnity. Often a clause will appear as follows in an appointment document prepared by a consultant:

> *"The Client shall indemnify the Consultant against all claims, demands and costs the Consultant incurs as a result of carrying out the Client's instructions."*

The consultant might regard this as being an obvious, indeed uncontroversial, clause. Why, if he incurs any costs, should he not be expected to be reimbursed by the entity whose instructions have caused him to incur those costs?

25.2 The difficulty is that the indemnity, being a contractual obligation, is read strictly according to its terms. This particular indemnity might operate to require the client to indemnify the consultant even where the consultant's negligence is the cause of the cost it has incurred.

25.3 A consultant's appointment may provide:

> *"The Client shall indemnify the Consultant against any costs, liability or loss the Consultant incurs as a result of any breach by the Client of this contract."*

Again, this will seem obvious from the consultant's point of view, the consultant merely trying to ensure that there is some incentive for the client to perform its obligations under the contract. The reality is though that every contractual obligation enables the innocent party to sue for damages in the event that some promise contained in the contract is broken by the other party. No indemnity is needed to achieve this effect. Indemnities can though have harsh effects because they can operate to defeat the general common law rule that a party is only responsible for the losses that it might reasonably contemplate the other party would suffer as a result of a breach and it may also subvert any clauses in the contract which operate to limit the times in which the parties can bring claims.

25.4 Indemnities can also operate harshly against a consultant. Depending always on their construction, an indemnity given by a consultant to a client can:

- negate the effects of any relevant limitation period that would otherwise operate meaning, effectively, that claims can be pursued at any time in the future;
- relieve the client from the usual requirement to prove that the type of loss suffered was reasonably within the consultant's contemplation; and
- relieve the client from any obligation to mitigate his loss.

Save in exceptional cases, it is our view that neither the client nor the consultant should promise to indemnify the other because, in the vast majority of cases, no such indemnity is needed.

26. Assignment

26.1 Often, consultants will incorporate into their standard forms terms which exclude the client's right to assign the benefit of the contract - essentially, the right to rely on the consultant's report and sue for loss - to any other party. Clients often desire a position where the benefit of the appointment can be assigned to any party, without reference to the consultant or on only giving the consultant notice of such assignment.

26.2 In our view, it must be accepted that often consultants do have an interest in the identity of the parties to whom the benefits of contracts with them are assigned and so mere notice should not be enough. A fair position is for the consultant's consent to be required subject to the proviso that that consent cannot be unreasonably withheld or delayed.

26.3 Clients should not be surprised about the concern with which consultants view assignments. Given the time spent drafting and administering collateral warranties, it would be odd if consultants casually agreed to assignments opening up the risk of liabilities to other parties, not privy to their original instructions, even further removed from the work they originally undertook. In relation to

each request to assign it is reasonable to expect the consultant to consider the risks he may be assuming and whether he is prepared to become liable to another party.

27. Inappropriate disclaimers and reports

27.1 It is good risk management for consultants to insert into their reports or other deliverables, such as letters of advice, statements designed to limit the reliance that certain parties can place on those reports. For example, assume that a report is prepared for the purchase of a site and the purchaser gives that report to a finance company that might lend funds to facilitate the purchase and subsequent development of it. As a result of relying on the report the funder makes available finance, suffers a loss as a result, and sues the consultant. Depending on a number of complicated factors the consultant may or may not owe a duty of care to the funder. But the risk of owing a duty of care might have been substantially reduced had the consultant simply incorporated into the report or letter a clause to the effect that it owes no duty of care to any person other than its client.

27.2 Difficulties arise where the consultant has agreed to owe a duty of care to someone other than the client, for example to the beneficiary of a collateral warranty or to other persons. In such a case, some variation of the normal disclaimer will be needed if the report is to operate effectively. Consultants should prepare standard form disclaimers but they need to consider whether they are appropriate in all cases and what changes may need to be made to them.

28. Duration of Risk

28.1 Sometimes, consultants impose terms that any claim made against them must be made within a very short period after their work, such as six months or, in some cases, even three months after their report is delivered. Consultants need to appreciate that their work is often completed at a very early stage and any negligence or other breach of contract might not come to light until some significant time after, for example, when substances in the soil have undermined a building's foundations or where regulators later decide to take action which was not predicted by the consultant.

28.2 That said, clients should expect consultants to object to their appointments being executed as deeds which would lead to a 12 year limitation period for the bringing of claims against them. The normal limitation period for breach of contract is six years with time running at the date of breach of contract. Ordinarily, where the negligence alleged arises out of matters relied upon in a report, the contractual limitation period will begin at the date of delivery of the report. In most cases this should be a starting point for discussion about the date by which claims must be brought, with consultants looking also to bring tort claims within the same framework. (Consultants will often owe concurrent duties to their clients in tort where, although the same six year period will apply, time will not start to run until the date the client suffers damage. With some

justification therefore consultants will want tort claims to be limited in the same way that contractual claims are limited to avoid the consultant having to deal with very stale claims.)

28.3 It seems to us that a fair starting point would be the insertion of a contract term that relieved the consultant of all liability (whether in contract, tort or otherwise) if proceedings are not commenced within 6 years of the completion of the consultant's services.

Disclaimer

This document is not intended to be exhaustive.Although every effort has been made to check the accuracy of the information and validity of the guidance given in this guide, neither the Association of Geotechnical and Geoenvironmental Specialists, The Environmental Industries Commission or The Association for Consultancy and Engineering shall be held liable for any loss, damage or claim of any kind sustained by any person or organisation as a result of the contents of this document or anything contained herein.