

Insights

ABCA FORM - KEY FEATURES

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SUMMARY

In this Insight, Olivia Turner considers the key features of the ABCA form for the Appointment of a Building Control Approver that clients should be aware of.

Part of the transformation of the building safety regime currently underway includes a major shake-up of the building control profession.

Where previously clients had a choice of the local authority or an approved inspector (AI) to provide building control oversight, now higher-risk buildings (HRBs) are overseen by the Building Safety Regulator (BSR) while non-HRBs retain the option of either local authority or private sector oversight.

Approved Inspectors (AIs) have been replaced by registered building control approvers (RBCAs) from 6 April 2024. The industry body for AIs (the Association of Consultant Approved Inspectors) has also changed its name to the Association of Building Control Approvers (ABCA).

Post Grenfell but prior to the introduction of RBCAs, and as a result of the hardening of the insurance market, it had become routine in the market to engage AIs using the Construction Industry Council (CIC) Contract for the Appointment of an Approved Inspector. Now that AIs are no more, in April, ABCA published two new forms of appointment for the engagement of RBCAs intended (we assume) as a replacement for the CIC form:

- the ABCA Contract for the Appointment of a Building Control Approver, First Edition; and
- the ABCA Short Form Contract for the Appointment of a Building Control Approver First Edition (intended to be used for domestic clients and for projects where the project value is less than £500,000).

This Insight takes a closer look at the long form version of this standard form.

KEY FEATURES OF THE ABCA CONTRACT FOR THE APPOINTMENT OF A BUILDING CONTROL APPROVER

Key features of the form for a client to be aware of before accepting these terms include:

Exclusions / limitations of liability

- The appointment contains an overall aggregate financial cap on the RBCA's liability (albeit at a level to be agreed). In addition, the RBCA's liability for fire safety claims is limited to the amount recoverable (if any) from the RBCA's professional indemnity (PI) insurance at the time the relevant claim is notified.
- The RBCA has no liability for claims relating to asbestos, pollution, contamination, mould, spores, war, civil disorder and/or terrorism and any fitness for purposes requirement in relation to the project.
- The RBCA has no liability for any direct or indirect loss of profit, loss of business or other indirect or consequential losses.
- A net contribution clause is included which, to the extent the RBCA's breach causes the client to suffer a loss but that loss was also contributed to by another member of the project team, limits the RBCA's liability to only that proportion of the loss for which it is just and equitable for the RBCA to pay. This places the risk of insolvency of the other parties that contributed to the loss, on the client.

Collateral Warranties / Third Party Rights

- There is no ability for the client to procure collateral warranties or third party rights (TPRs) to purchasers, tenants, funders (or any other third parties) under the ABCA appointment. This mirrors the CIC approach and is now (post Grenfell) seemingly a standard demand in the AI market. Having said this, from time to time, we have seen instances where certain AIs have agreed to provide warranties and TPRs as an amendment to the CIC form and it may be that this may become more common if market softens as the new building safety regime beds in and insurers feel more comfortable with building safety risks.

Assignment

- Where the market norm is for the client to be able to assign a professional consultant appointment at least twice without the relevant consultant's consent, under the ABCA appointment, the client cannot assign the benefit of the appointment without the RBCA's consent. Again, this matches the position under the CIC form where assignment without the AI's consent was prohibited.

Client obligations

- The ABCA appointment places specific obligations on the client with timelines for doing so. For instance, the client must give the RBCA 7 days' notice of commencement of the works and keep the RBCA regularly informed of the progress of the project. The client must give the RBCA all necessary information (including block plans showing public services within 6 metres of the boundary) so that the initial notice required to be submitted can be submitted no later than 5 working days prior to commencement of the works.

Such obligations merely track legislative requirements and enable the RBCA to do its job. However, clients should take care to note down what information is required and by when and ensure adequate resource is in place to meet these obligations.

- If the RBCA is required to carry out additional work due to changes in law, as a consequence of the UK not being a member of the EU or as a result of certain defined "force majeure" events, the client is required to pay for such work on a time charge basis.

Building Regulations

- The RBCA's obligations do not include a requirement to confirm that the Building Regulations have been complied with or provide advice to ensure that compliance with the Building Regulations is achieved, being limited only to taking "reasonable steps" to satisfy itself of the project's compliance with the Building Regulations.
- The ABCA appointment specifically states that the RBCA has no liability for any delay in issuing the final certificate under s51 Building Act and the final certificate itself will not be conclusive proof that every aspect of the project complies with the Building Regulations.

Termination

- The client can only terminate the ABCA appointment for material breach or insolvency (rather than at will).
- The RBCA can terminate on multiple grounds, including:
 - if it reasonably believes that it will not be able to issue a final certificate on completion;
 - the RBCA is unable to perform the services due to certain defined "force majeure" events, changes in law or as result of being unable to perform their services due to the continuing consequences of the UK no longer being a member of the EU;
 - if the RBCA is unable to maintain PI insurance and public liability insurance as required under the ABCA appointment;
 - if the RBCA considers there is a conflict between its obligations under the appointment and its statutory obligations under the Building Act or the Building Safety Act; or

- if the BSR suspends the RBCA's registration preventing it from carrying out the services under the ABCA appointment.

Limitation Period

- The limitation period under the appointment is specifically six years from the earlier of the date of completion of services or the termination of the ABCA appointment.

FINAL THOUGHTS

The ABCA form is very similar in many respects to the CIC form, the prevalence of which has been driven by insurers and has dominated the market for the last couple of years. The ABCA form is not remotely client friendly and prudent clients would be well advised to understand the allocation of risk for key features of the ABCA appointment (as set out in this Insight) and discuss with their advisors how best to proceed. However, clients should be mindful that there is unlikely to be much scope (if any) to agree amendments to the ABCA form, at least in the short term, while RBCAs and their insurers are still getting to grips with their new obligations under the new building safety legislation.

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