Appointment Agreements
Appointment agreements, or terms of engagement, often take many different forms.

They can be based upon a verbal agreement, an exchange of correspondence, a letter of engagement or there may be formal terms of appointment drawn up by you or your client.

Many professional bodies require their members to have terms of appointment in place with their clients.

The appointment agreements, in whatever form, represent your opportunity to define the services you will provide and the terms (including the fee) upon which the services will be provided.

They also represent the opportunity for clients who use their own forms of appointment to impose obligations upon you, some of which may be quite onerous.

There are many commercial issues that you, as a practice, must consider and then reach agreement with your prospective client.

Standard Forms of Appointment
There are several standard forms of appointment published by professional bodies that do not impose terms that take you outside the scope of your current professional indemnity insurance policy, so long as the clauses are not amended.

These forms of appointment are listed below and do not need to be referred to Barbican Protect Ltd - Claims for vetting:

- ACE Agreements A(1), A(2), B(1), B(2), C(1), (2) and the Shortform Agreement 2002 (amended 2004)
- British Property Federation Consultancy Agreement (2005)
- CIAT Conditions of Engagement (July 2005)
- RIBA Agreements 2007
- The Landscape Consultant’s Appointment (May 1998)
Appoinment & Collateral Warranty Information Sheet

Collateral Warranties
A “Collateral Warranty” is a contract between a consultant and the end user (landlord, purchaser, tenant) or funder of a development. It is a contract, which is collateral to i.e. sits alongside the consultant’s appointment agreement. It creates a contractual relationship (and therefore rights of action) between the consultant and the end users and funders of developments where otherwise, no contractual relationship would exist.

The wording of the warranty is an area of possible conflict between the consultant and the client.

The consultant is looking to keep the warranty as narrow as possible, whilst the client has the opposite aim. It is important to remember that you are not giving a guarantee about the performance or suitability of the development you have designed.

You are only confirming that you have exercised reasonable skill and care and that the beneficiary of the warranty can rely upon that exercise of reasonable skill and care.

A warranty that seeks to impose additional express guarantees may take you outside the scope of your professional indemnity cover. Such a warranty will be useless to both your client and yourself.

Commonly Asked Questions
Am I required to give a collateral warranty?
Check the terms of your appointment (whether an oral agreement, exchange of correspondence, written appointment agreement or letter of engagement).

You are only legally required to give a collateral warranty if you have agreed with your client as a term of your appointment that you will give a collateral warranty.

How many warranties am I required to give and to whom?
Again check the terms of your appointment. If under the appointment you have agreed to give collateral warranties, the appointment might be specific as to how many warranties you can be required to give and it should identify to whom the collateral warranties are to be given, for example, future tenants, purchasers and funders of the development.

What form of words should the collateral warranty take?
If you have agreed to give a collateral warranty as a term of your appointment, the form of warranty may already have been agreed in which case it will usually be annexed to the appointment document. If so, check that the wording of the warranty you are being asked to sign is identical to the wording of the warranty you agreed to sign at the time of agreeing your appointment.

If there was no prior agreement, but you decide to provide a collateral warranty you should offer to provide a warranty based upon one of the standard forms mentioned below.

Standard Forms of Warranty
There are several standard forms of collateral warranty that do not impose terms that take you outside the scope of your current professional indemnity insurance policy, so long as the clauses are not amended.

These forms of collateral warranty are listed below and do not need to be referred to Barbican Protect Ltd - Claims for vetting:

- **British Property Federation CoWa/P&T (3rd edition, 2005)**
  Consultant’s collateral warranty to be given to a purchaser or tenant of premises in a commercial and/or industrial development.

- **British Property Federation CoWa/F (4th edition, 2005)**
  Consultant’s collateral warranty to be given to a company providing finance for a proposed project.

- **CIC Collateral Warranty: Consultant – Purchaser/Tenant CIC/ConsWa/P&T (first edition, 2003)**
  Standard form of agreement for use where a collateral warranty is to be given by a consultant to a purchaser or tenant of the whole or part of a commercial or industrial development.

- **CIC Collateral Warranty: Consultant – Fundor CIC/ConsWa/F (first edition, 2003)**
  Standard form of agreement for use where a collateral warranty is to be given by a consultant to a funder of a commercial or industrial development.

National Housing Federation Recommended Form of Agreement or Collateral Warranty.

Non-standard Warranty Agreements
Claims and circumstances which may give rise to claims notified to Barbican Protect Ltd - Claims arising out of the terms of a standard form of appointment or collateral warranty referred to above will be treated in accordance with the terms and conditions of the policy in force at the time of the notification.

Many practices have a partner or director or practice manager who is responsible for the negotiation of appointment agreements and collateral warranties.

On occasion, assistance may be required. Barbican Protect Ltd - Claims provide a vetting service to assist you to assess whether non-standard appointment agreements and/or collateral warranties impose obligations that may not be covered by your current professional indemnity insurance policy.

It is important to bear in mind this service is designed to provide a one-off review of individual appointment and/or warranty agreements for obligations that may take you outside the scope of your current professional indemnity insurance policy. Letters of advice from Barbican Protect Ltd - Claims should not be forwarded to your clients or their solicitors. The onus is upon you to take heed of the advice and use the advice to your best advantage in your negotiations. (It could also undermine your negotiating position if you simply forward the letter of advice from Barbican Protect Ltd - Claims to a client or to your client’s solicitors).
Appointment & Collateral Warranty Information Sheet

The service is NOT designed to provide:

- more than initial advice (for example, the onus is on you to check that recommended amendments have been made in second, third etc drafts of the same contract).*
- advice regarding legal or commercial issues beyond those of a professional indemnity insurance policy nature.*
- legal representation in the form of written or verbal negotiations with your clients and/or their legal representatives.*

(* These services can be provided by Berrymans Lace Mawer LLP on a fee paying basis. Please contact jason.nash@blm-law.com)

Commonly Amended Clauses in Non-standard Appointment and Collateral Warranty Agreements

This section of the information sheet highlights some of the commonly amended clauses in non-standard appointment and collateral warranty agreements.

It is not a comprehensive guide to appointment and collateral warranty agreements but it does account for the majority of amendments that routinely arise.

If your client refuses to make any of the suggested amendments to these clauses, it becomes a matter of commercial risk for your practice as to whether you wish to enter into the appointment agreement and/or collateral warranty with the risks outlined above and having regard to the nature of the services you are to provide and the nature of the project you are working on. With this information, you should be in a better position to understand these issues and deal with the negotiations with your client.

Adjudication clauses – these clauses often appear in appointments and sometimes in collateral warranties.

It is a condition of your professional indemnity insurance policy that you do not agree to accept a clause which states that you agree to accept the decision of an adjudicator as finally determining the dispute with no further reference to legal proceedings, arbitration or alternative dispute resolution.

Failure to comply with this condition will entitle your Insurers to refuse to provide cover under the policy.

Deleterious materials clauses – these clauses often appear both in appointments and collateral warranties.

The obligations in these clauses should be limited to seeing that you exercise reasonable skill and care not to supply materials that are considered to be deleterious within your profession (e.g. as opposed to materials that are considered to be deleterious within the “construction industry generally” or amongst “professional consultants generally”).

Failure to observe these guidelines could expose you to a contractual obligation that takes you outside the scope of the professional duties that you have declared to your professional indemnity insurers. This in turn may jeopardise the cover available under the policy.

Professional indemnity insurance clauses – these clauses commonly appear in appointment agreements and collateral warranties. There are a number of considerations:

- The level of professional indemnity insurance cover required of you should be commensurate with the nature of the services you are providing for each individual project and, naturally, should not exceed the sums for which you are insured under your professional indemnity insurance policy.
- A common amendment is to change references to “occurrence or series of occurrences” to “claims or series of claims” because the cover under your current policy and virtually every professional indemnity insurance policy is on a “claims made basis”.
- The level of professional indemnity insurance cover required should be made subject to an annual aggregate limit in respect of pollution and contamination claims.
- You should resist any obligation to disclose your professional indemnity insurance policy to your client. However, an obligation to supply a certificate from your insurance brokers is perfectly acceptable.

Indemnity clauses – these clauses frequently arise in appointment agreements and sometimes in collateral warranties.

They usually attempt to make consultants liable to indemnify their clients in respect of “all losses, claims, damages, expenses and costs” that are caused by a particular breach of contract or duty on the part of the consultant.

This potentially allows your client greater or broader redress than is normally recoverable at common law. The best approach to indemnity clauses is to seek to have them removed from the agreement in their entirety.

Removing these clauses does not disadvantage your client in the sense that your client will not be precluded from bringing a claim for a breach of contract in the ordinary way.

Indemnity clauses (continued) – in addition, your client’s position is usually protected by the usual requirement that you maintain professional indemnity insurance policy cover.

If your client will not agree to remove the indemnity clause altogether, then as a fall back position, you should amend the clause so that the potentially recoverable losses are expressed to be “all reasonably foreseeable, legally recoverable and fully mitigated losses, claims, damages etc”.

Fitness for purpose clauses and Express guarantees – these clauses sometimes arise in appointment agreements and collateral warranties.

They amount to onerous, absolute obligations and impose a duty beyond the ordinary standard of reasonable skill and care in the performance of your services.

Your professional indemnity insurance policy will not cover you for any contractual liability you incur as a result of accepting a fitness for purpose obligation or guaranteeing fitness for purpose as a term of your appointment.
Nor will your policy cover you for any contractual liability you incur as a result of giving any express guarantee relating to the satisfaction of performance specifications and/or the period of project as a term of your appointment. There is policy cover in the event that you would have incurred liability in the absence of any obligations of this nature.

However the extent of your liability, in the absence of such obligations, may well be less than your liability as a result of these obligations being present.

In turn, the extent of cover available may be insufficient to cover the full extent of your liability.

**Liquidated Damages and Penalty clauses** – these clauses rarely arise in appointment agreements and collateral warranties.

Nevertheless, you should be aware that your professional indemnity insurance policy will not cover you for any contractual liability you incur as a result of any express penalty contained in a contract between you and your client or a third party.

Nor will the policy cover you for any contractual liability that you incur as a result of any express acceptance by you of liability for liquidated damages.

There is policy cover in the event that you would have incurred liability in the absence of any obligations of this nature.

However the extent of your liability, in the absence of such obligations, may well be less than your liability as a result of these obligations. In turn, the extent of cover available may be insufficient to cover the full extent of your liability.